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Trade and environment: Proposals and their possible implications for developing countries

background paper

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EXECUTIVE SUMMARY

There are widely divergent views between developed and developing countries' negotiators on whether Trade and Environment should be included in the mandate of the forthcoming trade negotiations. There are equally large differences of views between Northern and Southern NGOs on a range of issues. This paper examines developing countries' views on Trade and Environment, in particular with regard to proposals submitted to the WTO Council.

By and large, proposals by developed countries aim at (a) making environment an important cross-cutting issue throughout the negotiations; and (b) clarifying specific trade and environment issues, which may imply a further accommodation of environmental considerations into the multilateral trading system. Proposals focus on:

- “Mainstreaming” environmental considerations in WTO Committees and future negotiations.
- Clarifying the relationship between trade measures pursuant to Multilateral Environmental Agreements (MEAs) and the Multilateral Trading System (MTS).
- Examining the compatibility of eco-labelling schemes with WTO rules.
- Enhancing the role of environmental principles, such as the Precautionary Principle in WTO Agreements.
- Conducting sustainability assessments and national environmental reviews of the impact of trade policies and agreements.
- Increasing transparency and making further arrangements for the relation with Non-Governmental Organizations (NGOs).

Most developing countries' proposals focus on specific issues that have been discussed in the Committee on Trade and Environment and generally relate to environmental considerations in the implementation of different WTO agreements. Proposals largely focus on the following issues:

- The effects of environmental measures on market access.
- The issue of the export of domestically prohibited goods (DPGs).
- General issues stemming from the Agreement on Trade Related Intellectual Property Rights (TRIPS).
- Strengthening complementarities between the Convention on Biological Diversity (CBD) and the TRIPS Agreement, by reflecting the CBD principles in the TRIPS Agreement.

While there are strongly divergent views on the most of these proposals, there is a convergence of views between many developed and developing countries on:

- Pursuing the trade liberalization agenda in accordance with the objective of sustainable development.
- Identifying “win-win” situations, in particular with respect to agriculture, fisheries and environmental services, as well as in other sectors.
- Continuing the work of the CTE.

With regard almost all of the above-mentioned proposals, some language has been proposed

and put together in a draft ministerial text (dated 19 October 1999) aimed at identifying points of convergence and divergence. There is, however, no pretension that the draft text represents a certain level of consensus. Some consensus may be more likely to arise on issues such as:

- a reconfirmation of the objectives set out in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization, which includes *inter alia* promoting sustainable development and protection of the environment;
- some reference to the need to ensure that environmental and trade policies are mutually supportive and to enhance policy co-ordination at national and international levels;

Proposals to grant advisory roles to the CTE and the Committee on Trade and Development (CTD) require further clarification. According to these proposals, the CTE and the CTD could each provide a forum to identify and debate the developmental and environmental aspects of the negotiations, including synergies between trade liberalization, economic development and environmental protection. The work of the two bodies would be complementary and would help to ensure that the negotiations reflect the preamble of the Agreement establishing the WTO and the objectives sustainable development, while responding to the needs of developing countries, in particular the LDCs. The deliberations in the CTE and the CTD would provide useful inputs for national authorities. These ideas are supported by the EC, the United States and Norway. Several developing countries, however, are reportedly opposing such proposals. In their view, the CTE should continue its existing role, with its balanced agenda.

Another issue that is being discussed is whether and how sustainable development and trade should be reflected under the “principles governing the negotiations”.

Attention also focuses on the possible creation of Working Groups, in particular:

- a Working Group on Fisheries, to identify subsidies which have adverse effects on trade, environment and sustainable development and to elaborate WTO disciplines and commitments regarding their reduction or elimination;
- a Working Group on Biotechnology.

This paper is organized as follows. The introduction underlines that despite widely divergent views of developed and developing countries, trade and environment may nevertheless play an important role in future trade negotiations. Section II analyses general approaches to Trade and Environment, as reflected in some of the developed countries’ proposals, including with regard to topics such as “mainstreaming” and the role of the CTE. Section III first examines developed countries’ proposals on specific issues. It summarizes views expressed by other WTO Members on the issues concerned and provides an analysis of possible implications for developing countries. It also examines developing countries’ proposals on TRIPS, in particular as they relate to biodiversity. Section IV presents an overall assessment and some suggestions on how to reflect developing countries’ concerns as well as the Rio principles and Agenda 21 in the forthcoming negotiations. Annex I summarizes different proposals. The full texts of these proposals can be found on the WTO web site.¹

¹ The full text of these proposals can be seen on or downloaded from the WTO website, in particular page <http://www.wto.org/minist/seatdocs/htm/>

I. INTRODUCTION

The third WTO Ministerial Conference, which will be held in Seattle from 30 November to 3 December 1999, will launch new trade negotiations, for which intensive preparations are under way in Geneva. Part of the agenda of these negotiations is already determined: negotiations on agriculture and trade in services were mandated by agreements reached in the Uruguay Round, and in addition there are to be reviews of some of the key provisions in other Uruguay Round agreements, for example in the Agreement on Trade Related Intellectual Property Rights (TRIPs). Beyond this “built-in” agenda of mandated negotiations and planned reviews, however, the scope of the negotiations is not yet known.

In particular, at present there is no consensus on whether “Trade and Environment” should be included in the scope of the negotiations. This is a potentially contentious issue as opinions differ greatly between developed and developing countries.

In general, developed countries grant high political priority to the inclusion of environmental and sustainable development considerations in the agenda for the new negotiations. There may be basically three reasons for that. First, there are legitimate concerns about possible environmental effects of further trade liberalization. This has generated calls for sustainability impact assessments as well as other measures aimed at achieving greater integration of trade and environmental regimes. Second, observers in some developed countries see the Seattle Conference and a possible new round of Multilateral Trade Negotiations as a unique opportunity to make progress on Trade and Environment. They believe that in a broad process of trade negotiations, covering a wide range of issues, trade-offs can be identified. Third, policy makers in some developed countries believe that any negotiating agenda that does not pay attention to the environment may fail to generate political support.

Developing countries, on the contrary, are opposing negotiations on Trade and Environment.² First, developing countries are worried that there appears to be a resurgence of protectionism and unilateral measures; this may include measures taken under the guise of environmental concerns. There is also concern that the continued pressure to accommodate certain measures, particularly those based on standards for Process and Production Methods (PPMs) may spill over into other policy areas such as social standards. Finally, lack of progress in the implementation of developed countries’ commitments entered into at the United Nations Conference of Environment and Development (UNCED) has generated scepticism on how committed those countries are in moving towards sustainable development in an equitable fashion.

² In many developing countries there is not much excitement in about engaging in a new round of trade negotiations in general. Their concerns are largely threefold. First, they stress that the Uruguay Round and its implementation process did too little to improve market access for developing country exports of goods and services. Second, many developing countries feel that the new WTO rules have been imbalanced in several important development-related areas, such as the protection of intellectual property rights, while special and differential treatment for them in the WTO agreements has been inadequate and needs revision. Third, weaker human and institutional capacities, as well as a lack of financing, have prevented developing countries from using the WTO system to pursue their interests, particularly in making use of the dispute settlement mechanism, and also from complying fully with their multilateral obligations. See: Rubens Ricupero, *Why not a Development Round this time, for a change?* Keynote luncheon statement delivered at the Conference “To the Next Trade Negotiating Round, Examining the Agenda for Seattle”. Columbia University, 23 July 1999.

At the risk of oversimplification, the position of developing countries on Trade and Environment could be summarized as follows. Environment and sustainable development are important policy objectives. While there may be important conflicts with economic objectives, trade-offs must be resolved at the national level. There is no convincing evidence that existing trade rules stand in the way of legitimate environmental policies and the promotion of sustainable development. The WTO Committee on Trade and Environment is making an important contribution to enhancing understanding of trade and environment linkages, and this process is still ongoing. Finally, environmental and development objectives should be achieved through supportive measures and international cooperation, as well as better coordination at the national and multilateral levels, not through trade restrictions. In the light of the above it is premature to engage in negotiations on Trade and Environment.

Recent civil society meetings in the South seem to indicate that on many issues there are equally strong differences of views between Non-Governmental Organizations (NGOs) in the North and the South.³

It is very likely that the Ministerial Declaration will contain references to environment and sustainable development.⁴ This Declaration will have a large impact on how Trade and Environment may be handled in the post-Seattle process. It therefore requires careful consideration.

In the WTO decisions are made by consensus. However, developing countries may find it difficult to sustain total opposition of the inclusion of environmental considerations in the new trade negotiations for a number of reasons. First, calls for “mainstreaming” environment and improving transparency in the WTO process, including through NGO inputs to the dispute settlement process, may be intensified. Second, it is always possible that environmental considerations will be raised in any negotiating group (including under “other business”), even if environment were not explicitly mentioned in the negotiating mandate.

Furthermore, the built-in agenda already includes important trade and environment issues that have been discussed in the CTE. For example, issues such as pursuing “win-win” results are likely to come up in the context of the already mandated negotiations on agriculture and services. Similarly, biodiversity-related aspects of the TRIPs agreement play a key role in the already planned review of that agreement. In the context of the Agreement on Subsidies and Countervailing Measures, WTO Members will have to take decisions on the future of non-actionable subsidies for environmental compliance purposes.⁵ Finally, under the Agreement on Agriculture, decisions are due on the future

³ See *Financial Times*, 16 September 1999, page 10.

⁴ In the WTO Council, the Republic of Korea has mentioned that it strongly agrees on the need of emphasizing sustainable development in the Seattle Declaration as an overall objective for all WTO Members. Achieving this objective requires an integrated and balanced approach, bearing in mind that sustainable development encompasses comprehensive aspects of environmental protection, economic growth and social development.

⁵ Article 8.2(c) of the Agreement on Subsidies and Countervailing Measures allows, under certain conditions, for “assistance to promote the adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms”. Article 31, however, stipulates that the provisions of certain Articles, including 8.2(c), shall apply for a period of five years from the entry into force of the WTO and that, not later than 180 days before the end of this period, the Subsidies Committee will review the operation of these provisions “with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.”

of “green box” policies, which *inter alia* include domestic support measures under environmental programmes.⁶

This paper argues that clarifying trade and environment issues on the basis of case law, through the WTO dispute settlement mechanism, rather than through a process of deliberations, may also create a risk to developing countries. There is also a risk that some countries will seek to achieve environmental objectives through unilateral action. This risk may increase to the extent that the outcome of the Seattle Ministerial Conference is perceived as a failure.

⁶ Article 13 of the Agreement on Agriculture specifies that during the implementation period (i.e. until 1 January 2001) domestic support measures that fully comply with the provisions contained in Annex 2 of the Agreement (support measures with minimal impact on trade, known as “green box” policies) are excluded from reduction commitments. These include expenditures under environmental programmes. These “green box” measures are due to expire by the end of the year 2000, unless they are renewed.

II. HORIZONTAL ISSUES

A. Implications of the main proposals for developing countries⁷

1. *Environmental principles*

The general language that will be used in the Ministerial Declaration, for example on the need to take account of sustainable development and environmental objectives throughout the negotiations, is likely to be of key importance in determining how Trade and Environment issues will be dealt with in the post-Seattle process.

The **United States** emphasizes the need to “continue to recognize the right of Members to take science based measures to achieve those levels of health, safety and environmental protection that they deem appropriate – even when such levels of protection are higher than those provided by international standards”.

Some WTO Members, such as the **EC**, **Norway** and **Switzerland**, propose that the Ministerial Declaration should contain a reference to certain environmental principles contained in the Rio Declaration, in particular the precautionary principle. The Norwegian proposal also makes explicit reference to the polluter pays principle (PPP).⁸ In addition it refers to developmental principles, in particular the “right to development”. The Swiss proposal mentions the need to “elaborate instruments to take better account of basic principles of environmental protection and of current issues stemming from the interdependencies between trade and environment”.

