

# TRADE AND SUSTAINABLE DEVELOPMENT – AN OVERVIEW OF SOME KEY ISSUES

By

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## I. Introduction

What is the role of trade in achieving sustainable development? Many answers – often contradictory – have been given to this question. At the center of discussions is the main institution governing the multilateral trading system: the World Trade Organization (WTO). This note explores a range of issues that arise at the interface of trade and sustainable development, focusing specifically on discussions surrounding the WTO. Rather than providing a detailed study of any one issue arising in this field, it offers a brief sketch of the landscape and identifies a range of key issues that merit further consideration by students and scholars of international sustainable development law.

The note has six parts. Following this introduction, Section II provides an overview of the WTO's mandate and relevant agreements and committees. The note then explores issues of trade and sustainable development in three main categories: material; legal and policy; and organizational. Section III explores some issues arising from the *material linkages* between trade liberalization, the economy, society and the environment. Economic, social and environmental systems are inextricably connected in the material or physical world. Consequently, trade liberalization may change the pattern or nature of activity in one area, with impacts on another. Section IV explores some *legal and policy* issues, which arise between different fields of law and policy (for example, international economic, environmental and human rights law) and across different levels of social organization (for example, local, national and international law). Legal and policy issues are often created and ultimately resolved by organizations and other institutional arrangements. Section V thus focuses on some *organizational issues* arising between the WTO and other international bodies.<sup>2</sup> The paper concludes in Section VI.

## II. The WTO and sustainable development

Created by the Uruguay Round of trade negotiations, the WTO is both a set of legal agreements, and an institutional framework to administer the implementation of these agreements, settle trade disputes, and provide a forum for ongoing negotiations. The WTO's founding agreement encourages governments to achieve its economic objectives "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."<sup>3</sup>

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<sup>2</sup> These three categories – material, legal/policy, and organizational – are not mutually exclusive, and many issues classified within them will have a mixed character; they will arise in the phenomenal world, raise questions of law and policy, and/or require institutional action for their resolution. In this note I do not examine the generic relationship between these categories, but rather simply use them to help structure the discussion by organizing issues according to their primary character.

<sup>3</sup> Marrakesh Agreement Establishing the World Trade Organization, Preamble, April 15, 1994, *reprinted in* 33 I.L.M. 1144 (1994) [hereinafter "WTO Agreement"].

The WTO is much more than a “trade” organization in the traditional sense. Whereas the GATT focused primarily on liberalizing trade in goods, the WTO promotes economic liberalization in a range of sectors, and reaches deep into national regulatory systems to address impediments and distortions to international economic activity. Organizationally, it is structured to address three primary areas of activity – trade in goods, trade in services, and protection of intellectual property – but its agreements also touch on a number of others including investment and government procurement (see Box 1).

• **Box 1 – Relevant WTO agreements**

- Agreement Establishing the World Trade Organization (WTO Agreement) establishes the WTO’s main legal and institutional framework
- General Agreement on Tariffs and Trade (GATT) is the original framework for liberalizing trade in goods
- Agreement on Technical Barriers to Trade (TBT Agreement) provides more specific disciplines regarding national (or sub-national) technical regulations and non-binding standards.
- Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) applies to certain national measures designed to protect human, animal and plant life or health
- Agreement on Subsidies and Countervailing Measures (SCM) disciplines both trade distorting subsidies, and the countervailing measures that may be taken in response
- Agreement on Agriculture promotes liberalization in trade in agricultural goods
- General Agreement on Trade in Services (GATS) establishes binding rules to liberalize international trade in services
- Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) establishes uniform, minimum standards for the protection and enforcement of intellectual property rights
- The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which establishes procedures for the settlement of disputes arising out of the implementation of WTO agreements

These agreements are administered through a number of councils and committees. Trade and environment issues are considered primarily in the Committee on Trade and Environment (CTE). Trade and development issues are considered primarily in the Committee on Trade and Development (CTD). Environment and development issues are also considered, albeit less directly, in other WTO committees and councils (including those administering the agreements identified in Box 1).

At the WTO’s recent 4<sup>th</sup> Ministerial meeting in Doha, Qatar, the CTE and CTD were mandated, respectively, to identify and debate environmental and developmental aspects of upcoming negotiations, to “help achieve the objective of having sustainable development appropriately reflected in those negotiations”.<sup>4</sup> The Ministerial Declaration also established a number of other mandates with implications for sustainable development. Many of these are discussed in the following sections, as relevant.

The existing WTO agreements, as well the negotiations and discussions mandated by Ministers at the Doha Ministerial, have implications for the coherent development of the

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<sup>4</sup> WTO 4<sup>th</sup> Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC/1, para. 51.

institutional framework for sustainable development. They will play a role in determining the laws and policies developed within the WTO and elsewhere. And they will have significant implications for underlying economic, social and environmental systems, and for the well-being of the people and communities relying on them.

### III. Material Linkages – Economic, Social and Environmental

What is the effect on the economy, communities and the environment of liberalizing trade in agricultural or industrial goods? How might liberalizing services – such as healthcare or water provision services – affect human rights to health and food? What are the implications of intellectual property rules for access to life-saving medicines and technology? Answering these and other questions requires an understanding of complex interdependencies between trade and other facets of the world we live in.

Trade – defined broadly here as the transboundary movement of goods, services and capital – is intimately tied to numerous other economic and social aspects of human behavior. These, in turn, are intimately connected to each other, and to the natural environment. As a result of these linkages, changes the character or pattern of activity in one area can change the character or pattern of activity in another, with potentially profound implications for human wellbeing and sustainable development. As with any set of complex systems, the material linkages between trade, on one hand, and other economic activity, society and the environment, on the other, are multiple and not easily reducible to a set of simple categories or relationships. Nevertheless, some preliminary observations about these relationships are possible, and are relevant as context for discussions of legal, policy and organizational questions in the following sections.

First, while a number of analytic frameworks are conceivable, the most widely accepted framework suggests that trade liberalization can affect the economy, society and environment through four main *mechanisms or media*: by introducing new products, disseminating new technologies, affecting the structure of economic activity, or increasing the scale of activity and impacts.<sup>5</sup> This framework has been applied primarily to trade in goods, but may also provide some insights when examining the effects of liberalization in other areas of economic activity such as services or investment.

Second, the effects of trade liberalization on the economy, society and environment may differ in their *nature*. They may, for example, be *positive or negative (or neutral)*. Done well, trade liberalization can change the economy's structure and scale to promote economic growth, enhance employment and opportunity, and introduce environmentally sound products and technologies. Done poorly, it may collapse infant industries, undermine social cohesion through rapid structural change, or expand domestic market failures into global markets, with serious consequences for the environment. Often, both positive and negative effects of some kind will occur simultaneously, requiring policymakers to balance competing objectives to optimize outcomes.

