

**A Multilateral Environmental Agreement (MEA)
in the context of
the Multilateral Trading System (MTS):
"engendering" the analysis of the
relationship between TRIPS and CBD**

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Introduction

The field of international relations is the object of analysis in different branches of social sciences. Traditionally, in economics most of the literature on international relations deals with trade. Starting with the repeal of the “Corn Laws” (import duties on all sorts of grain) in 1846, “Free Trade” became the ideal for English economists and statesmen. Theoretical debates focussed on the issue of Free Trade versus Protectionism. Since then, the concept of “Most Favoured Nation” (MFN), has widely been used as defining equality in treatment in international trade. Trade issues have been the main content of international economics, on the basis of Ricardo’s contribution. Later on, the international studies in the economic field have dealt mostly with issues of economic growth and development (in the past considered equivalent), and the role played by trade and technology transfer. Environment was not yet an issue per se, and it is only from the 1970s that international environmental issues have progressively become the concern of economists, and not merely as a resources problem, and increasingly present in the policy agenda. The concern for gender issues as part of the economic analysis came even later as a dimension to be taken into account while addressing development issues –among others-, and in particular sustainable development issues since women are key actors in their daily interaction with the environment in developing countries.

The interface between international trade and global environmental problems is to be addressed as part of an integrated analysis in order to apprehend the complex relationship existing between them. In fact, trade flows and production patterns to meet international trade requirements impact on environmental quality, and, vice-versa, environmental requirements on the traded produces are also impacting trade flows. In this process, the use of know-how and technology, the access to it, and the equal opportunities for men and women to benefit from trade opportunities is a key dimension. The participation of both women and men into the implementation of the policies leading to sustainable development is a way to reduce inequalities, to launch endogenous equitable paths of sustainable development and to ensure social participation and appropriation of the process. In particular, we will apply our gender-sensitive analysis to the case of the relationship between the Convention on Biological Diversity (CBD) and the Trade-Related Intellectual Property rights agreement (TRIPS) of the WTO.

Although women represent more than 50% of the world population at an adult age, their specific role and contribution to economic development has often been under-analysed in mainstream economics, in spite of the fact that there are significant differences in practice in the way women and men contribute to and are remunerated for it by the economic system as a whole. This gender-sensitive analysis is being increasingly addressed by IGOs as well as by NGOs, and academic community, creating in such a way an international awareness on the need of mainstreaming gender-analysis when defining long-term development strategies. The role of women is a key one in making a positive contribution to the implementation and dissemination of development strategies at local level. The impact on women derived from the implementation of international policies is something that should be looked at carefully, since they are a strategic node in the multiplying effect of development programmes (see DITC papers on gender and international trade, May 2004, draft version).

The UN resolution 56/188 calls upon the United Nations system "to integrate gender mainstreaming into all its programmes and policies, in accordance with agreed conclusions 1997/2 on gender mainstreaming adopted by the ECOSOC in 1997"¹. Within UNCTAD, issues of property rights and environment are addressed in order to provide further analysis in relation to the trade-related dimension of these issues (and in particular to the WTO TRIPS agreements and the relationship between Multilateral Environmental Agreements and Specific Trade Obligations at the WTO). There is space for thinking on how to improve the efficiency

¹ Information on UN

of both trade and environment goals addressed by TRIPS and CBD by exploring the role of women in the achievement of these goals. There is also room for thinking on how to address the definition of these agreements in order to preserve women's traditional rights over natural resources that have sometimes been put into question by the transformation derived from the implementation of changes in the legislation. This note analyses the interface between trade and environment issues, by addressing as well the role of science and technology as a key factor to link them in order to be effective, and how this analysis should not be gender-blind so that specific gender dimension can be anticipated and embedded in the complete design of the programmes.

Economics, environment and distributional issues

The economic system is an open system, where boundaries are changing, where the "ecological utilisation space" is not a mere datum but a milestone in the process of co-evolution of economic and ecological systems. When dealing with economic issues, rationality and efficiency might be part of the criteria but they do not totally determine the final decision. Thus, the cultural patterns and the role of information and education in shaping economic attitudes are much more relevant than could be expected from their complete absence in the formal economic models². The inclusion of gender analysis into the complex interface of trade and environment issues in this essay intends to highlight the historical and cultural role of women in preserving, developing and transmitting the knowledge associated to the use and exploitation of the resources issued from biodiversity.

