

Session 8:

What future for the trade, investment and environment debate?

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Point 1:

MEA/WTO negotiations on the relationship. European industry is disappointed with the limited agenda and sceptical as to what can and should be realistically achieved in Mexico or at the end of the round.

The EU sells the Doha agenda as a success. Is it really a success with respect to the Trade and Environment discussions? The Doha mandate lists three items for negotiations:

- a) Multilateral Environmental Agreements (MEAs): The scope of the negotiations on MEAs is limited to members of an MEA.
- b) Co-operation between the secretariats of WTO and MEAs: What exactly should be negotiated? The participation of the secretariats in the negotiating process? The WTO is a member-driven organisation and the secretariats have no real role.
- c) Environmental goods and services: As there is no internationally recognised definition on what constitutes an environmental good, this negotiating item presents more problems than solutions.

Industry has a broader agenda on trade and environment negotiations: Governments should negotiate rather than settle open questions through recourse to dispute settlement. The European industry proposals go the limited scope of the Doha mandate. WE covered issues, such as non-MEA members and in particular eco-labelling. We feel that many of the problems in the area of PPMs (non product related process and production requirements) could be solved with an eco-labelling code, or a labelling code in general.

The most problematic point of the agenda is, however, not the limitation of the MEA negotiations with respect to MEA members but the general limitation contained in paragraph 32, second sentence. It reads:

"The outcome of this work as well as the negotiations carried out under paragraph 31 (i) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of members under existing WTO agreements, in particular the SPS Agreement, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least developed countries."

If that sentence is taken literally, the negotiations can only lead to some declaratory statements. Let us assume that the WTO were to repeat what is already contained in the 1996 report on trade and environment, namely that dispute settlement in MEAs should be given preference over dispute settlement in WTO (between MEA members only). Such a result would not lead to a radical change but would reflect a modest opening of the WTO vis-à-vis MEAs. Yet, such result would require an amendment to Dispute Settlement Understanding to the extent that WTO Dispute Settlement would only be possible after an MEA Dispute Settlement had failed. As such this result would however alter the balance of rights and obligations and it would run counter the mandate.

Given the limited scope of the agenda and given the just mentioned further limitation I fear that the negotiations on the MEA/WTO relationship will not lead to radical changes on how the WTO will handle trade disputes involving a trade measure taken pursuant to an MEA. Realistically, one should arrive at the following solution: First MEA Dispute Settlement and then WTO Dispute Settlement, if necessary, under the condition that both dispute settlement activities need to interpret the specific treaty provisions in light of the obligations contained in the other treaty; in other words the WTO informs the MEA in case of an MEA dispute settlement and the MEA informs the WTO in case of a WTO dispute settlement. Such reference to treaty interpretation will help to settle disputes without causing major conflicts between WTO and MEAs.

Point 2

Tariff reduction or elimination for environmental goods

Environmental Goods

This item causes real headaches because it introduces in the GATT tariff context a socio-economic distinction: there are good and bad products and the tariff schedule should distinguish between them.

Let me give you an example: polystyrene is used to insulate: it can be used as a coffee cup (US) or it could be used as an insulation material for a house in order to reduce heating and thus contributes to cutting CO₂ emissions. Is there a polystyrene with a good environmental use and a polystyrene with a questionable environmental use?

Do we really want to introduce into the tariff discussions in the WTO the element of *good and bad*, and if we do, could one further argue that tariffs should not be touched or even be raised from an environmental perspective? In my view such a discussion leads to absurd results from a trade policy point of view.

Tariff distinction between identical goods for their socio-economic purpose could also lead to a distinction at the border between identical products.

Note that with respect to the definition of *like product* tariff classification is one criterion to legally distinguish between products at the border.

Yet the question is: is it the trade liberalisation that leads to unsustainable results or is it the lack of domestic regulatory policies? And if it is the latter, should the WTO not try to seek for a cure of the illness instead of trying to pursue a cure for the symptoms. My answer I fear, ladies and gentlemen, is illusionary. I would argue that the WTO already deals with trade and environment issues, therefore it could also be the body to elaborate on minimum regulatory requirements that are necessary to make trade liberalisation in a given sector sustainable.