Third, the effects of trade liberalization may also differ in *degree*. In some cases, small changes in trade policy will have major implications for economic, social and/or environmental systems. In others, trade liberalization's impacts may be less intense, or take longer to materialize. The extent to which trade liberalization affects underlying systems will depend in part on the other policy measures in place (e.g. policies designed to ensure sustainable use of natural resources). It will also depend in part on the nature of the systems themselves (e.g. some natural systems such as fisheries may exhibit non-linear relationship).

Fourth, the effects of liberalization – including its benefits and burdens – are *distributed spatially* across different geographical areas, and to different communities. They may occur primarily within an importing or exporting country, across borders with transboundary effects

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<sup>5</sup> See OECD, *Methodologies for Environment and Trade Reviews*, OECD/GD(94) 103 (1994). See also UNEP, *Reference Manual for the Integrated Assessment of Trade-Related Policies* (2001).

on third countries (e.g. positive or negative economic, social or environmental externalities), or globally (e.g. promoting peace or exacerbating climate change). Liberalizing trade in timber products, for example, can benefit elites but harm local forest communities in exporting countries, provide cheap timber to consumers in importing countries, and affect biodiversity with implications for all.<sup>6</sup> The spatial distribution or locus of effects will influence who bears the benefits and burdens of liberalization, both within and between countries.

Finally, the nature and degree of effects, and who bears the benefits and burdens, will often vary among different *industry sectors and areas of policy*. For instance, the effects of liberalizing trade in agricultural versus industrial sectors may differ markedly. Similarly, the effects of liberalizing trade in goods (e.g. refrigerators or timber) versus liberalizing trade in services (e.g. transportation, tourism or education) will also differ. Understanding these relationships requires careful assessment on a case-by-case basis. Policy makers should be cautious of unthinkingly applying assumptions and experience gained in one area to other areas.

Viewed from these perspectives, trade and trade liberalization is neither inherently good nor bad. Rather, they are one *means* among many available to governments to achieve the *end* of enhancing human well-being and achieving sustainability. From a sustainable development perspective, trade and trade rules must therefore complement other policies in playing a role in optimizing individual and collective behavior to promote social and economic development and to protect the environment, in order to meet the needs of present generations with an emphasis on the poorest (intra-generational equity), and to preserve the ability of future generations to meet their own needs (inter-generational equity). Achieving sustainability will require collective action by governments, citizens and business, guided within different jurisdictions and at levels of governance by a coherent and balanced architecture of laws, policies and organizational arrangements.

#### **IV. Legal and policy issues – the importance of coherence and balance**

Addressing the material linkages between trade, the economy, society and environment, and regulating individual and collective human behavior accordingly, is a role for law and policy. Laws and policies establish the boundaries that keep us on course and prevent us from veering into barbarism or colliding with nature's boundaries. Just as the linkages between systems in the material world are complex, so too are the relationships between different laws and policies, and among them and the outcomes they are designed to induce in the real world.

At the interface of trade and sustainable development arise a whole constellation of legal and policy issues. Some of these have appeared in dispute settlement cases (See Box 2), others have been considered within formal institutional structures, and others still remain to be identified and discussed. This section provides a sketch of some of the main issues, with the goal of identifying areas for future investigation. Just as it was possible to offer some general introductory comments on the nature of material linkages, it is possible to offer some general comments on the nature of legal and policy issues, before addressing ten specific issues below.

First, it seems almost too obvious to say that achieving sustainability will require policymakers to design laws and policies to achieve clearly identified outcomes in the *material world*. Unfortunately, however, much multilateral trade policy-making has proceeded on the basis of theory, without a systematic examination of its effects on the economy, society and environment in specific countries and sectors, either by the WTO collectively or by many of its individual member countries. Some countries have recently undertaken integrated assessments of trade liberalization and trade rules, but the majority has

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<sup>6</sup> Sizer, Downes, and Kaimowitz, *Tree Trade: Liberalization of International Commerce in Forest Products: Risks and Opportunities* (WRI/CIEL, November 1999).

not.<sup>7</sup> Better analysis of actual and potential effects “on the ground” will be required before policymakers can accurately identify the role of trade in promoting national development goals, determine whether to liberalize and if so the nature and pace of liberalization, and design and implement the associated policies that are required to direct economic liberalization. The role of integrated assessments in exploring trade effects is discussed in Section V.A below.

#### **Box 2 – Relevant WTO Disputes**

*US-Gasoline*<sup>8</sup> (1996) involved a successful GATT challenge to US measures that addressed urban motor vehicle pollution by establishing minimum baselines for fuel quality, on the basis that the measures treated foreign and domestic fuel suppliers differently, and the US had made inadequate attempts to consult other governments or count the costs to foreign suppliers, constituting arbitrary discrimination and a disguised restriction on international trade under Article XX.

*EC-Hormones*<sup>9</sup> (1998) involved a successful challenge under the SPS Agreement to EC measures banning imports of hormone-treated beef, on the basis that the measures were not sufficiently based on a risk assessment as required by the SPS Agreement (Article 5.1).

*US-Shrimp*<sup>10</sup> (1998) involved a successful GATT challenge to US measures banning the import of shrimp caught with fishing methods that threatened endangered species of sea turtles, on the basis that the measures treated similarly placed countries differently, lacked flexibility and due process, and did not involve serious multilateral negotiations for sea turtle protection and so constituted arbitrary and unjustifiable discrimination under Article XX.

*Australia-Salmon*<sup>11</sup> (1998) involved a successful challenge under the SPS Agreement to Australian measures addressing the risk of invasive species by banning imports of uncooked salmon, on the basis that the measures were not sufficiently based on a risk assessment (Article 5.1), and failed to avoid arbitrary or unjustifiable distinctions in the levels of protection it considers to be appropriate in different situations (i.e. between risks from Canadian and ocean-caught Pacific salmon) (Article 5.5) as required by the SPS Agreement.

*Japan-Varietals*<sup>12</sup> (1999) involved a successful challenge under the SPS Agreement to Japanese measures banning imports of certain fruit crops to address the risk of invasive species, on the basis that the measures were maintained without sufficient scientific evidence (Article 2.2), and that provisional measures were not reviewed within a reasonable period and additional information was not sought for a more objective assessment of risk (Article 5.7).

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<sup>7</sup> See WTO 4<sup>th</sup> Ministerial Declaration, *supra* note 3. These assessments have been welcomed by Ministers in paragraph 6 of the Ministerial Declaration.

<sup>8</sup> Report of the Appellate Body, United States – Standards for Reformulated and Conventional Gasoline, AB-1996-1, WT/DS2/AB/R (1997).