It should be noted that the Rio Conference established a programme of action for sustainable development to be achieved on the basis of equity, as embodied in the Principle of Common but Differentiated Responsibilities. Selecting only some of the Rio Principles may risk undermining the Rio objectives of pursuing sustainable development on the basis of equity. In this context, incorporating environmental principles into the Ministerial Declaration while dealing separately with developing countries’ concerns by including the principle of Special and Differential (S&D) treatment, could create some problems. The views often expressed by developed countries regarding the extent to which such supportive measures can be specified in WTO agreements may aggravate this problem.

2. *Transparency*

Many Non-Governmental Organizations (NGOs) argue that there is a need to make the WTO, in particular its dispute settlement mechanism, more open and transparent in order to build public support for further trade liberalization and confidence in the WTO.⁹ The United States has

⁷ For a complete list of main proposals see Annex I.

⁸ These issues are further elaborated in section III.C.

⁹ See for example, WWF, Reform of the WTO Dispute Settlement Mechanism for Sustainable development. Discussion Paper, Gland, July 1999. The paper *inter alia* suggests (a) a comprehensive mediation system as an alternative to the panel process; (b) the formal introduction of *amicus curae* briefs into panel proceedings; (c)

expressed similar views.

In its proposal on Trade and Environment, the United States recalls earlier proposals in this area, including with regard to dispute settlement, the Trade Policy Review Mechanism and the relationship with NGOs. In the view of the United States, it is possible to resolve problems in the area of transparency, while respecting the government-to-government character of the WTO and its operations.¹⁰

Like other countries, developing countries may benefit from certain measures aimed at increasing transparency. For example derestricting documents and making information available to a wider range of developing country participants would lead to more informed participation.¹¹ However, certain proposals such as facilitating the submission of *amicus curae* briefs to dispute settlement panels may, in practice, accentuate imbalances in the Trade and Environment Agenda.¹² The panel procedure may be overloaded with such several *amicus curae* briefs in which case some selection criteria may be needed. This could defeat the purpose of transparency. Also, NGOs in the South have less financial resources to avail themselves of such opportunities.¹³

Developing countries are concerned that calls for “transparency” may have the effect of changing the balance of rights and obligations as well as result in greater influence of NGOs, particularly from developed countries, on the dispute settlement process (see below).

3. Mainstreaming and the role of the CTE¹⁴

The term “mainstreaming” was introduced into the Trade and Environment debate by the EC. In the process of preparations for the High Level Symposium on Trade and Environment, the EC proposed to examine "the scope for and need to factor environmental concerns into the WTO across the board (mainstreaming)". The EC further proposed that each relevant WTO committee should deal with environment in the area under its authority".¹⁵ Other countries, such as Canada, Iceland and Norway have also made suggestions concerning “mainstreaming”.

The **United States** proposes that “Ministers call upon the Committee on Trade and Environment, acting within its mandate, to serve as a forum for the identification and discussion of links between elements of the negotiating agenda and the environment and public health”. However,

enhanced access to information on dispute cases (including submissions and transcripts of hearings); (d) the establishment of the position of a council to the panel as a filter for the introduction of third party information; and (e) establish a roster of legal experts who are prepared to undertake work at reduced fees for developing countries.

¹⁰ WT/GC/W/139.

¹¹ For example, the recent creation of a website containing recent information and proposals concerning the Seattle Ministerial Conference may promote the effective and informed participation of developing countries.

¹² At present it is not clear how panels and the Appellate Body will interpret the term to “seek” information from NGOs (which may include both environmental NGOs as well as the business community) and expert opinion

¹³ Any formalization of *amicus curae* briefs will over time enable other powerful interest and pressure groups, including from the private sector, to follow this route. This could significantly increase pressure on dispute settlement panels.

¹⁴ See discussion paper on mainstreaming prepared for this workshop.

¹⁵ See: Communication from the European Communities, "High Level Trade and Environment Meeting" (WT/L/273), July 1998.

both the EC and the United States make it clear that negotiations on these issues would be the responsibility of the relevant negotiating groups.

Mainstreaming may pose certain risks to developing countries. First, diffusing the environmental agenda to several committees risks to undermine the balance in the agenda of the CTE. Diffusing the CTE agenda would also mean that several checks and balances would no longer be possible.

Second, the Marrakech Decision which set up the CTE made it clear that any recommendations stemming from CTE's work would need to command the broad support of the WTO membership. To the extent that mainstreaming implies that environmental aspects be considered in all the negotiating groups, with the CTE playing only an advisory role, the consensus-based character of the CTE's work could be affected. This could have the effect of forcing the pace on certain issues without consensus on the need to do so.

Third, mainstreaming the environment into several committees would make it more complicated for developing countries to participate effectively in corresponding WTO deliberations and negotiations. Developing country delegates would find it difficult to give attention to environmental issues as "environment" would be diffused in several committees and meetings.

Some have suggested that the CTE could play a role which is similar to that of the Committee on Trade and Development. It should be noted that the CTD is already mandated by GATT/WTO to provide an advisory role concerning the development aspects of all negotiations. The CTD's advisory role, however, has been relatively limited as most recommendations have been in the nature of best endeavour clauses, without any sanction for non-compliance. For example, failure to provide Special and Differential (S&D) treatment is not judiciable. It should be noted that remedies to environmental problems could be sought through the use of trade measures, whereas remedies to development problems have never been sought through the use of trade measures.

Also, if such a dual structure were created, there may be some pressure to transfer development-related trade and environment issues, such as transfer of technology, DPGs and market access would be transferred to the CTD, leaving the CTE to deal only with issues related to the use of trade measures for environmental purposes. Such a distinction would upset the balance in the agenda of the CTE.

There is broad consensus between all WTO Members to continue the work of the CTE. Developing countries insist that the CTE should maintain its balanced agenda. Several developing countries seem to support the idea contained in the US proposal that the CTE should serve as a forum for the discussion of links between elements of the negotiating agenda and the environment, although there is a need to clarify its implications.¹⁶ There are differences of views on the question whether the results of such discussions should be reported to the relevant negotiating groups, or only provide inputs to individual WTO Members, who can then use the arguments exposed during the

¹⁶ As a forum for discussion and analysis, the **Republic of Korea** believes that the CTE could provide inputs for relevant negotiating groups when required. The **Czech Republic** believes that the CTE should be charged to review the progress in negotiations as a whole to ensure that the objective of sustainable development is properly reflected throughout the relevant negotiating groups.

analytical process of the CTE in whatever negotiating forum they deem appropriate. The latter view has been expressed by **Malaysia** and **Hong Kong/China**.

Several developing countries (e.g. **Argentina**) consider that the CTE should be able to conduct a “cross checking” of the development of issues, being considered in different committees during the forthcoming negotiations, that have environmental consequences.

B. The Dispute Settlement Mechanism

In the review of the Dispute Settlement Undertaking (DSU), some developed countries have pointed to the need for increased transparency of the panel and Appellate body process. The **United States, Japan** and **Canada**, among others, contend that *amicus curae* briefs should be taken into account and that the process should be made more transparent.

Dispute settlement is another mechanism that could affect the balance represented in the work of the CTE. Successive interpretations by Panels and the Appellate Body have expanded the scope of GATT Article XX, sub-paragraphs (b) and (g), in a manner for which there appears to be no consensus in the CTE. It is important to examine the impact of this evolutionary interpretation of Article XX on the debate on Trade and Environment. While the Appellate Body and Panels do not bind members of the WTO, their precedent setting value is immense. Other Panels and the Appellate Body may find it difficult to ignore these interpretations.

The **EC, Switzerland** and **Norway** are of the opinion that unnecessary burden on the DSU can be avoided by a clarification of the WTO rules. For example, they seek a legal clarity on the relationship, through Article XX between WTO rules and trade measures taken pursuant to an MEA. They feel that this would increase predictability and decrease uncertainty (see section III.A). Acknowledging that MEAs are the best way of solving international environmental problems and that any trade measure they contain were negotiated and agreed in a multilateral context, they feel that such a clarification would be a guarantee against unilateral action and their use for protectionist purposes. They also feel that a consensus should be found for taking this into account in WTO rules. They also contend that the proliferation of environmental policies world-wide has resulted in the increased use of trade measures for environmental purposes. This is evidenced by a surge in the number of panels which have been raised in the WTO regarding Environment.

Evolutionary approach to the interpretation of law

There have been several suggestions from developing countries on the scope of the functions of the Appellate Body. Many developing countries have expressed the view that while no consensus has been achieved in the CTE on the interpretation of Article XX, the Appellate Body should not interpret rules in an evolutionary manner. According to **Pakistan**, it is necessary to clarify the relevant provisions of the DSU to make clear that the responsibility for clarifying or modifying the provisions of the WTO Agreements clearly rests with the WTO member countries; it would not be appropriate for the Appellate Body to usurp these functions under the guise of interpreting law on the basis of contemporary developments.¹⁷ Pakistan adds that the appellate body should refer to the

¹⁷ WT/GC/W/162.

General Council for making modifications in the relevant rules as the member countries consider appropriate.

Amicus curae briefs

According to Pakistan the participation of NGOs in the dispute settlement process has not been authorised by members. With the shrimp turtle dispute, a question has arisen as to whether panels should take account of *amicus curae* briefs submitted to it by public interest groups or by NGOs. The relevant applicable provisions of the DSU (Article 13.2) suggests that Panels may seek (emphasis added) information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. This does not appear to suggest that the Appellate body could accept unsolicited briefs. Pakistan therefore argues that Article 13.2 should be clarified to state that Panels and the Appellate Body should not take account of unsolicited information.

The role of the Appellate body

According to the DSU, the Appellate body is only expected to examine issues of law covered by the Panel report. In the shrimp turtle case, the Appellate body examined "de Novo" the facts of the case and "made" a finding on legal issues which were not addressed by the panel. Pakistan has proposed that in all such cases the Appellate body should be required to "remand" the case to the panel for reexamination, within a period of one month.

Reactions to the proposal

The proposal has also been supported by the **Republic of Tanzania, Uganda and Zimbabwe**. Many developing countries are of the view that *amicus curae* briefs would tilt the balance of rights and obligations in the WTO system. One reason is that NGOs from developed countries would have easier access to funding. They have also pointed out that NGOs from developing and developed countries do not concur on most issues and therefore their participation may not add much to the resolution of the dispute. It has also been argued that any inclusion of their opinions and inputs should be done through national coordination and that there is no need to internationalize essentially national conflicts .

III. SPECIFIC ISSUES

A. Trade measures taken pursuant to MEAs¹⁸

While there is broad consensus that there should be a harmonious relationship between MEAs and the multilateral trading system, there is no agreement on whether or not a modification or interpretation of WTO rules is needed to prevent conflicts between these two legal instruments.

The EC has for a long time argued that there is a need to provide MEA negotiators with a clear indication of possible packages of measures they can design in the process of negotiating multilateral environmental agreements. The EC has argued that trade measures “pursuant to” MEAs should not be challenged in the WTO, as this would undermine both the multilateral trading system as well as the international environmental agenda. The EC has further argued that legal clarity is particularly relevant in the context of future agreements. The United States argues that there is already sufficient flexibility under WTO rules to address environmental challenges through MEAs.

The United States believes that the possibility of conflict can be substantially reduced through policy coordination at the national level.¹⁹ Developing countries argue that GATT Article XX already provides sufficient room for trade measures, which are implemented in an appropriate, non-discriminatory way. They point out that no trade measures pursuant to MEAs have been challenged in the WTO until now, and that it is unlikely that this would happen in the foreseeable future.²⁰ Developing countries further argue that the international community should focus on supportive measures to assist them in joining MEAs and complying with their obligations under such agreements.

1. Proposals

The EC proposal recommends that that WTO rules should further accommodate MEA trade measures, but does not specify how. However, the EC would be considering various options, such as:

- Adopting an interpretation or understanding of GATT Article XX.
- Amending Article XX to provide an “environmental window” for current and future MEAs that satisfy certain criteria.