We could be indifferent to the whole issue of environmental tariffs. The chemical industry's position on tariffs is clear. The International Council of Chemical Associations has adopted a position that chemical tariffs should be eliminated by 2010 completely. Our position, at least, saves us from trying to define an environmental product. So we have no real problem.

Developing countries, which still have high tariffs, might have a problem with this negotiating item.

What should be achieved?

A definition of what constitutes an environmental good. This is easier said than done. The OECD definition only includes end-of-the pipe products, i.e. catalytic converters, polystyrene as a material for insulation would not be included. This demonstrates that any definition will have the inherent danger of discrimination.

Point 4: PPMs and Eco-labelling

It is interesting to note that the WTO negotiations will not address the thorny issues of PPMs (non product related process and production requirements). The WTO Committee on Trade and Environment will however continue its work and will also prepare a proposal on how to deal with eco-labelling. Such a proposal could help to solve quite a lot of the PPM issues.

Give the informed consumer a real choice and do not prescribe what the consumer is supposed to buy. As much as I buy organic salad I would have no hesitation whatsoever to buy US beef treated with growth hormones. But I do not have the choice.

An agreement on eco-labelling or labelling in general is, in my view, an absolute must in order to bring some movement into the trade and environment debate and in order to solve at least part of the PPM problem.

Point 4:

Dispute Settlement and Trade and Environment

It is interesting to note that a lot of WTO members have enormous difficulties to agree on a substantive negotiating agenda on trade and environment issues. In particular US, Canada, Australia but also many developing are rather lukewarm, or even oppose WTO negotiations.

On the other hand the recent WTO DS cases, in particular *Shrimps-turtle* and *Asbestos* do not seem to cause such enormous problems not even to the most outspoken critics of a trade and environment negotiations agenda. To be frank I do not understand why a country can oppose substantial trade and environment negotiations whilst at the same time accept the far-reaching consequences of the recent WTO case law.

I draw two consequences from *Shrimps/Turtle* and *Asbestos*:

The first is: you can impose unilaterally an environmental standard which others have to meet if they want to sell their product in your market provided that your regulation does not consist of a single, rigid and unbending requirement but allows for some flexibility. Second you need to negotiate with the export countries concerned in good faith. But

good-faith-negotiations rightly mean that you do not have to conclude an agreement. It only means that you have to negotiate seriously.

The second argument stems from the asbestos case. Here the WTO Appellate Body (AB) gave a new meaning to the term "necessary" to protect human health. In the past this word has always been understood to mean that an alternative not GATT incompatible or less incompatible means was reasonably available. And here the AB states that a measure is only reasonably available if the alternative measure contributes to the realisation of the end pursued. The AB then concludes that the alternative "secure use of asbestos" suggested by Canada could not be considered as a reasonably available alternative for France since that alternative measure would involve a continuation of the very risk that the French ban seeks to halt. In other words if the domestic regulation deals with a serious health issue the traditional GATT argument of "necessity" does not hold any longer. A WTO member can impose a ban and does not have to be afraid of the discussion on whether less trade restrictive alternatives exist.

Outlook

If the negotiations do not advance, and this is unfortunately a likely development, we will have to rely on the WTO dispute settlement mechanism to solve the most pertinent trade and environment issues.

I am sceptical as to judicial development as long as the court has no role with respect to positive integration. The AB cannot behave like the European Court of Justice and cannot be a motor for integration, the AB can only reverse the old GATT interpretations and become positive to environmental exceptions.

As long as regulatory barriers do however continue to be barriers trade we have not achieved much. Does it really matter if the barrier is a high tariff or a regulatory requirement, which I cannot meet. From a point of view of a trader it does not and therefore I strongly believe that the WTO should deal with positive integration and not just deal with some symptoms of the trade and environment debate.