<sup>9</sup> Report of the Appellate Body, EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R (1998).

<sup>10</sup> Report of the Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (1998).

<sup>11</sup> Report of the Appellate Body, Australia – Measures Affecting Importation of Salmon, AB-1998-5, WT/DS18/AB/R (1998).

<sup>12</sup> Report of the Appellate Body, Japan – Measures Affecting Agricultural Products, AB-1998-8, WT/DS76/AB/R (1999).

*EC-Asbestos*<sup>13</sup> (2001) involved an unsuccessful challenge under the TBT Agreement and the GATT to a French ban on imports of asbestos fibers and products containing them; the French measure was justified under as a measure necessary for the protection of human life or health (Article XX(b)) and the Appellate Body, overturning the panels decision that the TBT Agreement did not apply, determined it did not have an “adequate basis” to complete an analysis of the measure under the TBT Agreement.

*US-Shrimp 21.5*<sup>14</sup> (2001) involved an unsuccessful challenge to US measures to implement the decision in *US-Shrimp*; the US measures were justified under Article XX, subject to certain requirements, including that the US continue to seek a negotiated solution to protect sea turtles.

Second, many issues of law and policies arise *between* different fields of law and policy. Just as linkages exist in the material world, linkages arise among the different systems of law and policy responsible for governing trade, social development and environmental protection. Issues may, for example, arise between international economic law and other fields of international law relating to environment, human rights, health policy, labor rights, finance and development. These linkages give rise to a need for integration and coherence in law and policy across these different fields. The UN Sub-Commission on the Promotion and Protection of Human Rights, for example, has recently encouraged “Governments and economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation.”<sup>15</sup>

Third, issues may arise not only between different fields of law and policy, but also *at different levels of governance*. As noted in the previous paragraph, issues may arise between fields of law at one level of social organization: for example, at the international level between international economic law, and the rules embodied in the multilateral environmental agreements (MEAs) (“horizontal linkages”). Or they may arise between systems at different levels of social organization: for example, between international economic law, and law at the regional, national or sub-national level (“vertical linkages”). An integrated architecture of sustainable development governance must match the level of governance with the level of the object of regulation, and ensure balance and coherence between fields, both at and between different levels of social organization.

Fourth, issues also arise about the appropriate *balance between markets and regulation*. Many of the legal and policy issues identified below arise from the tension inherent between liberalizing economic activity by “disciplining” the use of regulations, and the need to regulate at different levels – local to international – to achieve economic, social or environmental objectives. In applying existing trade disciplines, and developing new ones, the trading system must balance attempts to enhance market access by, for example, removing or disciplining national measures (known as non-tariff barriers), on one hand, and preserving policy space to regulate to achieve economic, social and environmental objectives, on the other.

Ensuring a coherent and balanced architecture of rules to realize the benefits of economic liberalization while promoting social development and environmental protection – at each level of governance and between levels of governance – remains a major challenge. It is a challenge that will likely increase as globalization deepens interdependencies, and as an expanding human population competes for the planet’s limited carrying capacities. This section provides a brief overview of ten of the most prominent legal and policy issues in the

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<sup>13</sup> Report of the Appellate Body, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, AB-2000-11, WT/DS135/AB/R (2001).

<sup>14</sup> Report of the Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, AB-2001-4, WT/DS58/AB/RW (2001).

<sup>15</sup> Sub-Commission Resolution 1999/30 (E/CN.4/SUB.2/RES/1999/30).

field of trade and sustainable development, commencing with market access. When discussing these issues, the note also complements the general observations in Section III above on material linkages with some more specific comments on how trade liberalization affects the real world in particular sectors – such as agriculture or services – where relevant to the discussion of legal and policy issues.

#### **A. Market access**

Expanding market access can have a range of material effects on economic, social and environmental systems, and raises a series of legal and policy issues. At the WTO's Committee on Trade and Environment, discussions of market access have focused primarily on the material benefits to developing countries of improving access to markets in developed countries. Discussions have noted how improved market access and new trade opportunities can help reduce poverty, foster economic development, and gain resources to address environmental and social concerns. These discussions were reflected in the Doha Ministerial Declaration, which called on the CTE to give particular attention to the effect of environmental measures on market access.<sup>16</sup>

At a more general level, the purpose of the WTO is to enhance market access for all Members on the basis that freer trade encourages the realization of comparative advantages and economies of scale, promotes innovation in the face of international competition, and encourages the sharing information and ideas, thereby reducing potential for conflict. The advocates of freer trade also argue it enhances access to environmental goods, services and technologies and spurs demand and capacity for environmental protection.

Conversely, critics argue that freer trade can harm infant industries, exacerbate unequal distribution of wealth and opportunity, increase the scale of negative impacts (such as transport pollution), leverage local market failures into global markets, and reduce economic, social and/or environmental diversity and stability. In particular instances either view, or both, may be correct. Given the interdependency between economic, social and environmental systems, and a range of positive and negative linkages, the challenge is to maximize the contribution of trade to human welfare through ensuring the right kind and level of liberalization, at the right pace, bounded by the right policies and laws.

Legal and policy issues regarding market access arise primarily from the tension between liberalizing economic activity and regulating it. To liberalize trade, WTO rules discipline a range of national measures (i.e. “non-tariff barriers”) in order to promote market access and prevent protectionism. At the same time, market access will be affected by many legitimate national measures designed to protect society or environment. Consequently, legal and policy tensions arise between market access, on one hand, and environmental and social protection, on the other, where regulations – for example those establishing eco-labeling schemes or defining acceptable product characteristics – have the effect of restricting trade opportunities in certain products, such as textiles, leather, foot-ware, consumer durables, or fish and forest products.<sup>17</sup>

This tension is played out in how specific WTO disciplines – such as those in the GATT, TBT and SPS Agreements – are applied to specific national measures. Many of the issues below are specific instances of this tension between market access and national and international “regulatory” measures. To a certain extent, the following five issues – process and production methods, labeling, scientific uncertainty and precaution, biosafety and agriculture – are specific instances of the general challenge, noted here, of balancing enhanced market access, with the right of governments to regulate at the national and international level to achieve economic, social and environmental goals.

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<sup>16</sup> See WTO 4<sup>th</sup> Ministerial Declaration, *supra* note 3, para. 32(i).

<sup>17</sup> On this issue, see VEENA JHA, ANIL MARKANDYA & RENÉ VOSSENAAR, RECONCILING TRADE AND ENVIRONMENT (1999).