The EC does not seem to seriously consider other options that have been proposed, such as

¹⁸ On this issue see also the paper prepared for this meeting by FIELD, “The Compatibility of Recent MEAs with WTO Trade Rules”.

¹⁹ WTO High Level Symposium on Trade and Environment, March 15-16, 1999. Linkages Between Trade and Environment Policies, Statement by the United States.

²⁰ Currently, the only MEA, which seems to be a source of some conflict is the Ban Amendment under the Basel Convention. It provides for a multilateral export ban from Annex VII countries (OECD, EC and Liechtenstein) to non-Annex VII countries (all other nations). The Ban Amendment comes into effect when 62 state Parties will have ratified it. At the end of June 1999, 13 state Parties had ratified the Ban Amendment. The most contentious issue at the moment is the implementation of the Ban Amendment by the European Union ahead of its coming into effect.

the waiver approach or guidelines for MEA negotiators, with the possible exception of a new WTO side agreement on MEAs.²¹

Norway also favours the accommodation of trade-related instruments pursuant to Multilateral Environmental Agreements (MEAs). Its proposal does not offer specific language, but Norway may be supportive of a GATT Article XX adjustment.

Switzerland proposes that negotiations should *inter alia* aim at clarifying the relationship between the multilateral trading system and MEAs, but does not favour negotiations on GATT Article XX. Switzerland believes that clarification can be best achieved through the establishment of appropriate principles, rules or procedures.

In the WTO Council, the **Republic of Korea** has argued that it is necessary to clarify the scope and conditions under which WTO provisions can accommodate trade measures taken pursuant to MEAs for the following reasons:

- There is a need to clearly differentiate between trade measures specifically mandated by genuine MEAs and unilateral trade measures to deal with environmental challenges outside the jurisdiction of the importing state.
- Clear-cut guidelines or an understanding in the relevant WTO provisions is desirable for preventing or reducing potential conflict, thereby better managing resources and alleviating the DSB from a potentially heavy workload.

2. Possible implications for developing countries

Accommodation of MEA trade measures in the multilateral trading system may have significant implications for developing countries. The discussion that follows focuses on the EC proposal.

Concerns of developing countries

Concerns expressed by developing countries include the following:

- Further accommodation of MEA trade measures could affect the balance of rights and obligations under the WTO.
- Discriminatory trade measures against non-parties could be used effectively only against economically weaker trading partners. Developing countries cannot use trade measures to induce developed countries to join MEAs of which they are not a member.
- Accommodating trade measures may reduce incentives to search for supportive measures
- Certain forms of accommodation could imply that trade measures purportedly taken “pursuant to” an MEA by one or several Parties, and which are regarded arbitrary and unjustifiable by other Parties, could no longer be challenged at the WTO.

On the other hand, developing countries may also wish to consider the fact that Appellate body decisions may have widespread effects including a possible precedent setting on interpretations of Article XX (see section on judicial activism). This could imply that even if clarification of the scope

²¹ Duncan Brack, “CTE Issues: MEAs and the WTO”. Royal Institute for International Affairs (RIIA), London. Workshop on Environment and the Millennium Round.

of measures covered by Article XX (sub paragraphs b and g) XX were desirable, there is no need to amend either the chapeau or the text of Article XX.

Issues requiring further clarification

Account should be taken of the following points, which have been raised in the debate:

- There is no agreed definition of what constitutes an MEA.
- The two most important problems are the use of discriminatory measures against non-parties and “unilateral” trade measures claimed to be taken “pursuant to” an MEA (for instance, the anticipated implementation of the Basel Ban Amendment by the EU, although the Ban Amendment is not yet effective). It should also be noted that MEAs are frequently amended and each amendment is considered as a separate agreement, for example with regard to non-Parties. For example, while most WTO Members are Parties to the Montreal Protocol, fewer are Parties to the London, Copenhagen and Montreal Amendments, and may be treated as non-Parties (i.e. subject to trade restrictions) with regard to the substances included in the respective amendments.
- It is very difficult to generalize the effectiveness and necessity of trade measures. While uniform trade measures are applied in most MEAs, in practice they tend to have non-uniform effects, given differences between developing countries in the stage of development, technological profiles, trade patterns and trade intensities. This is why MEAs need to be flexible to address the conditions and needs of particular countries or groups of countries. It should be noted, however, that the Appellate body in the shrimp-turtle case did away with examining XX (b), i.e. the necessity of the measure.
- Generally, there is insufficient understanding of the effects of trade measures on countries at different levels of development.
- International co-operation, e.g. in the context of MEAs, is essential to avoid unilateral measures. However, the assumption that trade measures pursuant to MEAs are always based on a broad consensus is incorrect. For example, decisions on the Basel Ban Amendment have been taken under strong political pressure of NGOs. Conversely, several important exporters of secondary material (i.e. Australia, Canada, the United States and New Zealand) recorded formal reservations referring to the arbitrary nature of defining criteria for joining Annex VII and thus being exempted from trade restrictions.

3. Judicial activism

In the absence of any “interpretative” clarification between the rules of the MTS and trade restrictions in MEAs, there is a risk that panel rulings on cases dealing with bilateral trade conflicts may be used to draw parallels with MEA-related conflicts. It is important to discuss the implications of clarifying issues through the development of case law, in particular through Appellate Body decisions, in the CTE

Recent decisions by the Appellate Body may have reduced pressure to seek an Article XX adjustment, although the Appellate Body decision on Shrimp/Turtle may have shifted attention away from the subparagraphs (b) and (g) (or the introduction of a new subparagraph) to the headnote of Article XX.

Through the review process of the Dispute Settlement Understanding, developing countries should seek clarification of the scope and terms of reference of the Appellate Body and its rulings.

4. Alternative solutions

It may be possible to make progress on alternative solutions to avoid conflicts between trade measures in MEAs and the WTO rules, some of which have already been proposed in the international debate:

- Strengthened coordination at the national and multilateral levels.
- Strengthened Cupertino between the WTO, UNEP and the MEA secretariats. UNCTAD (and other relevant organizations) should play a role here (reviewing economic and developmental implications of MEAs, examining packages of measures, including supportive measures).
- The establishment of joint business/NGO expert groups to help conflicts from arising.

It may also be useful to consider the possible implications for developing countries of:

- Some language conforming the importance of MEAs (in accordance with the 1996 CTE Report) in the ministerial declaration.
- The use of “safe clauses”.²²
- Guidelines for MEA negotiators, for example Canada’s approach.²³
- The development of criteria for dispute settlement, provided this does not weaken the headnote of GATT Article XX and contains strong language in favour of the effective implementation of supportive measures and against unilateralism.
- A side agreement to guide Panels and the Appellate Body adjudicating on trade measures taken for environmental purposes. In this case, the necessity and effectiveness of the trade measure can only be judged against the implementation of supportive measures. The necessity test would require that the Panel examine the whole range of non-trade measures which could be used to achieve the environmental objective before judging the necessity of the trade measure.
- Further improvement of MEA provisions to avoid trade conflicts. This concerns:
 - The creation of an effective dispute settlement mechanism.
 - Provision of compliance opportunity to non-Parties.
 - The development of clear and scientific criteria for the use of trade measures.

²² In the context of some recent MEA negotiations, clauses have emerged indicating that none of the MEA provisions being negotiated should undermine the WTO rights of Parties (PIC Convention, Biosafety Protocol). While some have noted that this will at least formally avoid conflicts between two international legal instruments, others are of the view that this implies undue supremacy of WTO trade rules over MEA provisions.

²³ Canada proposes a “principles and criteria” approach to guide international negotiators contemplating the use of trade measures in particular MEAs. Canada suggests that MEA negotiators use the following criteria to determine the need for trade provision: (a) trade measures are chosen only when effective and when other alternative measures are considered to be ineffective in achieving the environmental objective or when other measures have proven to be ineffective without accompanying trade measures; (b) trade measures should not be more restrictive than necessary to achieve the environmental objectives concerned; and (c) the trade measures chosen should not constitute arbitrary or unjustifiable discrimination

- Development of mechanisms for making trade measures adjustable and flexible.
- Prior assessment of potential environmental and economic effects of trade measures (effectiveness and efficiency issue).
- Establishing sub-groups of trade experts during MEA negotiations or renegotiations, which review the effectiveness and efficiency of trade measures and their distortionary effects.

B. Eco-labelling

Some WTO Members, in particular the EC and Norway, propose that the WTO compatibility of eco-labelling should be considered in future trade negotiations.

Several developed countries argue that it should be clarified that voluntary eco-labelling schemes, including those using criteria based on non-product related processes and production methods (PPMs), are covered by trade rules and disciplines, provided that there is strict adherence to multilaterally agreed eco-labelling guidelines.²⁴ Developing countries, on the contrary, argue that non-product related PPMs are not within the scope of the WTO

Some argue that eco-labelling only becomes a WTO issue if it causes undue trade effects and that in such case WTO laws provide adequate coverage in terms of its criteria of least trade restrictiveness, as well as arbitrary and unjustifiable discrimination clauses. Some feel that, if necessary, it may be possible to spell out guidelines for the panels on eco-labelling which take account of additional considerations such as mutual recognition and equivalence.

There is broad consensus that notification of eco-labelling schemes can be useful.²⁵ Mere notification obligations of a measure do not make it automatically consistent with the WTO. For example, Members have an obligation to notify subsidies to the WTO, but this does not imply that all notified subsidies are non-actionable.

²⁴ A range of arguments have been put forward, although each of them need not be shared by all proponents:

- Providing information to consumers is a legitimate policy objective, unless confusing or misleading.
- Eco-labels are a “market reality”
- Eco-labels have already been considered GATT-consistent in the Tuna-Dolphin I dispute (It is true that the Panel report was never adopted and that the dispute settlement mechanism is based on a case-by-case approach. It would nevertheless be very unlikely that a Panel would rule against eco-labels only because they use criteria related to non product-related PPMs. The recent Appellate Body decision on Shrimp/Turtle would also seem to provide some room for the use of non product-related PPMs).
- The ISO has developed guidelines for eco-labels, which are very likely to be adopted as international standards in the near future.

²⁵ In its 1996 Report, the CTE agreed that “without prejudice to the views of WTO Members concerning the coverage and application of the TBT Agreement to certain aspects of such voluntary eco-labelling schemes/programmes and criteria, i.e. those aspects concerning non-product-related PPMs, and therefore to the obligations of Members under this Agreement regarding those aspects, the CTE stresses the importance of WTO Members following the provisions of the TBT Agreement and its Code of Good Practice, including those on transparency. In this context, the CTE underlines the particular importance of ensuring fair access of foreign producers to eco-labelling schemes/programmes”.

1. Proposals

The EC proposal seeks a “clarification of the relationship between WTO rules and non-product related Process and Production Methods requirements and, in particular, of the WTO compatibility of eco-labelling schemes based on a life-cycle approach”. Norway proposes the accommodation of voluntary eco-labelling in the WTO system.

The EC proposal contains a vague reference to PPMs.²⁶ Any discussion on PPMs as a stand-alone issue would imply very drastic changes to the multilateral trading system. This section focuses exclusively on PPMs in the context of voluntary eco-labelling .

2. Possible implications for developing countries

Risks to developing countries

Developing countries have expressed the following concerns about the implications of accommodating eco-labelling programmes based on non-PPMs in the MTS:

- *Precedent*: would clarification of WTO compatibility of eco-labels set a precedent for accommodation of other PPM-based instruments in the WTO?
- *Spill-over effects*: would this encourage application of labels to other policy areas (social issues)?

In the WTO Council, several developing countries have argued that eco-labelling schemes, despite their voluntary nature, can limit market access and that compliance with eco-labelling criteria could be expensive, thereby diminishing the competitiveness of a products exported by developing countries. They have also argued that the eco-labels based using criteria related to non product-related PPM are inconsistent with WTO rules.