Issues such as sustainability and equity are essentially value-issues, whose definition depends heavily on the different world-views from which the different perceptions come. In fact, the worldviews on these dimensions are not necessarily coincident, since the priorities in terms of development and of the use of available resources (human and natural capital) are not always weighted with the same measures (Castells, 1999).. This complexity also relates to the use of sound scientific science when defining the thresholds that determine binding parameters in the rules of international trade and in the environmental standards related to the compliance of MEAs. This is not a mere philosophical question, indeed, scientific inputs are embedded in many standards and regulations and they strongly affect the real possibilities of

² Cultural, psychological and social influences in economic behaviour are often the object of study in the subset of the "Political Economy". In the mathematical models of the economy, widely used for the purpose of "quantitative predictive assessment", psychological influences can be included through the parameters representing the preferences, but this always implies a kind of stability and coherence of the preferences that are much higher in the model than they are in reality.

trade in specific products and the use and production of specific technologies related to both the respect of the rules of the MTS and the compliance with MEAs.

Economic and ecological distribution: beyond efficiency

If ecological resources are not considered as a given datum in the economy but as a system themselves, then the dynamic of the ecological system affects the boundaries of the economic system. The distributional dimension of environmental policies deals with both ecological and economic distribution. These are different concepts, as defined by Martínez-Alier and O'Connor (1996),

“Ecological distribution refers, therefore, to the following questions: What is the distribution of the benefits of present patterns of natural resource and environmental exploitation? Who carries the principal burdens of the unwanted side-effects of these exploitation? Which social groups suffer most from the impairment of life-support functions and from the loss of environmental amenities resulting from environmental degradation? How are they distributed across societies, across space, and time? Finally, how are these asymmetries valued (or devalued)?” (Martínez-Alier and O'Connor, 1996, p. 161).

In a more synthetic definition, they write:

“Ecological distribution thus refers to the social, spatial and temporal asymmetries or inequalities in the use by humans of environmental resources and services, and in the burdens of pollution, for example, in the depletion of natural resources” (Martínez-Alier and O'Connor, 1996, p. 160).

The introduction of the “ecological distribution” concept to analyse trade-related environmental policies creates a theoretical space to deal with issues that were marginalized from former economic approaches. Since economic distribution was usually accounted in monetary terms and mainly evaluated through the analysis of variations of income and wealth, other consequences of environmental and/or trade policies did not find an adequate analytical framework for analysis. By the use of the concept of Ecological Distribution, asymmetries in other areas (i.e. the access to the use of resources, the distribution of environmental risks) can be included in the analysis. By means of including such social, spatial and temporal asymmetries related to environmental policies, the analytical framework may become more powerful, since the combination of both economic and ecological distribution concepts in a single framework facilitates the emergence of new answers to the questions regarding the interrelations of the two systems in co-evolution.

Such an integrated approach to the distributive aspect of environmental and trade policies may benefit from the mutual reinforcement from the disciplines of economics and ecology. Neo-classical economics missed part of the issue by ignoring those aspects dealing with incommensurability, uncertainty, and feedback from the biophysical system; ecology as a discipline lacks the system of valuation that characterises economics studies, as well as a relation to the human social system. The integration of the two disciplines facilitates the emergence of new explanations and answers, in the manner that traditionally has been the purpose of Institutional Economics. And it can be said that UNCTAD was born with a mandate that is part of this frame of Institutional Economics close to Raul Prebisch's doctrine on economic development, going beyond the well-behaved assumptions of economic models and including the social and developmental factors as part of the overall elements to be considered when planning and implementing sustainable³ development strategies.

The distributional implications of international environmental policies

Why are the concepts of ecological and economic distribution relevant for the analysis of Multilateral Environmental Agreements? The distributional issues are one of the main obstacles to reach agreements, as reflected in the following quotation:

“The two broad areas of conflict that are most directly relevant to international environmental negotiations are, first, conflicts over the setting of priorities and the distribution of the costs of managing the global environment and, second, conflicts over a variety of sovereignty -related issues” (Hurrell and Kingsbury, 1992, p. 36).

The distributional issues at stake when analysing the processes linked to the design and implementation of MEAs are mainly related to asymmetries in burden-sharing and in the decisional power among the different stakeholders⁴ involved in the negotiation. In the 20th century, the pace at which the number of IEAs has grown has increased significantly (Frank, 1994). It could be interpreted that there is some environmental urgency that makes humanity more sensible to the risks that the environmental disruption represents for human health and the preservation of quality of life. Another possible interpretation of such increased interest is that the economically richer countries of the world happened to be the ecologically poorer,

³ Sustainability as such was of course not part of initial UNCTAD's mandate, but it could be said that the spirit of it was there, as looking for a development path that is endogenous, stable and empowers the local population to improve its quality of life by means of trade and the profitable use of their natural resources, which means by definition avoiding as well over-exploitation to ensure a long-term trend of development.