## B. Process and production methods

Should importing countries be permitted to distinguish between timber imports on the basis that some were produced sustainably and others were not? Can countries ban the import of shoes on the basis that their production involved an abuse of labor standards? How do such measures affect exporters, who may be faced with numerous and competing requirements? At the WTO a fundamental debate has turned around whether importing countries should be entitled to ban or regulate products based *not* on their physical characteristics (which may have effects within the importing country), but on factors not reflected in the product's physical composition – such as the social or environmental effects of the *process or production methods* (PPMs) used in exporting countries.

The distinction between regulations based on physical (or “product-related”) and PPM (or “non-product related”) characteristics has spurred a decade of debate.<sup>18</sup> On one hand, permitting regulation based on the impact of production methods is consistent with environmental management principles, which seek to reduce impacts over a product's whole life cycle (i.e. production, use and disposal). And it recognizes that PPMs may have transboundary impacts, or raise ethical concerns within importing countries. On the other hand, PPM-based distinctions enforced in importing countries may confront exporters with a tangle of different and competing requirements, and are open to protectionist abuse. As a matter of policy, reconciling these competing interests requires striking an appropriate balance both between market access and domestic regulation (i.e. between markets and regulation), and between oversight by the trading system at the international level and deference to national policy-making (“vertical linkage”).

As a matter of law, the PPM issue arose historically from the GATT's non-discrimination obligations, which oblige countries to avoid discrimination between “like” foreign products (Article I's most favored nation or MFN obligation), and between “like” foreign and domestic products (Article III's national treatment obligation). Under the GATT, the traditional “like product” test involved “employing four general criteria in analyzing ‘likeness’: (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products; and (iv) the tariff classification of the products...”<sup>19</sup>

In examining PPM-based measures, GATT panels tended to focus on the first of these criteria. They adopted the view that different production methods cannot render two otherwise identical products (such as two shipments of timber one produced sustainably and one unsustainably) “unlike”. Consequently, differential treatment of such “like” products based on their production methods was found to violate GATT non-discrimination obligations. The tendency of GATT panels to discount non-product related characteristics and to downplay other elements of the traditional test when determining *likeness* has been criticized by many outside the trading community as drawing a bright line in the wrong place, and as failing to balance the need to avoid protectionist abuse of PPM measures, and allowing governments to make valid regulatory distinctions between products on the basis of non-product related, ethical, social or environmental grounds.

The “bright line” approach of GATT panels does not seem to have been adopted by the WTO Appellate Body. In *EC-Asbestos*, the Appellate Body acknowledged the value of the traditional test, but noted that its general criteria are neither treaty mandated, nor are they a

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<sup>18</sup> I leave aside here the distinction between product-related and non-product-related PPMs. Product-related PPMs serve as a proxy for physical (product-related) characteristics and so are treated within that category for the purposes of this analysis.

<sup>19</sup> *EC-Asbestos*, *supra* note 12, at para.85.

closed list of criteria.<sup>20</sup> Use of the criteria “does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence”<sup>21</sup>. It stated:

...the kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly ... it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace.<sup>22</sup>

While the *EC - Asbestos* case did not directly address PPM-based measures, the Appellate Body’s approach to “like product” requires consideration of “all the relevant evidence”, which could in future cases conceivably include non-product-related or non-trade concerns (including those arising out of a product’s process or production methods), at least to the extent they relate to elements of the traditional test – such as consumer’s perceptions and behavior – or to the nature and extent of a competitive relationship between and among products.

Even if struck down under Article III’s “like products” test, PPM measures may still be permissible under Article XX, which permits a higher degree of discrimination between domestic and imported products.<sup>23</sup> Recent decisions in *US-Shrimp* and *US-Shrimp 21.5* suggest that PPM-based measures may, under certain circumstances, be permissible under Article XX. In those cases, the United States’ measure effectively required exporting countries to use a production method involving “turtle excluder devices” as a precondition to market entry for their shrimp products. The practical outcome of the Appellate Body’s decision in *US-Shrimp 21.5* is to permit the United States to retain its PPM-based measure as long as it continues to satisfy the requirements set out by the Appellate Body, including the requirement to seek a negotiated solution.

### **C. Labeling**

Labels generally provide consumers with information about a product’s characteristics and/or the social or environmental impacts of its production, and provide a market-based incentive for the production of socially and environmentally sound products and technologies. Labeling schemes may be voluntary (i.e. producers volunteer information to gain market advantage – e.g. that food is organically produced) or mandatory (i.e. producers are compelled by government to provide information – e.g. that a product is genetically modified). Labeling schemes may affect market access, and so are addressed in a number of WTO agreements, raising questions of how to balance market access with the legitimate use of labels at the national level for social and environmental policy purposes (“vertical linkage”).

Three WTO agreements are particularly relevant: the TBT Agreement, the SPS Agreement and the GATT. The TBT Agreement applies to labeling schemes falling within its definitions

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<sup>20</sup> I note that while *EC-Asbestos* did not address PPM-based measures, the Appellate Body’s interpretation and application of Article III will likely have implications for future cases involving PPM-based measures.

<sup>21</sup> *EC-Asbestos*, *supra* note 8, para. 102.

<sup>22</sup> *Id.*, paras. 101-103.

<sup>23</sup> *US-Reformulated Gasoline*, *supra* note 7, at p. 22, stating: “The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified”.

of “technical regulations” and non-binding “standards”.<sup>24</sup> The SPS Agreement applies to “packaging and labeling requirements directly related to food safety”.<sup>25</sup> And the GATT applies concurrently with the TBT and SPS Agreements, to the extent that its provisions do not conflict with these agreements.<sup>26</sup> From these agreements arise a number of legal and policy issues. Four are discussed here.

An initial issue is which of the TBT and SPS Agreements should apply to mandatory labeling schemes, such as those regarding genetically modified organisms, which have both food safety and consumer information as a justification. Should these be considered “primarily related to food safety” and therefore subject to the SPS Agreement’s more stringent science-based disciplines?<sup>27</sup> Or given their diverse policy justifications – including awareness-raising, ethical, religious and environmental concerns, and consumers’ right to know – should they be subject to the TBT Agreement’s more general requirements? The precise relationship between these agreements remains to be considered by the WTO Appellate Body.<sup>28</sup>

Issues also arise around how WTO agreements apply to mandatory labeling schemes. Most mandatory labeling schemes will be covered by the TBT Agreement’s definition of technical regulations, which includes “packaging, marking or labelling requirements as they apply to a product, process or production method” (Annex 1). To these regulations the agreement applies obligations regarding non-discrimination (Article 2.1), trade-restrictiveness (Article 2.2), preferential use of international standards (Article 2.4), notification requirements (Article 2.9), transparency (Article 10), technical assistance (Article 11), and special and differential treatment (Article 12), among others. As yet, the application of these provisions to mandatory labeling schemes has not been considered by the WTO Appellate Body, and so many issues regarding mandatory labeling remain unresolved.