According to the **Republic of Korea**, in view of the difficulties of reaching a consensus on the applicability of the TBT Agreement to non-product related PPMs, ensuring sufficient transparency and granting all stakeholders including foreign exporters appropriate opportunities for consultation and inputs in each phase of development of eco-labelling schemes should become a priority issue.

The consistency of non product related PPMs with WTO rules has been discussed extensively and no consensus has been reached. The issue of notification of eco-labelling schemes appears to be a mere technicality as it is already permitted under the TBT Agreement. However, it has been argued that making such schemes consistent with WTO would require the reinterpretation of the TBT Agreement, in particular Articles 7 and 8. There is no consensus to do so.

Are there possible benefits for developing countries?

²⁶ The broad reference to “market based, non-discriminatory, non-protectionist instruments as a means of achieving environmental objectives” is equally vague.

There may be advantages in clarifying the WTO compatibility of eco-labelling based on non product-related PPMs. These possible advantages, however, need to be qualified:

- In principle, greater WTO discipline could help to avoid that eco-labels result in unnecessary restrictions to trade. However, the CTE has already recommended that maximum use should be made of certain provisions in the TBT Agreement (such as provisions on notification, conformity assessment and mutual recognition), independent from the question of the relationship between eco-labelling based on life cycle approach and the TBT Agreement. Some have noted that eco-labels can be regarded as standards and that they therefore fall under TBT discipline, regardless of the information contained in the label.
- Recognition of the WTO compatibility of eco-labelling would make it very difficult for certain other trade measures to pass test of least trade restrictiveness, or least WTO inconsistency. For example, providing relevant information to the consumer can be a viable way to deal with consumer concerns, including where “values” are involved. In the first tuna/dolphin case, “dolphin safe“ labels were considered appropriate.
- Some developing countries use non product-related eco-labelling as marketing instruments, e.g. in the area of timber. However, there is no reason to believe that their ability to use such labels is currently constraint by WTO rules and principles.

Issues requiring further clarification

In assessing proposals on eco-labelling, the following may need clarification:

- *Coverage*: current proposals do not seem to cover purely private eco-labels which may have potential trade effects on developing countries (e.g. in sectors such as timber and timber products; textiles and cut flowers).
- *Guidelines*: available international guidelines on eco-labelling may not adequately address the question how to deal with trade implications of the use of voluntary standards based on non-product related PPMs.
- *International standards*: developing countries have difficulties in participating effectively in international standard setting. This raises the question of definition of a truly international standard.
- *Equivalency*: no progress has been made on this concept

Thus, in further work on eco-labelling, developing countries could pursue:

- Further clarification of the concept of equivalency, and its effective implementation.
- Support for the effective participation of developing countries in the development of international standards in ISO and elsewhere.
- Appropriate opportunities for consultation and inputs in each phase of development of eco-labelling schemes.

C. The Precautionary Principle and other environmental principles.

1. *The Precautionary principle*

The precautionary principle embodies the logic that prevention is often better than cure, and acknowledges that scientific certainty often arrives too late to allow policy makers to formulate policy to avert serious environmental damage. In the trade context, the precautionary principle suggests greater deference by the trade rules, in certain defined circumstances, to national environmental measures. Recent interest in policy measures based on the precautionary principle has also emerged in response to growing public concern about contaminated food and genetically modified organisms (GMOs).

The SPS Agreement, through Art. 5.7 (see box), already includes the precautionary approach. The SPS Agreement applies science-based disciplines to the adoption and enforcement of national SPS measures to minimize their impacts on trade. National measures must be based on “sound science” and on an assessment of risks involved but it allows governments, under certain conditions, to take provisional measures where relevant scientific information is insufficient. The TBT Agreement does not explicitly include the precautionary approach in its text.

The precautionary principle

Principle 15 of the Rio Declaration reads as follows:

In order to protect the environment, the precautionary approach shall be widely applied by Member States in accordance with their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Article 5.7 of the SPS Agreement reads as follows:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the necessary information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measures accordingly, within a reasonable period of time.

2. *Proposals*

The EC proposal *inter alia* states that “reviewing if a clarification of the relationship between multilateral trade rules and core environmental principles, notably the precautionary principle, is needed”. Norway proposes to include a reference to the precautionary principle in the

Ministerial Declaration.

3. Possible implications for developing countries

Wider use of the precautionary principle may pose certain risks to developing to the extent that it may make it easier to introduce overly stringent SPS measures. There is a need to examine the possible abuse of the precautionary approach for protectionist purposes. For example, there may be a risk that the precautionary principle may be invoked not in cases where there is inadequate science, but rather in cases where there is a conflict in the scientific bases. Developing countries could propose further analysis and eventually the development of guidelines for the appropriate use of the precautionary approach in the context of international trade.

Some have suggested that developing countries could consider whether the precautionary principle could be used to develop prior informed consent procedures and, where appropriate, proof by the exporter of a minimum level of safety for trade in inherently risky products (such as domestically prohibited goods, hazardous wastes and chemicals and genetically modified organisms). This may be particularly important in cases where developing countries lack capacity to control and test imports. This, however, is not the rationale for existing proposals. Others, however, have noted that in cases where developing countries want to invoke the precautionary principle, e.g. to control GMOs, SPS Article 5.7 may already provide sufficient scope for doing so.

4. Other environmental principles

As mentioned before, Norway proposes to make a reference to the Polluter Pays Principle (PPP) in the Ministerial Declaration.

It may not be accurate to refer to the PPP as a multilaterally-agreed principle. Principle 16 of the Rio Declaration states that national authorities should endeavour to promote the internalization of environmental costs, taking into account the approach that the polluter should, in principle, bear the cost of pollution (emphasis added). While several developing countries have adopted the PPP at the national level, only the OECD has adopted it as an international principle.

A 1993 UNCTAD report states that trade and environment experts generally agree that it is desirable to internalize environmental costs and benefits, which is seen as a key to reconciling trade and environment policies.²⁷ “However, there is little practical experience in the identification and measurement and resource values to be internalized and the feasibility of different policy measures to achieve internalization. Much conceptual and empirical work (still) needs to be done in this area.”

The report further argues that the ability of developing countries to internalize environmental costs will be strongly influenced by conditions under which they export their products. As recognized in Agenda 21, in order to support sound environmental policies in developing countries, international cooperation is needed to remove trade distortions, improve the commodity prices and the terms of trade of developing countries, reduce indebtedness and increase financial assistance”.

²⁷ UNCTAD, “Trends in the Field of Trade and Environment in the Framework of International Cooperation”, TD/B/40(1)/6, 6 August 1993.

The MTS could contribute to enhancing the ability of developing countries to internalize environmental costs by removing obstacles to trade, including non-tariff obstacles to trade, tariff peaks and tariff escalation. There may also be merit in examining how Part IV of the GATT 1994 could be used to assist developing countries to achieve sustainable development. UNCTAD's work on internalization, for example in the case of natural and synthetic rubber²⁸, and the work of the Commission on Sustainable Development on sustainable consumption and production are also of key importance.

D. Environmental benefits of eliminating subsidies

It is argued that "win-win" situations arise when the removal or reduction of trade restrictions (high tariffs, tariff escalation and non-obstacles to trade) and distortions have the potential to yield both direct economic benefits for developing countries as well as positive environmental results.

1. Proposals

The **United States** proposes that the forthcoming trade negotiations should *inter alia* aim at pursuing "win-win" (or "double dividend") results. These could be present in many areas. The proposal identifies three specific areas:

- The establishment of disciplines to eliminate subsidies that contribute to overcapacity in fisheries sector. This work should be carried out in consultation with the Food and Agricultural Organization (FAO).
- The elimination of agricultural export subsidies and the continued reduction of domestic subsidy programmes that distort trade and contribute to the degradation of natural resources (while retaining the so-called "Green Box" for subsidies that have no or negligible impact on trade).
- The elimination of restrictions on trade in environmental goods and services.

As mentioned above, **Australia, Iceland, New Zealand, Norway, Peru, the Philippines** and the **United States** have made proposals in the area of fisheries.

Some WTO members, however, have expressed the view that certain subsidies may be necessary and that trade liberalization need not result in environmental benefits. Thus, environment-related issues have also been raised in the context of non-trade concerns (NTCs), as embodied in Article XX of the Agreement on Agriculture. In this context, the concept of "multifunctionality"²⁹ of agriculture has been mentioned (for example by the EC, Japan and Norway) to emphasize the need to address environmental aspects of agricultural production.

²⁸ See Proceedings of the first and second joint UNCTAD/International Rubber Study Group workshops on opportunities for and constraints of internalization of environmental costs and benefits in prices of rubber and rubber goods, held in Manchester (1997) and Bali (1998). Available on web site www.unctad.org/en/subsites/ted/

²⁹ The multiple functions of agriculture include (a) its primary role of producing food and fibre; providing employment as well as (b) prevention of soil erosion, landslides and flooding; conservation of water resources; preserving bio-diversity; maintaining the landscape and providing recreational space through sustainable agricultural activities.

Similarly, some countries have argued that there is no evidence that fishing subsidies need to contribute to overcapacity and unsustainability.³⁰

2. Possible implications for developing countries

The removal of agricultural export subsidies may bring substantive benefits to a range of developing countries, particularly those with a large, export-oriented agricultural sector. Other developing countries, such as the net food importing countries, could, however be adversely affected. These countries would have to cope with higher world market prices for imported food and reduced availability of food aid. Finally, some developing countries have expressed concern that food security objectives should not be compromised by further trade liberalization.

With regard to fisheries, substantial benefits may also be achieved. However, some developing countries may derive important economic benefits from existing arrangements in the fisheries sector. For example, fishing agreements (which may include subsidies) may provide important economic benefits. These countries need to anticipate possible short-term adverse economic effects that may arise from the elimination of certain subsidies.³¹ This could be done, for example, by seeking the replacement of certain kinds of payments that could be considered as subsidies by other forms of assistance, including technical co-operation

Some have expressed the view that mandated negotiations at the WTO on trade liberalization should not be linked to environment. If trade liberalization also results in environmental benefits than there is an added advantage. However, even in cases where immediate environmental benefits are not discernible, additional and effective market access for developing countries can contribute to sustainable development. Some have noted that more emphasis should be placed in ensuring that the implementation of WTO agreements is done in such a way as to grant effective increases in market access to developing countries.

With regard to domestic support programmes, some developing countries, in particular **Cuba, Dominican Republic, El Salvador, Honduras, Nicaragua** and **Pakistan** propose that, in the context of non-trade concerns of developing countries, in particular those with small and vulnerable economies, packages of measures aimed *inter alia* at preserving the environment should be exempted from the reduction commitments.³²

E. Environmental impacts assessments of trade policies and agreements

Trade liberalization should be accompanied by environmental and resource management policies in order to realize its full potential contribution to the promotion of sustainable development.

³⁰For example, in the High Level Meeting on Trade and Environment, Japan questioned the view that fisheries subsidies are the cause of excessive catch and should, therefore be eliminated “. Japan believed that “such an opinion is quite one-sided and inappropriate, and that a more balanced view should be adopted”.

³¹Also, developing countries may feel a need to provide some incentives, including through subsidies, to promote domestic fishing activities, including artisanal fishing, as well as domestic processing of fish caught in their waters.

³² WT/GC/W/163, 9 April 1999

Environmental impact assessments (EIAs) may be useful tools in this context. It has been emphasized, however, that EIAs are not only a tool for the minimization of negative environmental impacts; their principal objective is to focus on and to be used in promoting sustainable development. In a broad sense, the challenge is to promote the integration of environment and economics.

1. Proposals

The European Commission,³³ the United States, Canada and some other developed countries have announced that they will carry out “sustainability impact studies” of forthcoming trade negotiations. The EC proposal states that its assessment “will provide the Community with a clearer basis for consideration of the environment and economic implications of the New Round throughout the negotiations”.³⁴ The United States believes “that it would be useful to share the results of these reviews with one another”.

2. Possible implications for developing countries

Environmental impact assessments can be a useful tool at the **national level**; they may promote policy co-ordination as well as help to identify environmental policy measures aimed at ensuring that trade liberalization contributes to sustainable development.