⁴ The term “stakeholder” is used here instead of “actor” since it represents any “player” who somehow has a concern for the issue at stake. This is not necessarily synonymous with “actor”, since not all the stakeholders have their position represented in the actors of the policies, or in the decision-making arena. Stakeholders thus involve a priori probably more participants than the actors themselves.

relatively speaking. The most developed countries – which happen to be those where public opinion is more aware of, and demands, environmental quality – have based their economic growth on a capital-intensive production system, where the primary inputs were mainly depleted from developing countries, and they added value by means of high technology and capital-intensive production systems. In such a way, they have lost contact with their own ecological environment and they have often damaged their natural habitat through the waste derived from their productive system (i.e air pollution, eutrophication of lakes, health consequences). Such pioneering experiences in growing, depleting and polluting have made them aware of the consequences of such unsustainable patterns, by having damaged – in some cases irreversibly – the natural environment of their countries and the health of their population. This has awakened a stronger concern in such countries, which are economically rich but ecologically poor, towards the preservation of the Natural environment now perceived from their point of view as a “common resource” for humankind. Their interest lies in exporting at the international level the strong concern they have for such “common” resources. It often happens that these resources, i.e. the Amazonian Rainforest, are not under an international authority but under the sovereignty of a few developing countries. They have become of world concern because of their essential role in the Earth’s ecosystem, but negotiating what to do with such environmental resources entails much more than the issue itself. In practice, most often it happens that the ecologically richer countries are also the economically poorer⁵, and vice-versa. Thus, negotiating on environmental issues and taking into account the distributional dimension implies the simultaneous consideration of both the ecological and economic distribution that characterise the initial endowments, and to put these distributions in a historical perspective.

The current environmental problems are not a-historical, they are mostly the consequences of the model of economic growth adopted by the industrialised countries, which through the demonstration effect and by means of the globalisation of the economic system, has become the goal for all the countries of the world. Clearly, such patterns of consumption for the whole population of the planet are unsustainable. Negotiating MEAs entails a discussion on property rights, not necessarily of the resources themselves but of the access to their use, the rules concerning their use, and the distribution of the returns generated by their use. The gap between North and South will be an obstacle to agreements as long as the South owns the territories and the larger area of the world ecosystem and the North continues to

⁵ Except when the natural resource is directly related to energy, in which cases we have specific situations of high per capita income, not necessarily positively co-related with other indicators of development and welfare.

dominate the economic system. The economic growth of the North has contributed to the consumption of much more natural resources than is sustainable in the long term (and that would correspond to a per-capita based approach, which is discussed when addressing the so-called “ecological debt”⁶. If such an excess in consumption were recognised as a basis for funding and paying an environmental debt to the Southern countries, then the economic and ecological distribution would be put together in the analytical framework so as to start to define a space for agreement among such a priori conflicting positions (Azar, 1994). But this presupposes to go beyond the current behaviour when dealing with international cooperation and negotiation.

Distribution is thus not distribution of money, distribution of trees, distribution of “air units”. Distribution concerns defining the rights of the different countries and stakeholders of the world to have access to the world resources in a way that does not consolidate inequalities in terms of trade opportunities, market access and environmental disruption. Distribution deals with changing a *status quo*, which up to now has led humankind along unsustainable paths of development and economic growth. Almost 30 years after Boulding’s warning against the perpetual running after growth, consumption, and production, we still have to change the economic view that distributional issues are not to be solved only by making the pie bigger, but also by taking care of the pie and attempting to distribute it fairly on the basis of equity considerations, among the present and future generations, and among the different social groups of the current generations, such as for instance women and men.

Precisely our gender analysis of the CBD and TRIPS compatibility (or non) will be addressing a specific group, the one of women and their role in the preservation of the biodiversity, their increasing role in trading and services –mainly in informal economy- and the access they have (or they do not) to technology and finances related to MEAs implementation in compliance with the two international regimes on trade and environment.

CBD and TRIPS: compatibility of Trade and Environment regimes?

The potential conflict between TRIPS and CBD is directly linked to the discussion concerning the compatibility of two different international regimes, the trade and the environment regimes⁷. This essay does not pretend to provide an answer to this question, it is nor the place neither the purpose of this short essay which emphasis is to highlight the gender dimension

⁶ See Azar, C. 1996

⁷ For a discussion on Trade and Environment regimes and the case of MEAs, see Trade and Environment Review, UNCTAD, 2003 (www.unctad.org/trade_env/TER).

and how it can be addressed as an example of mainstreaming gender into policy analysis when dealing with trade and development policies.