Like mandatory schemes, the coverage by the WTO of voluntary labeling schemes has also been much discussed. Many voluntary schemes are administered by local governments or non-governmental bodies, and not by the central governments signing WTO agreements. WTO Members have sought to cover local and non-governmental bodies through the TBT Agreement’s Code of Good Practice, which parallels many of the obligations applied to technical regulations. WTO Members are to make “such reasonable measures as may be available to them” to ensure local and non-governmental bodies adopt the Code (Article 3.1). What constitutes “reasonable measures” and how, in fact, the Code will be applied to voluntary labeling schemes remains a subject of discussion in the TBT Committee and the CTE.<sup>29</sup>

A fourth issue is whether and how the TBT Agreement applies to labels based on process and production method (PPM) criteria. The views of WTO Members about the scope and coverage of the agreement can be divided (loosely) into three categories. Some (mainly developing countries) are concerned about market access impacts and have argued the TBT Agreement does *not* apply, because to do so would sanctify PPM-based labels; others (notably Switzerland) share the view that the TBT Agreement may not apply, but for opposite reasons – because they support PPM-based labels and are concerned about WTO oversight; and still others (e.g. Canada and the United States and Australia) argue that they *do* fall within

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<sup>24</sup> TBT Agreement, Annex 1.

<sup>25</sup> SPS Agreement, Annex A.

<sup>26</sup> WTO Agreement, General Interpretive Note to Annex 1A

<sup>27</sup> See SPS Agreement, Article 1(4) (stating “Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement”).

<sup>28</sup> For a discussion of how the TBT and SPS Agreements could apply to labeling of genetically modified organisms see, Stilwell and Van Dyke, *An Activists Handbook on Genetically Modified Organisms and the WTO*, [www.consumerscouncil.org](http://www.consumerscouncil.org).

<sup>29</sup> See, for example, WTO document (G/TBT/M/5) for a discussion by WTO Members of how the TBT Agreement may apply to various labeling schemes.

the TBT Agreement, and so are permissible, subject to compliance with TBT disciplines.<sup>30</sup> This debate remains unresolved, and has been given heightened importance by the WTO Doha Ministerial Declaration's call for the CTE to pay particular attention to labeling requirements for environmental purposes (paragraph 32(iii)), and for potential future negotiations if recommended by the CTE (paragraph 32).

#### **D. Scientific Uncertainty and Precaution**

Issues of science, uncertainty and precaution are at the center of a number of trade controversies. The impacts, for instance, of a transboundary movement of alien species on plant life and health, of increased timber trade on forests and biodiversity, or of liberalizing transportation or energy services on climate change, are shrouded in uncertainty.

Potential for controversy arises because policymakers must often regulate to protect health and the environment under conditions of scientific uncertainty. At the same time, however, the trading system seeks to prevent these regulations from being used for protectionist purposes by ensuring governments have a sound scientific basis for their actions. While not irreconcilable in theory, these two approaches give rise to considerable tension in practice. They require a careful balance between oversight by the multilateral trading system, and appropriate deference to national policy-makers. Who determines this balance, and how it is done has given rise to tension in past cases, and will continue to do so in the future.

At the heart of this issue is the precautionary principle, which provides that “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”. It recognizes that the complexity of many environmental and health threats may prevent clear science from emerging in time to take policy action, but that the potential consequences of these threats are too great to defer that action. The precautionary principle is now embodied in many MEAs, and provides the basis of many domestic measures in both developed and developing countries, and in countries representing the major legal systems and regions of the world.

The relationship between precaution and multilateral trade rules gives rise to a number of closely related issues. The first and most general is how to strike an appropriate balance when applying a range of WTO disciplines (including those in the GATT, SPS and TBT Agreements) to national measures based on the precautionary principle (“vertical linkage”)? How an appropriate balance is struck between maintaining domestic regulatory space to respond to scientific uncertainty, and the need for predictable trading relations, depends on the interpretation of WTO obligations and their application on a case-by-case basis to particular domestic measures.

A second and closely related question is largely internal to the trading system: to what extent is the precautionary principle reflected at the international level in the WTO's rules themselves? According to the Appellate Body in *Hormones*, “the precautionary principle has been incorporated in, *inter alia*, Article 5.7 of the SPS Agreement”, which addresses the right to take provisional measures where relevant scientific information is insufficient, and “in the sixth paragraph of the preamble and in Article 3.3”.<sup>31</sup> At the same time, the Appellate Body notes that the principle “does not ... relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation”.<sup>32</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *EC-Hormones*, *supra* note 8, at paras.124 and 253. The extent to which the principle is reflected in other WTO agreements remains unexamined by the Appellate Body. It is worth noting, however, that the TBT Agreement's preamble includes provisions similar to those identified by the Appellate Body in the SPS Agreement as reflecting the precautionary principle.

<sup>32</sup> *Id.*

From this statement arises a third issue between WTO rules and the broader field of public international law: to what extent is the precautionary principle a principle of customary international law that should be taken into account when interpreting WTO agreements? Some WTO Members argue that it has crystallized as customary law and therefore must be used to interpret WTO agreements<sup>33</sup>; others have argued that it is and cannot become customary law and so cannot be used to interpret WTO agreements.<sup>34</sup> The Appellate Body has so far declined to offer a definitive ruling on this issue.<sup>35</sup>

Finally, scientific uncertainty and precaution raises issues of horizontal coherence between different fields of international law (“horizontal linkage”). Many obligations in international environmental law – including those directly affecting international trade – are based on the precautionary principle. For instance, the precautionary principle forms the basis of bans on trade in certain listed endangered species under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>36</sup> The Cartagena Protocol on Biosafety, similarly, includes explicit reference to precaution in its operative provisions that affect trade.<sup>37</sup> As discussed in the following section on the Cartagena Protocol, in the event of a trade dispute, the relationship between these precautionary obligations and relevant WTO agreements would need to be clarified.

### **E. Biosafety**

Biosafety raises some specific instances of the more general issues of market access and labeling (each discussed above), and the relationship between MEAs and WTO rules (discussed below). Again, the debate arises in large part from the basic tension between exporting countries’ desire for market access, and the need to regulate transboundary movement and domestic use of genetically modified organisms (GMOs) to protect health and the environment.