The **Republic of Korea** is of the view that the potential impact of the new round of trade negotiations and their impact on the environment and sustainable development will differ among Members. Therefore, uniform guidelines and methodologies that do not factor in both country-specific and regional-specific situations for assessing environmental impacts are simply not realistic. Furthermore, environmental reviews should not fundamentally alter the process of negotiations or greatly modify the agreements or the benefits sought from the agreements by the Members.

Multilateral processes (including proposals to consider EIA reports in the context of WTO Trade Policy Reviews) may pose a risk to developing countries. It should further be noted that:

- In certain cases calls for environmental impact assessments could be motivated by protectionist purposes.
- Pressures to attach a commitment to carry out EIAs to the launching and conduct of a possible new round of multilateral trade negotiations may overburden developing

³³ The European Community has commissioned a Sustainability Impact Assessment of the proposed new round of multilateral trade negotiations (See: Specifications related to the tendering of a Sustainability Impact Assessment of proposed WTO New Round of multilateral trade negotiations). The assessment should measure the environmental and economic impacts of trade liberalization. The EC emphasizes that the objective of the assessment is not to assess the desirability of WTO-led liberalization as such, but to define how best to define a full package of domestic (i.e. EU) policies and international initiatives to help ensure an optimal outcome in terms of sustainable development. While the assessment would give guidance to EU policies, it could “legitimately address needs in partner countries through, for example, capacity building and other forms of technical assistance and could apply to action that needs to be taken by multilateral institutions”. For example, the assessment could include proposals for flanking policies to ensure that positive effects are maximized as well as for further strengthening of capacity building activities carried out by a range of institutions.

³⁴ Some NGOs, however, are pushing for (a) a multilateral process and (b) the inclusion of social factors in the impact assessments.

countries and have chilling effects on further trade liberalization in favour of developing countries

There may be a need to seek clarification of proposals concerning EIAs or sustainability assessments, in particular with regard to:

- Objective
- Coverage (to what extent does the assessment cover environmental, economic and social effects)
- Responsibility (whose policies being assessed?)
- Multilateral dimensions (to what extent are countries requested to compare notes, and what would be the implications?)
- Coverage with regard to WTO Agreements (note that some NGOs have proposed an environmental impact assessment of the TRIPS Agreement)³⁵

The scope of the agreements as well as the commitments that developing countries would undertake in the new round is as yet unclear. It has also been noted that EIAs of Uruguay Round Agreements have as yet not been carried out.

F. Environmental requirements and market access

Several developed countries wish to ensure that trade liberalization is supportive of high public health and environmental standards. For example, the US proposal emphasizes the need to “continue to recognize the right of Members to take science based measures to achieve those levels of health, safety and environmental protection that they deem appropriate – even when such levels of protection are higher than those provided by international standards”.

While any country has the right to set environmental standards in accordance with national priorities, there are cases where a balance has to be sought. For example, developed countries should not shift the burden of environmental improvements (e.g. in terms of adjustment costs) to developing countries. In addition, developed countries must ensure that their environmental policies, standards and regulations do not cause unnecessary adverse impacts on developing countries.

India and **Kenya** have expressed general concerns about the trade and competitiveness effects of environmental standards in the proposals. In a broad context, other proposals also refer to standards. These include proposals (by **Kenya** and the **LDCs**) on the issue of exports of domestically prohibited goods and other environmentally risky products as well the need to make subsidies to assist developing countries’ producers to comply with environmental standards non-actionable.³⁶

³⁵ See the results of the IUCN Programme on Biodiversity and Trade.

³⁶ See also a statement by El Salvador, speaking in the WTO Council, also on behalf of Cuba, the Dominican Republic, Honduras and Nicaragua, proposing that subsidies for national production and exports, which contribute inter alia to sustainable development, should be non-actionable. WT/GC/M/39, page 6.

2. *Proposals*

India proposes that where environmental standards are difficult to comply with, implementation of Article 11 on technical assistance (e.g. to upgrade conformity assessment procedure in developing countries in order that they gain acceptance in developed markets) should be made obligatory, rather than remain a best endeavour clause. The provisions for special and differential treatment contained in Article 12 of the TBT Agreement should be fully implemented, in particular with regard to the acceptance in importing countries of self-declaration, and of certification procedures adopted by developing country certification bodies, based on international standards.

India also proposes to make it obligatory for international standardizing bodies to ensure the presence of developing countries in the different phases of standard setting as well as to comply with the Code of Good Practice. International standards should be defined and³⁷ a specific provision should be introduced in the TBT, so that if a measure in a developed country creates difficulties for developing countries, then it should be reconsidered.³⁸

Several developing countries' proposals concerning the WTO Agreement on Subsidies and Countervailing Measures directly or indirectly refer to the costs of compliance by either domestic or external environmental requirements. For example, the **LDCs** propose that financial resources should be made available to meet the special needs of LDCs, particularly with respect to the non-actionable subsidies for environmental compliance purposes (Article 8.2.c). **Cuba, the Dominican Republic, El Salvador, Honduras and Nicaragua** propose that subsidies for environmental compliance and sustainable development purposes should be non-actionable.

India has called for modifying certain imbalances the SCM Agreement. For example, while the Agreement provides for non-actionable subsidies to adapt to environmental standards, developmental subsidies used by developing countries to diversify or upgrade industries are actionable.

G. Trade related intellectual property rights

1. *Background*

The objectives of the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS), which came into force on 1 January 1995, are laid down in its Article 7, which reads as follows: "The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

An important element in the protection of intellectual property is to ensure that there is a balance between the interests of the innovator on the one hand and the user on the other.³⁹ This is

³⁷ See WT/GC/M/39.

³⁸ See WT/GC/M/39.

³⁹ B.L. Das, An Introduction to the WTO Agreements, Third World Network, Trade and Development Issues and the World Trade Organization.

particularly relevant in the context of technologies required for enhancing environmental protection. When a society chooses the grant exclusive rights to IPR owners, it should have the right to ensure that societal priorities concerning environmental protection and sustainable development are fully taken into account.

2. *Proposals*

It has been argued that in the context of certain MEAs, the obligation to use specific ESTs to phase out hazardous substances or environmentally harmful processes (for example under the Montreal Protocol) tends to reinforce the monopolistic rights already created by international property rights regimes (IPRs). Short transition periods often inhibit the development of alternative technology so that the patent owner artificially profits from MEA provisions. **India** proposes that exceptions be made in the TRIPS Agreement on environmental grounds for the transfer of technology mandated for use in the context of an MEA. They propose that the mechanism of compulsory licensing could be used for this purpose instead of patents. **India** has also proposed that Articles 7 and 8 of the TRIPS Agreement should be operationalized by providing for the transfer of technology on fair and mutually advantageous terms. This is particularly applicable to technologies, which are mandated by MEAs.⁴⁰

Venezuela has proposed that the incentives mentioned in Article 66.2 of the TRIPS Agreement should also be extended to developing country members, not just to the least developed countries. While Venezuela's proposal does not explicitly refer to the environment, this would be particularly important in the context of technologies which are mandated by MEAs or required to comply with national standards of the export markets.

Article 8.2 of the TRIPS Agreement embodies the principle that abuse of IPRs should be avoided.⁴¹ This is further elaborated in Article 31.⁴² In the WTO Council, **Cuba, Dominican Republic, Honduras and Nicaragua** proposed that the description of the circumstances under which Members have the right to use compulsory licences should include terms such as public interest, including public health and the protection of the environment. They recall that the adoption of compulsory licences was recommended by Agenda 21.⁴³

⁴⁰ WT/GC/W/294.

⁴¹ Article 8.2 of the TRIPS Agreement recognizes that "Appropriate measures, provided that they are consistent with the provisions of this agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unnecessarily restrain trade or adversely affect the international transfer of technology."

⁴² Article 31 of the TRIPS Agreement allows Members to authorize the use of patents without the consent of the owner in the following circumstances:

- In national emergency or some other extreme urgency or for public non-commercial use
- In other cases, if the proposed user has made efforts to get authorization from the owner on reasonable commercial terms and conditions, and has not been able to get the authorization within a reasonable period of time.

The important conditions permitting the use of patents without the consent of the owner are as follows:

- The owner will be paid adequate remuneration
- The authorization of such use will be mainly for the supply to the domestic market
- The scope and duration of such use will be limited to the purpose for which it is used.

⁴³ Paragraph 34.18(e)(iv) of Agenda 21 lists compulsory licensing under the measures that could be undertaken, in particular for developing countries, to prevent the abuse of IPRs.

H. TRIPS and biodiversity

The TRIPS Agreement requires that WTO Members apply intellectual property rights (IPRs) to all technologies, including those previously considered unsuitable for monopoly rights, such as plant varieties and microorganisms. Articles 27.2⁴⁴ and 27.3(b)⁴⁵ allow Members to exclude certain biological resources from patentability.

Key issues raised in trade and environment debate are (a) possible conflicts between the Members rights and obligations under the Convention on Biological Diversity (CBD) on the one hand and the TRIPS agreements on the other; and (b) the wider ethical, economic, environmental and social issues. Many developing countries have made proposals on these issues for consideration in the review of the TRIPS Agreement.

Review of Article 27.3(b) is currently underway.⁴⁶ In addition, article 71 of the TRIPS Agreement specifies that the Council for TRIPS shall review the implementation of the entire agreement in 2000. Despite the review, most developing countries should have enacted legislation for the protection of plant varieties by 1 January 2000. Least developed countries have until 1 January 2005.

1. Complementarity between the CBD and the TRIPS Agreement

Several developing have made proposals aimed at achieving greater complementarity between the CBD and the TRIPS Agreement. For example, **Venezuela** proposes to include the principles of the CBD in the TRIPS Agreement.

Sovereignty

The CBD recognizes the sovereign rights of States over their biological and genetic resources (Articles 3 and 15). **Cuba**, the **Dominican Republic**, **Honduras** and **Nicaragua** consider that the TRIPS Agreement should include provisions, consistent with the Convention on Biological Diversity, indicating that the State exercises sovereignty and inalienable rights over the

⁴⁴ Article 27.2 allows Members to exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect, *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by law

⁴⁵ Article 27.3(b) reads as follows: "Members may also exclude from patentability: ... (b) plants and animals other than micro-organisms and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by *sui generis* systems or any combination thereof. The provisions of this subparagraph shall be reviewed four years after the entry into force of the WTO Agreement".

⁴⁶ There is some debate about whether Article 27.3(b) provides for the review of the implementation of the provisions therein, or for the review of the substantive provisions of the Article itself. Some, mainly developed countries, see it only as a review of the extent to which the provisions have been implemented. Others, mainly developing countries, see it as a review of the provisions themselves that could lead to revision of the text. The **African Group**, for example, emphasizes that the wording of the last sentence of Article 27.3(b) makes it clear that the mandate of the Council is to review the substantive provisions of this Article, and that the mandated review cannot be meant to be confined to the implementation of the subparagraph.

biological resources within its national territory.⁴⁷

Prior informed consent

The CBD stipulates that access to genetic resources can only occur on mutually agreed terms and with the “prior and informed consent” of States, unless States have otherwise determined.⁴⁸ In the CTE, several developing countries have proposed that in all patent applications for biotechnological innovations the country of origin of the germplasm should be indicated. It should also be indicated whether prior informed consent was obtained for the biological genetic resource or traditional knowledge so that mutual benefit-sharing arrangements can be made. For example, **India** proposes to prohibit the granting of patents to those inventions made with foreign genetic material that are inconsistent with Article 15 of the CBD relating to the recognition of sovereignty and access to genetic resources.⁴⁹ In its own submission, **Venezuela** supports this proposal.⁵⁰

Equitable sharing of benefits

The CBD requires the equitable sharing of benefits arising from the commercial use of communities’ biological resources and local knowledge (Article 15.7). Some of the proposals, such as those on prior and informed consent may contribute to mutual benefit-sharing arrangements.