The agreement on Trade-Related Property Rights (TRIPS), as one of the seminal WTO agreements, aims to protect the intellectual property as a means to ensure and promote the commercial dimension of the development of the rights issued from intellectual property. As all WTO agreements, the primary goal of such agreement is the one of facilitating the necessary conditions for free trade. The "raison d'être" of TRIPS is the belief that protecting and well-defining the property rights related to inventions and innovation will enable the development of trade opportunities while ensuring the legal rights derived from the exploitation of innovation and invention. Nevertheless, a different view on TRIPS emanates from the analysis of to whom it brings real benefits. Further, it is no secret that individuals and firms in developed countries own most of the patents granted on genetic resources from Africa and Asia. In addition, technology transfer to developing countries has remained unattained. Therefore, developing countries see TRIPS as another tool that perpetuates the imbalance in global trade and technology distribution while developed countries see it as part of globalization.

By making intellectual property part of the trade regime, imitation and reverse engineering have become very difficult. Yet, these activities of trial and error are important aspects of learning by doing which is an important step in acquiring and developing new knowledge. On the other hand, TRIPS ensure the superiority of those that have mastered technology, possibly through copying and imitating in the past. Therefore, perceived conflicts may also stem from the view that TRIPS is a biased legal instrument rather than one that seeks to promote symbiotic relationships and opportunities.

The Convention on Biological Diversity was signed at the Rio Conference (1992). Its primary goal is to protect the biological diversity, to preserve the resources from biological diversity, to prevent their over-exploitation or their expropriation. Part of the aspects included in the Convention is the issue of exploiting natural resources and ensuring equitable access and benefit sharing. This is directly related to the fact that in many cases resources that were collectively owned by the "community" but without a legal definition of property were used and patented by private companies that made use of these resources and became the owners of all the benefits derived from the exploitation of these resources (in what is known as cases of bio-piracy).

The following box compares different aspects of the two agreements:

The historical conflict

	TRIPS	CBD
Negotiators	Trade ministers, experts & industry	Environment NGOs, experts & ministers,
Purpose	Trade and protection of intellectual property rights	Conservation
Emphasis	Individual rights; <i>led by developed countries</i>	National rights, <i>led by Developing countries</i>
Interests	Promote homogeneity; <i>favor uniformity in variety</i>	Promote variety; <i>favor diversity in variety</i>
Benefits	Immediate benefits	Long-term benefits
Clarity	complex language	Specific language
Time frame	Lengthy negotiation period	Short negotiation period
Stand on biotechnology	Supportive but indirect	Cautious but direct

Source: Based on Robert Lettington, "The biodiversity Convention and TRIPS"

The CBD is clearer on how resources may be accessed, contracts executed and technology and benefits shared. The TRIPS Agreement is very vague on technology transfer and none of the authorized exclusions from patenting could be implemented without resorting to lengthy court battles or negotiations. The meaning of terminologies is also unclear. For example, diagnostic and therapeutic methods for humans and animals are almost impossible to exclude. Further, the difference between “microbiological processes and micro-organisms” that could be patentable and “biological processes and organisms” that may not be patentable is open for interpretations. The TRIPS Agreement avoids the word biotechnology in total while the CBD explicitly states that biotechnology as one among other technologies.

Part of article 15 is a source of concern to both developing countries rich in biodiversity and developed countries rich in technological diversity. Section 5 through seven states:

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

There is no disagreement over the need to respect sovereignty of nations to determine or regulate access to biological resources within its borders, but the implementation is a source of concern. Some argue that in order to identify biological resources incorporated in industrial products and thus enable fair and equitable sharing of benefits arising from such resources, patents should include the approval of the country of origin. If such a condition is introduced in national legislation then this would imply additional requirements not foreseen in the legal text.

Mainstreaming gender dimension into the CBD-TRIPS analysis

Research from academics and experience from technical cooperation programmes have provided evidence of the so-called gender gap, which reflects disparities in treatment and inequalities in opportunities between men and women (World Bank, 2003). In some cases development programmes are not targeting in a balanced way women and men involved in similar activities, such as for instance agriculture. This non-equitable approach in implementing development programmes and in giving access to resources for a better management of their economic activity leads to a growing gap between men and women in achieving goals of sustainable development in their daily activity. Furthermore, due to the key role of women in the daily management of natural resources, the fact of under-representing their participation leads to a non-optima use of the natural resources due to lack of means and/or lack of knowledge⁸.