Issues of biosafety, biotechnology and trade in GMOs cut across a number of WTO agreements including the GATT (general provisions on non-discrimination and quantitative restrictions), the TBT Agreement (labeling of GMOs), the SPS Agreement (national measures to protect life and health), TRIPS Agreement (intellectual property rights over plant genetic resources) and Agreement on Agriculture (non-discrimination and non-trade concerns). They also arise between the WTO and the agreements and processes administered by other bodies, including the UN Food and Agriculture Organization (International Treaty on Plant Genetic Resources for Food and Agriculture), the Codex Alimentarius Commission (GMO labeling standards), the Organization for Economic Cooperation and Development (OECD) (work on biotechnology, and agriculture), and a protocol to the Convention on Biological Diversity, the Cartagena Protocol on Biosafety (“horizontal linkages”).

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<sup>33</sup> *Id.*, at para. 16 (Appellate Body noting “[t]he precautionary principle is already, in the view of the European Communities, a general customary rule of international law or at least a general principle of law.” See also *Japan – Varietals*, *supra* note 11, at para. 10 (Appellate Body noting “[i]n Japan’s view, the Panel failed to give due regard to the precautionary principle, which was recognized in both *EC Measures Concerning Meat and Meat Products (Hormones)* and *Australia – Measures Affecting Importation of Salmon*.”)

<sup>34</sup> See *EC-Hormones*, *supra* note 8, at para. 43, (Appellate Body noting “The United States does not consider that the ‘precautionary principle’ represents a principle of customary international law; rather, it may be characterized as an ‘approach’ -- the content of which may vary from context to context.”)

<sup>35</sup> *Id.*, at para. 123 (Appellate Body noting that “The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question.” (citations omitted)

<sup>36</sup> See, for example, CITES Resolution Conf. 9.24, Annex 4 (stating “when considering any proposal to amend Appendix I or II the Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of conservation of the species.”)

<sup>37</sup> See, Cartagena Protocol on Biosafety, UNEP/CBC/ExCOP/1/L.5 (28 January 2000), preamble and Articles 10 and 11.8.

The Cartagena Protocol provides the most extensive international instrument regulating transboundary movement of certain GMOs (known in the Protocol as “living modified organisms” or “LMOs”). It protects biodiversity from potential LMO risks by, among other things, establishing an “advanced informed agreement” procedure, by incorporating precautionary approach to the transboundary movement of LMOs, and by establishing a Biosafety Clearing-house to facilitate information exchange and assist implementation.

As both the Cartagena Protocol and WTO agreements cover the transboundary movement of LMOs, a number of closely related issues arise between them. First of all, the Protocol and the WTO SPS Agreement include differing language on how governments should make decisions under conditions of scientific uncertainty. The Protocol explicitly embodies a precautionary approach (preamble, Article 10.6 and 11.8) and explicitly permits countries to prohibit the import of certain LMOs (Article 10.3). The SPS Agreement, by contrast, merely “reflects” the precautionary principle in certain articles<sup>38</sup> and allows Members to adopt sanitary or phytosanitary measures on a *provisional* basis to be reviewed “within a reasonable period of time” (Article 5.7).

Second, in relation to a specific category of LMOs (known as LMOs “intended for direct use as food or feed, or for processing”) the Protocol does not explicitly permit countries to prohibit the import of LMOs, but rather merely states that they may make “a final decision regarding domestic use, including placing on the market, of a living modified organism” (Article 11.1). Decisions made to ban or restrict trade in such LMOs will be closely scrutinized by exporting countries, who may seek to use the SPS Agreement’s provisions to challenge such a decision. Again, the relationship between these provisions in the Protocol and SPS Agreement has not been the subject of dispute settlement or authoritative interpretive decision.

Third, the two agreements include slightly differing provisions on risk assessment. The Protocol explicitly permits importing countries to require exporters to carry out and pay for risk assessments (Article 15). The SPS Agreement, by contrast, makes no such explicit provision. Rather, it states that Members must base their measures on a risk assessment (Article 3.1), and that, in relation to provisional measures, “Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time” (Article 5.7).<sup>39</sup>

Finally, the Protocol and WTO agreements both include references to packaging/labeling. The Protocol requires parties to consider the “need for and modalities of developing standards with regard to identification, handling, packaging and transport practices”. The TBT Agreement seeks to discipline measures for “packaging, marking or labelling requirements” so they do not create “unnecessary obstacles to international trade” (Article 2.2). The Protocol’s international standards, as well as national measures implementing them, may thus well raise questions of consistency with provisions of the TBT Agreement, and vice-versa.

There are a number of approaches to resolving these legal and policy tensions. The WTO could consider using the Protocol an international standard under the SPS Agreement (Article 3.1 and Annex A) and TBT Agreements (Article 2 and Annex 1). Unnecessary conflicts could also be avoided by interpreting each agreement in light of the other, in accordance with the

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<sup>38</sup> For a more detailed discussion of the relationship between precaution and SPS rules see Section IV.D above.

<sup>39</sup> Notably, the Appellate Body has stated that Article 3.1 does not require Members to undertake risk assessments themselves, but may rely on risk assessments undertaken by other Members or international organizations. See, *EC-Hormones*, *supra* note 8, at para. 190. In relation to Article 5.7, the Appellate Body has stated that a provisional measure may not be maintained unless “the Member which adopted the measure ... seek[s] to obtain the additional information necessary for a more objective assessment of risk” (emphasis added). See *Japan-Varietals*, *supra* note 11, at para. 89. I note, however, that the text of Article 5.7 states that Members (plural) must seek additional information, which is consistent with the Biosafety Protocol’s provisions allowing importing countries to require exporters to undertake risk assessments.

international law presumption against conflicts.<sup>40</sup> Unnecessary conflicts could also be avoided by promoting cooperation through reciprocal observer status for the Cartagena Protocol and WTO Secretariats in their respective bodies (See Section V.B below for a general discussion of observer status).

In the event of a dispute regarding trade in LMOs, a question may arise about whether the Convention on Biological Diversity or the WTO is the appropriate forum for deciding the dispute. To avoid overlapping jurisdiction, WTO Members could agree to follow the recommendation in the 1996 CTE Report to the Singapore Ministerial that Members should consider resolving disputes “over the use of trade measures they are applying between themselves pursuant to the MEA ... through the dispute settlement mechanisms available under the MEA”. In the event of a dispute at the WTO, Protocol Secretariat staff (or other biosafety experts) could be involved in WTO consultations (Article 4 DSU) and mediation (Article 5 DSU), serve as panel members, form an expert group to consider factual issues (Article 13.1 and Appendix 4 DSU), or serve as *ad hoc* experts to advise the panel (Article 13 DSU). Issues relating to dispute settlement are discussed further in Section V.C.