Protecting the rights of communities, farmers and indigenous people

The CBD requires parties to protect and promote the rights of communities, farmers and indigenous peoples *vis-à-vis* their customary use of biological resources and knowledge systems (Articles 8j and 10). However, the **African Group** expresses the view that by mandating or enabling the patenting of seeds, plants and genetic and biological materials, Article 27.3(b) of the TRIPs Agreement is likely to lead to appropriation of the knowledge and resources of indigenous and local communities. The African Group therefore proposes to seek to harmonize Article 27.3(b) with the CBD and the International Undertaking, *inter alia* by allowing developing countries to implement *sui generis* law that can provide for the protection of the innovations of indigenous and local farming communities in developing countries.

Venezuela proposes to “establish on a mandatory basis within the TRIPS Agreement a system for the protection of intellectual property, with an ethical and economic content, applicable to the traditional knowledge of local and indigenous communities, together with recognition of the need to define the rights of collective holders”.⁵¹

Cuba, the Dominican Republic, Honduras and Nicaragua propose that, within the context of the review of the TRIPS Agreement provided for in Article 71:1, a new Article specifying the rights of indigenous peoples and local communities be included in Part I (“General provisions and

⁴⁷ WT/GC/M/39, Page 4.

⁴⁸ These rules do not apply to seed in gene banks collected prior to the date when the CBD came into effect. Such *ex situ* collections are dealt with in the International Undertaking.

⁴⁹ WT/GC/W/225

⁵⁰ WT/GC/W/282, 6 August 1999

⁵¹ WT/GC/W/282, 6 August 1999

basic principles") of the Agreement.⁵²

2. Ethical, economic, environmental and social issues

Moral and ethical concerns arise over the extension of patents to life forms and over the way agreements are arrived at. There are also economic, environmental and social concerns. Some are of the view that plants, animals and essentially biological processes must not be patented.⁵³ However, by providing Members the option whether or not to exclude the patentability of plants and animals, Article 27.3(b) allows for life forms to be patented. The **African Group** proposes that the review of Article 27.3 should clarify that plants and animals as well as micro-organisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable. This is also proposed by the **LDCs**.

3. Summary of positions

Some developing countries are seeking additional time for examining the full implications of Article 27.3(b) as well as for a consideration of different options for implementing *sui generis* systems. This would also provide an opportunity to examine possible conflicts between the Convention on Biological Diversity (CBD) and the TRIPs Agreement, as well as await the satisfactory completion of the International Plant Genetic Resources (IU).⁵⁴

For example, the **African Group** emphasized that the review of Article 27.3 (b) should not “pre-empt the outcome of deliberations in other related fora such as CBD, UPOV, FAO, the International Undertaking, and the development of an OAU model law on Community Rights and Control of Access to Biological Resources. These are important fora dealing with Article 27.3(b) issues (from a developmental perspective) which the TRIPS Council cannot afford to ignore”.

According to the **United States**, the review should consider “whether it is desirable to modify the TRIPS Agreement by eliminating the exclusion from patentability of plants and animals and incorporating key provisions of the UPOV agreement regarding plant variety protection”.⁵⁵ In general this is also the position favoured by pharmaceutical and agro-technology industries. Several other developed countries would also prefer UPOV 91 as the sole *sui generis* option.⁵⁶

Many developing countries (e.g. the **African Group**), on the contrary, see the review as an opportunity to widen the options for excluding life forms from patentability and/or to increase the

⁵² WT/GC/M/39, Page 4.

⁵³ B.L. Das, “Proposals For Improvements in the Agreement on TRIPS”, SEANTINI (Southern and Eastern African Trade, Information and Negotiations Initiative) Bulletin. Volume 1 No. 8, 1998.

⁵⁴ The negotiations to revise the International Undertaking on Plant Genetic Resources for Food and Agriculture (IU) in harmony with the CBD started in the intergovernmental FAO Commission on Genetic Resources for Food and Agriculture (CGFRA). The negotiations concern the scope of the IU, the rules governing benefit sharing and the realisation of farmer’s rights. For details, see Geoff Tansey, *Trade, Intellectual Property and Biodiversity*, discussion paper, box 9. This paper, published by Quaker Peace & Service, London, can be downloaded from the QUNO web site <http://www.quaker.org/quno>.

⁵⁵ WT/GC/W/115, 19 November 1998

⁵⁶ The European Union would probably want to retain the UPOV option for plant varieties, but an EU position may be difficult to arrive at since the Dutch formally challenged the legitimacy of the EU Patent Directive that allows patents on plants and animals. Geoff Tansey, *op. cit.*, page 14.

compatibility between the provisions of the TRIPS Agreement and the Convention on Biological Diversity (CBD). Other developing countries wish at least to have their options open and have more time to examine the issues and possibilities. They thus favour a *status quo*.

I. Biotechnology and GMOs

The **United States** calls for the WTO to address “disciplines to ensure trade in biotechnology products is based on transparent, predictable and timely processes”.⁵⁷

Canada proposes to “establish a Working Party on biotechnology in the WTO with a fact-finding mandate to consider adequacy and effectiveness of existing rules as well as the capacity of WTO Members to implement these rules effectively. One year after its establishment, the Working Party would report on its findings to the Steering Body (to be established at Seattle) and provide any conclusions it considered appropriate”.⁵⁸

Japan proposes that the WTO should “establish an appropriate forum to address new issues, including GMOs. Such a forum would hold discussions from a broad perspective in order to analyse the current situation of GMOs, to examine the issues which need to be addressed and to consider their relationship with existing WTO agreements”.⁵⁹ This could be “a sub-group of an independent negotiating group on agriculture to identify topics on food-related matters of GMOs”. Such a group should *inter alia* consider whether the relevant WTO agreements, such as SPS, TBT and TRIPs, are capable of responding to GMOs the matters.

⁵⁷ Measures Affecting Trade in Agricultural Biotechnology Products, WT/GC/W/288, 4 August 1999. The United States argues that while relatively recent, the basic issues related to trade in agricultural biotechnology products are already covered under the WTO framework, for example, under the Agreement on Agriculture. The WTO agreements aim at reducing trade restrictions, including in agriculture, and at ensuring all measures are transparent and do not create unnecessary or arbitrary barriers to trade. “These goals are in the interests of producers (to have fair competition in the marketplace) and consumers (to ensure transparency and protection against identified hazards)”.

⁵⁸ Proposal for Establishment of a Working Party on Biotechnology in WTO, WT/GC/W/359, 12 October 1999.

⁵⁹ Proposal of Japan on Genetically Modified Organisms (GMOs), WT/GC/W/365, 12 October 1999

IV. OVERALL ASSESSMENT

There are widely diverging views between developed and developing countries on the question whether Trade and Environment should be treated in the forthcoming WTO Ministerial Conference and the ensuing trade negotiations.

With regard to developed countries' proposals, developing countries have argued that the balance, as represented in the CTE work programme, will be lost if only some specific issues are selected for negotiation, as proposed by the **EC**, **Norway** and **Switzerland**. For example, the reference made in the EC proposal to a "finite set of specific issues" excludes a number of important items of the CTE agenda.

Similarly, making reference to the only some of the Principles in the Rio Declaration is unbalanced. For example, the Precautionary Principle is only one of the set of Rio Principles. It would be more appropriate to refer to the Rio principles governing multilateral cooperation, in particular principles 7, 11 and 12. Principle 7 on Common but Differentiated Responsibilities should be the guiding principle. From this perspective, the reference in the proposal by **Norway** to "the principle of differential and more favourable treatment of developing countries" to be addressed "separately in the Ministerial Declaration" requires clarification.

Developing countries have argued that some proposals are ambiguous and require clarification. For example, **Switzerland's** proposal "to elaborate instrument to take better account of basic principles of environmental protection" seems to imply a need for a major reform of the MTS. Also, it is not clear why making sustainable development a "central benchmark" in the new negotiations (as proposed by the **EC**), requires that priority should be attached to "environmental considerations" rather than economic development, the diffusion or technology or other aspects of human development. In addition, the strong focus "environmentally friendly consequences" of the final package may be difficult to measure at a multilateral level and need not be uniform across countries.

With regard to specific proposals, several developing countries have expressed the following views:

- There is no need for accommodation of WTO rules or revision of Article XX to deal with the use of trade measures pursuant to MEAs.
- Non-product related PPMs are not within the scope of the WTO.
- The Precautionary Principle is just one of the Rio Principles and its faulty application could reduce market access for developing countries.

The Ministerial Declaration is likely to reconfirm the objectives of sustainable development and the protection of the environment. In this context, some have suggested that it is important to consider the language contained in the Preamble of the Agreement establishing the WTO, concerning the need for WTO Members "to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." Reference could also be made to language contained in paragraph 4 of the Ministerial Declaration adopted in May 1998: "We shall also continue to improve our efforts towards the objectives of sustained economic growth

and sustainable development”. (emphasis added).

Some developed countries have proposed references to high environmental standards as well as certain environmental principles contained in the Rio Declaration. Developing countries have emphasized Principle 7 on Common but Differentiated Responsibilities, as well as Principles 11 and 12. References to environmental principles and concepts aimed exclusively at providing guidance to national authorities, such as the Polluter Pays Principle, appear more difficult to justify.

Most developing countries want to continue the role of the CTE, with its present mandate and balanced agenda. The idea of making the CTE an ”advisory body” requires further clarification. Any such arrangement should not adversely affect the balance in the CTE’s work programme and take account of the Marrakech Decision, which made it clear that any recommendations stemming from CTE’s work would need to command the broad support of the WTO membership. Some have suggested that the CTE should be able to conduct a “cross checking” of the development of issues, being considered in different committees during the forthcoming negotiations, that have environmental consequences.

With regard to specific issues, several developed countries may propose language on the need to clarify the relationship between the multilateral trading system and multilateral environmental agreements (MEAs). Alternatively, language could be proposed confirming the important role that MEAs play in addressing global environmental problems, based on multilateral cooperation and the Rio Principle on Common but Differentiated Responsibilities. There may also be a need for language encouraging the effective implementation of supportive measures. Several developing countries are proposing to strengthen complementarities between the Convention on Biological Diversity and de TRIPs Agreement, by better reflection the principles of the CBD in the TRIPs Agreement. It is also important to examine the challenges posed by TRIPs in meeting environmental standards mandated either by MEAs or by the national standards of the major export markets.

Safeguarding market access through a better enforcement of both the S&D clauses of the TBT as well as better understanding and acceptability of developing country environmental standards should be encouraged. With respect to dispute settlement it should be emphasized that environment related disputes have thrown up several new dimensions to dispute settlement which should be discussed and a consensus reached on providing some guidance to the DSB.

Certain alliances are emerging between groups of developed and developing countries in pursuing “win-win” results, especially in agriculture, fisheries and environmental services. However, some have noted that since further trade liberalization in agriculture is already mandated by in the UR Agreement, trade liberalization measures should be implemented without seeking trade-offs.

Sustainability assessments may be preferred over EIAs as they emphasize the sustainable development impacts of trade agreements, which weigh costs and benefits in economic terms. Any such assessments should be carried out at the national level.

There is also a need to stress the importance of policy coordination at the national level as well as solutions outside the multilateral trading system.

ANNEX I: SUMMARY OF PROPOSALS

A. Proposals by developed countries

1. *The European Community (EC)*

The EC emphasizes that the WTO already recognizes the overall objective of sustainable development.⁶⁰ The EC proposes that “at Seattle, Ministers should reaffirm this as a central benchmark for the proposed round.

Environmental considerations should be borne in mind throughout the negotiations with a view to achieving by the end of the round an overall outcome where environmentally friendly consequences can be identified in the relevant parts of the final package. The question is therefore how, to define a finite set of specific issues in appropriate parts of the negotiations”.