In order to reduce the gender gap the UN have strengthened their commitment to include specific attention to gender dimension whenever this is relevant to issue at stake (which can be much more often than what could be expected a priori).

Several difficulties appear when aiming at including the gender dimension in the design of development policies and strategies. First of all, there is not a pre-established standard

⁸ The study of the World Bank (2003 op.cit) refers to the impact of women's insecure land tenure rights avoiding their adoption of sustainable ways of cultivating rice in Vietnam, compared to male farmers.

procedure to mainstream gender issues into a broader context. Second, gender dimension can be present in almost every issue, as women are actors involved in virtually all dimensions and activities of human life and they are also those that are most often into direct contact with the resources for human life, due to their social role. The poorest the country, the closer the women are to natural resources use and exploitation. Third, mainstreaming the gender perspective should be done when meaningful and being consistent with the overarching goal of reaching gender equality as well as sustainable development. Mainstreaming might sometimes have perverse effects if undertaken in a standardised way without re-considering its specific purpose within the real context where the gender gap is being addressed. We mean that sometimes simple measures are taken in order to fill in quantitative parameters which are not necessarily translating into real reduction of the gender gap. One of the most direct indicators being the one of increasing the number of women participating in a project, it happens that it becomes almost the only indicator effectively looked at. Nevertheless, changes in this parameter per se will not bring any overall improvement, unless part of a well-articulated and coherent strategy addressing different aspects of the gap existing between men and women in terms of potential opportunities of benefiting from and participating in sustainable development. Broader integrated policy frameworks should be built in which constant evaluation of results should be undertaken so that, in the process of learning-by-doing, the best strategy to reduce the gender gap would be identified on an *ad hoc* basis.

As stated earlier, the potential conflicts between the CBD goals and the TRIPS agreements derive from the different purpose of these two international instruments. The Convention aims to preserve and protect biodiversity, the primary goal is the environmental protection. The TRIPS agreement aims to regulate the rights on intellectual property, and as such it deals as well with the rights emanating from the development of products that use inputs from biodiversity.

The problem appears when some property rights have been allocated to the industrial promoters of products that were traditionally known and own by the indigenous communities but were lacking of formal legal recognition at the international level. Traditionally, women have been depositary of the community knowledge as embedded in their daily household activities. In first instance, when traditional knowledge is patented to be owned outside of the community, this can cause severe problems to the local communities. Among the poor communities, women are among those that will suffer the most from this negative impact, since they will be in charge of solving the logistic problem for their families caused by the loss of the right to use resources that were freely available in the past.

In the attempt of reducing the gender gap, several UN resolutions have called for increasing the attention on the impact on women concerning development policies. Although it is true that women are traditionally key actors in their interaction with the environment, it is not clear if the tradition will keep going at the same pace of women's emancipation. Thus, when taking into account the impact on women, it is necessary to address the whole social relationship between men and women, as this is not a simple system but a complex one, in which the change of economic condition might lead to a change in social structure, and therefore the complexity should be addressed ex-ante when designing the strategies to reduce the gender gap.

Conclusions

The relationship between the two regimes, the one on property rights and the one on environmental law, and the inclusion of gender relations in this analysis is not a simple exercise. In order to provide an objective and structures analysis of what the impact on environment and on development might be depending from different scenarios, it would be necessary to count with data that would have been collected in such a way to facilitate a gender-disaggregated analysis. Several institutions have made a lot of progress on the construction of data with specific gender –sensitivity (such as UN-ECE and the World Bank), nevertheless, there is still a lack of coordinated approach to such an effort and of a commonly accepted methodology to deal with similar problems in different agencies and or academic communities. Therefore, in order to make further progress in the direction of mainstreaming gender into development and trade policies, there is a need for a positive approach to build methodologies that could be applied generally to economic analysis with the value-added of providing as well information on gender disparities. This is not a mere "compassionate" or any other or "value-based" approach to the issue of gender equality: the economic role of women in development is an asset for developing countries, and its explicit consideration in the design of development strategies would provide a positive multiplier effect in realizing a great potential of economic growth and poverty reduction.

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Abbreviations:

CBD	Convention on Biological Diversity
CTE	Committee on Trade and Environment (of the WTO)
DITC	Division on International Trade in Goods and Services, and Commodities
DMC	Doha Ministerial Conference
DMD	Doha Ministerial Declaration
IPRs	Intellectual Property Rights
LDCs	Least Developed Countries
MEA	Multilateral Environmental Agreement
NGO	Non-Governmental Organization
STOs	Specific Trade Obligations
TK	Traditional Knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
WIPO	World International Property Organization
WTO	World Trade Organization