## **F. Agriculture**

Because agriculture is so intimately tied to so many other facets of the human and natural world, liberalization of trade in agricultural products may have significant implications for sustainable development. The Agreement on Agriculture embodies a movement towards a “market-oriented agricultural trading system”. The agreement’s preamble, as well as Article 20 on further negotiations, notes the need to consider non-trade concerns, including a variety of sustainable development issues such as food security and environmental protection. The agreement has the long-term goal of “substantial progressive reductions in agricultural support and protection ... resulting in correcting and preventing restrictions and distortions in world agricultural markets” by addressing three areas: increasing market access, reducing domestic support, and phasing out export competition.

Increasing *market access* involves reducing both tariff and non-tariff barriers to agricultural trade. Reducing tariffs may have a range of positive and negative effects for different actors in different countries. Reducing tariffs will, for example, increase market access for exporting country producers, while exposing producers in importing countries to increased competition. Addressing non-tariff barriers, similarly, raises a range of issues. On one hand, disciplining non-tariff measures, such as national sanitary requirements, may impact health and environment in importing countries. On the other hand, increasing market access is important to developing countries which have based their development strategies in part on exporting agricultural products to northern markets. This balance will likely be influenced by ongoing negotiations, pursuant to Article 20 of the agreement, of new rules and disciplines to increase market access.

Reducing *domestic support* – including a range of subsidies and other benefits to farmers – also raises a set of closely interrelated economic, social and environmental issues. Economically, it will reduce the benefits paid to producers in the supporting country, while increasing the competitiveness of foreign producers. Socially, it may affect the viability of recipient agricultural communities, increase the viability of foreign agricultural communities, and reduce the tax burden on non-agricultural communities in the supporting country. Environmentally, it may reduce over-use of expensive and environmentally harmful inputs such as pesticides and fertilizers in the supporting country, and enhance export opportunities for environmentally sound products produced elsewhere. Within the Agreement on Agriculture, some forms of domestic support are protected, including certain subsidies not related to production and payments related to research and structural adjustment programs (“green box” – Article 13(a) and Annex 2), certain payments for limiting production (“blue box” – Articles 6 and 13(b)), and certain trade distorting subsidies that are permitted subject

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<sup>40</sup> See Barbara Eggers and Ruth MacKenzie, *The Cartagena Protocol on Biosafety*, 3 JIEL 525, 541 (2000).

to reduction commitments (“amber box” – Article 13(c) and Part V). WTO Members are currently discussing whether these classifications should be retained, or whether some other approach should be adopted (e.g. a “development box”). The outcome of these discussions will influence the kinds of national measures that may be taken to protect non-trade concerns such as environment, food safety, animal welfare, food security and development.

As with domestic support, reducing *export subsidies* raises a complex set of issues. Reducing these subsidies will help to decrease incentives for overproduction, reduce the dumping of agricultural products on world markets at artificially low prices, and increase the competitiveness of unsubsidized products from developing countries. Although reducing export subsidies may affect recipient producers, it is generally assumed that the net effects will be positive.

WTO Members have agreed (in Article 20) to further negotiations to liberalize trade in agricultural products. In the Doha Ministerial Declaration, they committed themselves to “comprehensive negotiations aimed at: substantial improvements in market access; reduction of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support” (paragraph 13). They also agreed that “special and differential treatment shall be an integral part of all elements of the negotiations” so as to “enable developing countries to effectively take account of their development needs, including food security and rural development” (paragraph 13). In addition to the areas raised above, some Members have raised geographical indications, food safety and food labeling as issues to be discussed in the Agriculture negotiations.

## **G. Subsidies**

Subsidies are covered by a number of WTO agreements, including the Agreement on Agriculture and the General Agreement on Trade in Services. The primary agreement addressing subsidies, however, is the Agreement on Subsidies and Countervailing Measures (SCM), which disciplines both trade distorting subsidies, and the “countervailing” measures that may be taken by other countries in response to them. It classifies subsidies as prohibited, non-actionable or actionable depending on their trade impact. *Prohibited subsidies* include certain subsidies with serious trade implications, which must be removed immediately once identified. *Non-actionable subsidies* include certain subsidies with limited trade implications, which are protected from challenge. Between these extremes, *actionable subsidies* are permissible, but may be challenged in WTO dispute settlement if they cause adverse effects to the interests of other WTO Members.

Subsidies can have both positive and negative implications for sustainable development. Used well, they can correct market failures (e.g. failure to reflect positive externalities) and promote behavior that is environmentally and socially sound. Used poorly, they constitute policy failures that distort otherwise efficient markets, and promote behavior that is environmentally and socially unsound. In some cases, they may have mixed economic, social and environmental effects; for example, in some cases distorting markets is required to protect social or cultural values or environmental resources. When and how subsidies should be applied, and the distribution of their costs and benefits on people within and between countries, is a complex question. Consequently, how subsidies are treated by the WTO is an important sustainable development issue.

The SCM Agreement gives rise to a number of legal and policy issues. One arises around how the agreement is applied to environmental subsidies. Until 2000, the agreement established an automatic exemption for some government subsidies to help industries adapt existing facilities to new environmental requirements (Article 8.2(c)). These exemptions, however, were not extended after 2000, raising questions about whether the agreement provides sufficient space for environmental subsidies. While as yet no environmental subsidy has been challenged, in the future, environmental subsidies – such as those to promote cleaner

production – will be subject to scrutiny as actionable subsidies, and may be found inconsistent with the SCM Agreement.

A second set of issues arises from the potential of the SCM Agreement to yield “triple-win” outcomes – for trade, environment and development – by removing perverse subsidies that distort trade, harm the environment, and limit developing countries’ market opportunities. Removing perverse fisheries subsidies, for example, can help to address both trade distortions and over-fishing. At the Doha Ministerial, WTO Members agreed to negotiate to improve WTO disciplines on fisheries subsidies (paragraph 28 and 31 of Ministerial Declaration). The outcome of these negotiations will have important implications for sustainable fisheries management, and may set a precedent for the reduction of subsidies in other areas.

## **H. Services**

Economic liberalization of services is the goal of the General Agreement on Trade in Services (GATS). According to the GATS, services are traded through four “modes of delivery”: cross-border delivery, consumption abroad, foreign direct investment (commercial establishment), and movement of natural persons supplying services. The GATS seeks to liberalize international trade in services by applying rules relating to national treatment, most favored nation treatment, market access, and transparency.

Economic liberalization of services may have positive, negative or neutral economic, social and environmental impacts.<sup>41</sup> Liberalization of services – such as transport, health care, or waste treatment – may have a range of positive impacts where existing services are inadequately provided, or where competition is lacking. By contrast, in the absence of appropriate national legislation, liberalization may ultimately facilitate consolidation of commercial services; increase the cost or reduce coverage to marginal areas of postal, health care, water or education services; or increase impacts of environmentally risky services such as mining, tourism or transportation.