The EC proposal contains five specific points. It does not offer specific language. However, in essence the EC aims at (further) accommodation in the WTO of: (a) trade measures pursuant to MEAs, (b) certain standards based on Non-Product Related Process and Production Methods (PPMs), in particular eco-labels based on life cycle analysis (i.e. using PPM-related criteria), and (c) the precautionary principle. The proposal also emphasizes the importance that the EC attaches to its own sustainability assessment of the new round. A fifth specific point refers to co-operation between the WTO and other institutions, including UNCTAD and UNEP.

2. *The United States*

The US proposal broadly aims at ensuring that a new round of trade negotiations “are guided by shared commitments to sustainable development, including protection of the environment”.⁶¹ The United States emphasizes the need to reiterate the right of Members to take science based measures to achieve those levels of health, safety and environmental protection that they deem appropriate – even when such levels of protection are higher than those provided by international standards.

The United States considers that it is essential that the links between what is under negotiation and the environment and public health be considered throughout the negotiating process. To achieve this, the United States proposes:

- That the CTE should serve as a forum for the identification and discussion of links between

⁶⁰ European Community’, “EC Approach to Trade and Environment in the New WTO round”, WT/GC/W/194, 1 June 1999

⁶¹ Trade and Sustainable Development, Communication from the United States, WT/GC/W/304, 6 August 1999.

elements of the negotiating agenda and the environment and public health. The CTE would provide reports of its discussions to the relevant negotiating groups. The United States expects that the CTE's efforts would provide important input to deliberations at the national level on positions to be taken in the actual negotiating groups. The United States emphasizes that the CTE's role in identifying issues would not detract from, or interfere with, the responsibilities of negotiating groups.

- That WTO Members be encouraged to carry out environmental reviews at the national level.
- To make "the WTO's operation more efficient, open and transparent to foster public support for trade liberalization and confidence in the WTO".⁶²

With regard to specific issues, the US proposes to pursue win-win opportunities, in particular through:

- Disciplines to eliminate subsidies that contribute to overcapacity in fisheries sector.
- The elimination of agricultural export subsidies and the continued reduction of domestic subsidy programmes that distort trade and contribute to the degradation of natural resources (while retaining the so-called "Green Box" for subsidies that have no or negligible impact on trade).
- The elimination of restrictions on trade in environmental goods and services.

With regard to biotechnology, the United States calls for the WTO to address "disciplines to ensure trade in biotechnology products is based on transparent, predictable and timely processes"

3. Norway

Norway proposes that the Ministerial Declaration should contain a reference to the objective of sustainable development, including environmental and developmental principles as reflected in the Rio Declaration, in particular the precautionary principle, the polluter pays principle and the right to development.⁶³ The proposal mentions that concerns of developing countries must be taken into account. In this context, Norway "foresees that the principle of differential and more favourable treatment of developing countries will be addressed separately in the Ministerial Declaration".

With regard to specific issues, Norway favours the accommodation of trade-related instruments pursuant to Multilateral Environmental Agreements (MEAs) and voluntary eco-labelling in the WTO system.

Norway pays high priority to environmental reviews, which should cover both negotiations on market access and negotiations on rules and disciplines. Environmental reviews should be conducted early in the negotiation process and/or near the end of the process, when draft agreements are available. Norway recognizes that national authorities are responsible for carrying out reviews. However, since there are capacity problems in many countries it would be helpful, if participants were encouraged to exchange views and experience multilaterally on the basis of their

⁶² The US proposal referred to proposals it had already tabled to this effect, for example in the ongoing review of the Dispute Settlement Understanding.

⁶³ WT/GC/W/176, 30 April 1999

reviews.

4. Switzerland

Switzerland proposes that, in order to ensure that further trade liberalization also reflects legitimate environmental concerns, the Seattle Declaration should refer to the overall objective of sustainable development as recognized by the WTO, as well as to specific trade and environment issues as a subject for negotiations.⁶⁴

With regard to specific issues, Switzerland proposes that negotiations should aim at: (a) clarifying the relationship between the multilateral trading system and MEAs through the establishment of appropriate principles, rules or procedures and (b) elaborating instruments to take better account of basic principles of environmental protection and of current issues stemming from the interdependencies between trade and environment.

5. Japan

Japan shares the view that trade and environment policies must play a mutually supportive role and that the work of the WTO in this area should contribute to sustainable development.⁶⁵ There is a need to foster common understanding among Members and to respond appropriately to the various voices of civil society. With regard to specific issues, Japan cautions that improved market access will not have uniform positive effects on the environment. For example, in the areas of fisheries and forestry, due consideration should be given to the overall objectives and effects of fishery and forestry policies.⁶⁶ Japan is of the view that it is inappropriate to discuss trade liberalization and improved market access in the context of Trade and Environment, as this would duplicate negotiations in other areas

6. Canada

Canada emphasizes the need to ensure that trade policies support sustainable development and do not restrict legitimate actions to protect and preserve the environment.⁶⁷ Environmental policies should be developed and implemented in the least trade restrictive manner necessary to accomplish the policy objective.

The CTE should serve as a focal point for the integration of environmental considerations in the WTO negotiations without coming to conclusions or negotiating the issues. Each negotiating group should take environmental issues into consideration to make certain that liberalized trade is consistent with, and supportive of, the achievement of sustainable development (i.e. “mainstreaming”).

⁶⁴ WT/GC/W/265, 20 July 1999

⁶⁵ WT/GC/W/145, 8 February 1999.

⁶⁶ See also Japan’s communications on Negotiations on Forestry and Fishery Products, WT/GC/W/221, 28 June 1999

⁶⁷ Canadian Approach to Trade and Environment in the New WTO Round WT/GC/W/358, 12 October 1999.

Increased transparency of WTO operations, including more outreach by the Secretariat, will help maintain and build public support for the multilateral trading system.

Canada will conduct a national Strategic Environmental Assessment of the upcoming round of multilateral trade negotiations at the WTO. It would be useful for Members undertaking environmental assessments to exchange information on their approaches and their findings with other WTO Members.

Specific policy issues

Canada supports further work to clarify the relationship between WTO rules and trade measures in multilateral environmental agreements (MEAs). Canada proposes a “principles and criteria” approach to clarify existing WTO rules. This could be incorporated in some form of interpretative or ministerial statement, which would assist both WTO panels in assessing the legitimacy of MEA trade measures and international MEA negotiators in contemplating the appropriate use of trade measures in particular MEAs.

It may be useful to consider, in the appropriate fora, whether relevant multilateral trade disciplines could be strengthened to take into account the increasing use of voluntary international standards based on life cycle considerations.

Identifying the synergies between trade liberalization and improved environmental protection in a variety of sectors can contribute to the achievement of sustainable development. Removing or reducing trade distorting measures can lead to greater environmental protection. Actions could focus on:

- the agricultural sector, in particular trade distorting subsidies particularly export subsidies,
- the fishing sector, in particular subsidies that contribute to overcapacity and undermine the sustainable use of marine resources .
- the forest sector, trade distortions created by the application of higher tariffs to value-added products. These distortions impact on the ability of affected exporting countries to manage their forests sustainably.
- environmental goods and services

B. Proposals by developing countries

1. India.

India has made detailed proposals concerning (a) safeguarding market access by adjusting the TBT Agreement⁶⁸; (b) TRIPS and MEAs⁶⁹; and (c) the relationship between TRIPS and the Convention on Biological Diversity (CBD).⁷⁰

⁶⁸ WT/GC/W/223

⁶⁹ WT/GC/W/225

⁷⁰ WT/GC/W/147 (Proposals on IPR Issues)

The TBT Agreement

While referring to standards in general, India's proposal on the TBT Agreement includes an explicit reference to environment-related measures, which may represent a barrier to exports from developing countries.⁷¹ India proposes to amend the TBT Agreement, with the following objectives:

- To make implementation of Article 11 on technical assistance (e.g. to upgrade conformity assessment procedure in developing countries in order that they gain acceptance in developed markets) obligatory rather than a best endeavour.
- To strengthen the provisions for special and differential treatment contained in Article 12 of the TBT Agreement (in particular with regard to the acceptance in importing countries of self-declaration concerning adherence to standards by developing country exporters and of certification procedures adopted by developing country certification bodies, based on international standards).
- To ensure effective participation of developing countries in setting of standards by international standard-setting organization. In particular, India proposes to make it obligatory for international standardizing bodies to ensure the presence of developing countries in the different phases of standard setting as well as to comply with the Code of Good Practice.
- To define international standards.⁷²
- To introduce a specific provision that if a measure in a developed country creates difficulties for developing countries, then it should be reconsidered.⁷³

MEAs and TRIPS

India proposes to promote the transfer of technology through a binding obligation by the holders of proprietary technology. India reiterates earlier proposals in the CTE, that owners of environmentally sound technologies and products should sell such technologies and products at fair and most favourable terms and conditions upon demand to any interested party which has an obligation to adopt these technologies under an MEA.⁷⁴

The TRIPS Agreement and the Convention on Biological Diversity (CBD).

India proposes to incorporate a provision in the TRIPS Agreement prohibiting the granting of

⁷¹ The proposal notes that, in general, barriers to trade may arise (a) because standards, regulations and conformity assessment procedures implemented by importing countries are inconsistent with TBT obligations or (b) because developing countries lack the technical or financial capacity to comply with them, even when they are TBT consistent.

⁷² See WT/GC/M/39.

⁷³ See WT/GC/M/39.

⁷⁴ India notes that "Transfer of technology at fair and most favorable terms has been highlighted in all discussions and debates on sustainable development. The Rio Declaration of 1992 as well as most of the multilateral environmental agreements emphasize the need for such technology transfers. The preamble of the WTO Agreement affirms the objective of sustainable development in a manner consistent with the respective needs and concerns of Members at different levels of development. Thus, an obligation is cast upon the WTO to bring about easy access to and wide dissemination of technology relevant for sustainable development".

patents inconsistent with Article 15 of the CBD.⁷⁵ An obligation should be included in Article 29 of the TRIPS Agreement, requiring that any application for patents should include a clear mention of the biological source material and the country of origin, open to full public scrutiny.⁷⁶ To implement this, it would be necessary to require: (a) a *material transfer agreement* where the inventor wishes to use biological material and (b) a *transfer of information agreement* where the inventor bases himself on indigenous or traditional knowledge. At the same time domestic biodiversity laws could include provisions to enable the signing of such agreements, and these should be considered compatible with the TRIPS Agreement.

2. Kenya

In a comprehensive communication covering a broad range of topics, Kenya *inter alia* refers to Trade and Environment as well as the revision of the TRIPs Agreement, including, in particular, as it relates to biodiversity.⁷⁷

It is Kenya's view that “environmental standards are a function of the stage of development of the economy. Therefore, to impose on low income developing countries environmental standards prevailing in advanced countries would, internally, artificially raise their costs of production and, externally, extinguish their comparative advantage in the export sector”.

While Kenya is a key proponent of environment conservation, it objects any move to use environmental measures as a barrier to trade. Kenya believes that Article XX of GATT 1994 is flexible enough to allow for exceptions to accommodate environmental issues. In addition, the conditions contained in this Article provide for the checks and balances in the new WTO systems that are aimed at preventing the abuse of such exceptions.

In the area of exports of domestically prohibited goods (while not making explicit reference to this term) Kenya notes with concern that some countries are exporting products that are sub-standard, rejects, expired and/or environmentally damaging to developing countries. Kenya therefore proposes that all exported products meet the requirement of international standards where they exist or the national requirements of the exporting country.

Kenya is of the view that the short period given to the developing countries for implementation of the TRIPS Agreement is not adequate. In addition, there are instances where the ambiguity of the text of the TRIPS Agreement allow for different and controversial interpretations, as exemplified in Article 27:3(b) on the protection of plant varieties by patents or effective *sui generis* systems. Kenya therefore proposes:

- That an additional five-year period is granted to developing countries to implement the TRIPS Agreement.
- To amend Article 27:3(b) to increase the scope of protection to include protection of indigenous knowledge and farmers rights.

⁷⁵ WT/GC/W/225. This proposal is further elaborated in WT/GC/W/147.

⁷⁶ WT/GC/W/147.

⁷⁷ WT/GC/W/233, 5 July 1999

- To harmonize the Convention on Bio-Diversity (CBD) and TRIPS Agreement on the protection of indigenous knowledge, farmers' rights and pieces of intellectual creation.

3. The Least Developed Countries⁷⁸

As part of a “Comprehensive New Plan of Action in the Context of the Third WTO Ministerial Conference”, the Least Developed Countries (LDCs)⁷⁹ propose that.⁸⁰

- Positive measures (which include, *inter alia*, capacity building, financial and technical assistance) should be first considered before accommodation is sought for the use of trade-restrictive measures in the implementation of MEAs.
- Financial resources should be made available to meet the special needs of LDCs, particularly with respect to the subsidies covered by Article 8.2.c of the Agreement on Subsidies and Countervailing Measures (concerning environmental compliance subsidies).
- WTO Members should clearly define which domestically prohibited goods (DPG) should be considered at the WTO, establish and implement concrete mechanisms such as a DPG notification system to increase transparency, and develop enforceable obligations for additional technical assistance to monitor trade in DPG by LDCs.
- Under the review of Article 27.3:
 - There should be a formal clarification that naturally occurring plants, animals, the parts of plants and animals, including the gene sequence and essentially biological processes for the production of plants, animals and their parts, must not be granted patents.
 - A provision should be incorporated to the effect that patents must not be granted without the prior consent of the country of origin of products referred to in the paragraph above. Patents inconsistent with Article 15 of the CBD must not be granted.
 - Members should retain the flexibility to develop *sui generis* protection regimes suited to the seed supply systems of each country.

4. African Group

Kenya, on behalf of the African Group, has made substantive and specific proposals on the TRIPs Agreement.⁸¹ In general terms, the African Group proposes that the work of the TRIPS Council should be staggered and sequenced in a manner that enables developing to participate effectively in its work. The African Group also proposes a regular full review of the implementation

⁷⁸ See: “The challenge of integrating LDCs into the Multilateral Trading System”, outcome of the Coordinating Workshop for Senior Advisers to Ministers of Trade in LDCs in Preparation for the Third WTO Ministerial Conference. Sun City, South Africa, 21-25 June 1999.

⁷⁹ Of the 48 LDCs, 29 are WTO Members and nine are observers, of which six are in the process of accession.

⁸⁰ WT/GC/W/251

⁸¹ WT/GC/W/302, 6 August 1999.

of the provisions of Article 66.2 on incentives for transfer of technology to LDCs by developed countries.⁸² With regard to Article 23.4 - establishment of a multilateral system of notification and registration of geographical indications-, the African Group is in favour of the extension these provisions to other products recognizable by their geographical origins (such as handicrafts and agro-food products).⁸³

The submission, however, focuses largely on Article 27.3(b). The African Group emphasizes that the review of this article should not to be confined to implementation issues; the TRIPs Council is to review the substantive provisions of Article 27.3(b). It also proposes that more time be given for implementation of the provisions. With regard to the review of the substantive provisions of the Article itself, the African Group proposes that the review should:

- Decide what can and what cannot be excluded from patentability. In particular it should clarify why the option of exclusion of patentability of plants and animals does not extend to micro-organisms (as there is no scientific basis for the distinction) and why the option of exclusion of patentability of "essentially biological processes" does not extend to "microbiological processes" (as the latter are also biological processes).
- Clarify that plants and animals as well as micro-organisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable.
- Seek to harmonize Article 27.3(b) with the provisions of the CBD and the International Undertaking, in which the conservation and sustainable use of biological diversity, the protection of the rights and knowledge of indigenous and local communities, and the promotion of farmers' rights are fully taken into account.
- Insert a footnote after the sentence on plant variety protection in Article 27.3(b), stating that any *sui generis* law for plant variety protection can provide for:
 - The protection of the innovations of indigenous and local farming communities in developing countries, consistent with the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources.
 - The continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest.
 - Preventing anti-competitive rights or practices, which will threaten food sovereignty of people in developing countries, as is permitted by Article 31 of the TRIPS Agreement.

5. Venezuela

Venezuela proposes a full review and possible renegotiations of the TRIPS Agreement from the development standpoint, taking into account the scope and interpretation, which should be given to special and differential treatment.⁸⁴ Venezuela considers that, among other things, a review should involve the following:

⁸² Article 66.2 is based only on a "best endeavour" principle.

⁸³ Currently the TRIPs agreement provides for the protection of geographical indications for wines; and negotiations are under way on spirits.

⁸⁴ WT/GC/W/282, 6 August 1999

- Include the principles of the Convention on Biodiversity in the TRIPS Agreement, and prohibit the granting of patents to those inventions made with foreign genetic material that are inconsistent with Article 15 of the CBD relating to the recognition of sovereignty and access to genetic resources;
- Establish, on a mandatory basis within the TRIPS Agreement, a system for the protection of intellectual property, with an ethical and economic content, applicable to the traditional knowledge of local and indigenous communities, together with recognition of the need to define the rights of collective holders.

6. Cuba, Dominican Republic, Honduras and Nicaragua

Cuba, Dominican Republic, Honduras and Nicaragua propose that in the review of the TRIPS Agreement, certain aspects of Article 31, which sets out the conditions governing the use of so-called compulsory licenses, should be made more specific and flexible.⁸⁵ In particular, the circumstances under which Members have the right to use compulsory licences should include public health and the protection of the environment.

7. Bolivia, Colombia, Ecuador, Nicaragua, and Peru

Bolivia, Colombia, Ecuador, Nicaragua, and Peru propose that the Seattle Ministerial Conference establish a mandate with the following purposes:⁸⁶

- To carry out studies, in collaboration with other relevant international organizations, in order to make recommendations on the most appropriate means of recognizing and protecting traditional knowledge as the subject matter of intellectual property rights.
- On the basis of the above-mentioned recommendations, initiate negotiations with a view to establishing a multilateral legal framework that will grant effective protection to the expressions and manifestations of traditional knowledge;
- To complete the legal framework envisaged in paragraph (b) above in time for it to be included as part of the results of this round of trade negotiations.

8. The Republic of Korea

The **Republic of Korea** proposes to set up a separate Negotiation Group on Fishery and Forestry Products.⁸⁷ It argues that fishery and forestry products have special characteristics different from other industrial goods and that the fishery and forestry sectors perform unique social and environmental functions.

C. Other proposals

⁸⁵ WT/GC/M/39.

⁸⁶ Proposal on Protection of the Intellectual Property Rights Relating to the Traditional Knowledge of Local and Indigenous Communities WT/GC/W/362, 12 October 1999

⁸⁷ Proposal for Separate Negotiation Group on Fishery and Forestry Products, WT/GC/W/368, 12 October 1999

There is a convergence of views between certain developed and developing countries on pursuing “win-win” results.

A number of countries (Australia, Iceland, New Zealand, Norway, Peru, Philippines and United States) propose “that, as a part of the upcoming WTO negotiations, Members agree to eliminate subsidies that contribute to fisheries overcapacity, in view of the fact that they distort trade, seriously undermine sustainable utilization of fish stocks and hamper sustainable development”.⁸⁸

D. Proposals by CTE items

Annex I shows that the different proposals submitted to the WTO Council cover 8 out of the 10 items included in the CTE work programme, i.e. all items except item 4 (Transparency of environmental measures with significant trade effects) and item 9 (The Agreement on Services and the environment). Taking into account that some proposals address a variety of items that have been discussed in the CTE, one could consider that there are around 30 proposals on specific CTE items, which are divided more or less equally between “developed country issues” (items 1, 2, 3 and 10) and “developing country issues” (items 6a, 7 and 8).

⁸⁸ WT/GC/W/303, 6 August 1999. See also proposals by Iceland (WT/GC/W/229, 6 July 1999) and New Zealand (WT/GC/W/292, 5 August 1999)

TABLE 1: PROPOSALS BY CTE ITEMS

Item of the CTE agenda	WTO Members	Source
<i>Items 1 and 5:</i> The relationship between the provisions of the MTS and trade measures pursuant to MEAs	EC	WT/GC/W/194
	Norway	WT/GC/W/176
	Switzerland	WT/GC/W/265
	LDCs (positive measures)	WT/GC/W/251
<i>Item 2:</i> The relationship between environmental policies and MTS Note: this includes proposals concerning sustainability impact assessments and environmental principles	EC	WT/GC/W/194
	Japan	WT/GC/W/145
	Norway	WT/GC/W/176
	Switzerland	WT/GC/W/265
	United States	WT/GC/W/304
<i>Item 3:</i> Environmental requirements for products, including eco-labelling	EC	WT/GC/W/194
	Norway	WT/GC/W/176
<i>Item 4:</i> Transparency of env. Measures	-	-
<i>Item 6a:</i> Environmental measures and market access. Note: This includes subsidies for environmental compliance and sustainable development	India	WT/GC/W/223
	LDCs (subsidies)	WT/GC/W/251
	Cuba, the Dominican Republic, El Salvador, Honduras and Nicaragua (subsidies)	T/GC/M/39
<i>Item 6b:</i> Environmental benefits of removing trade restrictions and distortions.	United States	WT/GC/W/304
	Australia, Iceland, New Zealand, Norway, Peru, Philippines and United States	WT/GC/W/303 WT/GC/W/229 (Iceland) WT/GC/W/292 (New Zealand)
	Cuba, Dominican Republic, El Salvador, Honduras, Nicaragua and Pakistan (domestic support programmes)	WT/GC/W/163
<i>Item 7:</i> Exports of DPGs	Kenya	WT/GC/W/233
	LDCs	WT/GC/W/251
<i>Item 8:</i> Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the environment; Note: Proposals on the TRIPs Agreement in general and proposals concerning the relationship between TRIPS Agreement and the Convention on Biological Diversity are presented separately.	African Group	WT/GC/W/302
	India (TRIPS and MEAs)	WT/GC/W/225
	India (TRIPS and CBD)	WT/GC/W/147 WT/GC/W/225
	Kenya	WT/GC/W/233
	Venezuela	WT/GC/W/282
	Cuba, the Dominican Republic, Honduras and Nicaragua (compulsory licensing)	T/GC/M/39
	Cuba, the Dominican Republic, Honduras and Nicaragua (TRIPS and the CBD)	T/GC/M/39
	LDCs	WT/GC/W/251
<i>Item 9:</i> Services and environment	-	-
<i>Item 10:</i> Relationship with NGOs	United States	WT/GC/W/304

ANNEX II: WTO WORK PROGRAMME IN PREPARATION OF SEATTLE

Through paragraph 9 of the Decision adopted by the WTO Ministerial Conference, at its Second Session, WTO Members decided to establish a process, under the direction of the General Council to prepare for the Third Session.⁸⁹

This process, which is currently being implemented in Geneva, should enable the General Council to submit recommendations regarding the WTO's work programme, including "further liberalization sufficiently broad-based to respond to the range of interests and concerns of all Members, within the WTO framework". This will enable WTO Members to take decisions at the Third Session (Seattle 30 November to 3 December 1999).

The General Council's work programme shall encompass the following:

- (a) recommendations concerning:
 - (i) the issues, including those brought forward by Members, relating to implementation of existing agreements and decisions;
 - (ii) the negotiations already mandated at Marrakech, to ensure that such negotiations begin on schedule;
 - (iii) future work already provided for under other existing agreements and decisions taken at Marrakech;
- (b) recommendations concerning other possible future work on the basis of the work programme initiated at Singapore;
- (c) recommendations on the follow-up to the High-Level Meeting on Least-Developed Countries;
- (d) recommendations arising from consideration of other matters proposed and agreed to by Members concerning their multilateral trade relations.

The WTO Council has listed Trade and Environment among the matters that may be included under item (d). Trade and environment issues may also emerge under (a), such as issues related to the implementation of the TRIPS agreement.

⁸⁹ WT/MIN(98)/Dec/1, May 1998.