Regulating services to promote positive outcomes and avoid negative ones is a role for national legislation. One key legal and policy issue is the appropriate balance between national rules designed to regulate services, and the multilateral GATS disciplines that apply to these rules (“vertical linkage”). As noted in the WTO’s Ministerial Declaration on Trade in Services “measures necessary to protect the environment may conflict with the provisions of the Agreement”. This is not only true of existing GATS rules, but also of ones currently under negotiation, such as those to be elaborated Article IV(4) to ensure certain national regulations do not “constitute unnecessary barriers to trade in services” and are “not more burdensome than necessary to ensure the quality of the service”.

The CTE has been asked to examine GATS in the context of sustainable development. It has the mandate to “report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development” and to determine whether any modification of the GATS exception (Article XIV) is required. So far the CTE has focused primarily on the potential material benefits of liberalizing environmental services, and has focused little on potential negative material effects (e.g. environmental impacts of liberalizing energy or transportation services), or on the potential legal and policy conflicts between GATS rules and valid national measures. Further work is therefore required to examine the economic, social and environmental implications of services liberalization, and the relationship between GATS disciplines and national regulations.

Just as there are linkages between national and international levels, there are also legal and policy issues arising horizontally at the international level between GATS and other systems of international law, including environmental law and human rights (“horizontal linkages”).

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<sup>41</sup> For a discussion of the potential effects of services liberalization on developing countries, *see*, Communication of Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe, WTO Doc. S/CSS/W/114.

Environmental law is identified in the CTE's mandate, which includes "examin[ing] the relevance of inter-governmental agreements on the environment and their relationship to the Agreement". Services liberalization may influence the implementation of the Basel Convention (e.g. impacts of waste management services on transboundary management of hazardous waste), the Convention on Biological Diversity (e.g. impacts of tourism or mining services on conservation of biodiversity) and the Kyoto Protocol (e.g. impacts of energy or transport services on global warming). As well as changing patterns of economic activity – with implications for society and the environment – GATS disciplines will define and delimit the domestic legal and policy measures available to regulate services in order to implement MEAs. So far the CTE has not offered recommendations on this issue, and nor have the MEAs undertaken work examining the possible relationship between GATS disciplines on their respective mandates.

Increasingly legal issues are arising between the GATS and human rights law, especially in the area of basic services. The UN The Sub-Commission on the Promotion and Protection of Human Rights, for example, has recommended that "the World Trade Organization and its Council for Trade in Services, in conducting its assessments of the impact of GATS in its current and future forms, include consideration of the human rights implications of the international trade in basic services (such as, *inter alia*, the provision of affordable and accessible health and education services) and the further liberalization thereof".<sup>42</sup> It has also encouraged "other relevant United Nations agencies, in particular the World Health Organization and the United Nations Educational, Scientific and Cultural Organization, to undertake analyses, within their respective competencies, of the implementation of GATS on the provision of basic services such as health and education services".<sup>43</sup> The relationship between WTO rules and human rights is a relatively new area that merits further consideration by students and scholars of international sustainable development law.

Additional research – on both material and legal/policy implications of services liberalization and rules – is urgently needed in the context of the mandated assessment of the GATS. GATS Article XIX:3 requires an assessment of the application of the agreement. This assessment, according to some WTO Members, should include an assessment of the agreement's potential impacts on the standards of services provided, especially to populations that are poor, vulnerable or socially disadvantaged.<sup>44</sup> This assessment, as well as the ongoing discussions of trade in services at the WTO, provides an important opportunity for the non-trade community (as well as non-trade ministries, parliaments, international organizations and the broader public) to evaluate the role of services liberalization as a means to the broader end of sustainable development.

## **I. Intellectual property**

Intellectual property is covered by the WTO's TRIPS Agreement. This agreement differs significantly from WTO agreements on goods and services: rather than seeking to liberalize trade, it requires states to establish minimum national standards to protect intellectual property rights such as patents and trademarks, copyright and industrial designs, geographical indications and plant variety protection. Because intellectual property is a driver of innovation and influences technological development and patterns of economic development, the TRIPS Agreement has significant implications for sustainability.

Traditionally, intellectual property has provided an instrumental tool at the national level to maximize the benefits to society from innovation by rewarding inventors, and balancing the short-term costs of near-monopoly rights, against the long-term dynamic benefits of a more innovative society. However, the traditional role of intellectual property is changing. There

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<sup>42</sup> Sub-Commission Resolution 2001/4(E/CN.4/SUB.2/RES/2001/4).

<sup>43</sup> *Id.*

<sup>44</sup> See Communication of Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe, *supra* note 28.

is a tendency at the WTO, and other international organizations such as the World Intellectual Property Organization (WIPO), to extend the scope and geographical coverage of intellectual property rules, with implications for the traditional balance between private rights and the public domain, and between developed countries (which are the primary producers of formal innovation) and developing countries (who are primarily consumers of formal innovation).

This shifting balance plays out in a myriad of more specific issues, including issues relating to public health, biodiversity protection, traditional knowledge, and technology transfer. Among the most controversial of these has been the relationship between the TRIPS Agreement and public health. Many developing countries have raised concern that patents required by the TRIPS Agreement are undermining their ability to access affordable medicines to address HIV AIDS, tuberculosis, malaria, and other epidemics. As a result, WTO Members at the Doha Ministerial Meeting adopted a Declaration on the TRIPS Agreement and Public Health which emphasized that “the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all”.<sup>45</sup> Left unresolved by the Declaration is how to countries with insufficient or no manufacturing capacities in the pharmaceutical sector can make effective use of compulsory licensing. WTO Members have agreed to find an “expeditious solution” to this problem, and will likely negotiate a waiver and a subsequent amendment to the TRIPS Agreement.<sup>46</sup>

A second major issue is the relationship between intellectual property and biodiversity conservation. The importance of this relationship was highlighted in the Doha Ministerial Declaration, which called on the TRIPS Council to “examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity”.<sup>47</sup> Among the concerns raised by developing countries is that patents are being granted in developed countries over genetic resources taken without permission from developing countries, and without efforts to share the benefits of the use of the genetic resources as required by Article 15 of the Convention on Biological Diversity.<sup>48</sup> Some countries are supporting an amendment of the TRIPS Agreement to address these issues, whereas others believe that a more effective system of contracts between the users and custodians of genetic resources would address the concerns of developing countries.<sup>49</sup> The need for international cooperation is recognized in the Convention on Biological Diversity, which states that “Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives”.<sup>50</sup>

Closely related to issues of biodiversity are those surrounding the implications of the TRIPS Agreement for the rights of indigenous and other local communities over their traditional knowledge, innovations and practices. The Doha Ministerial Statement calls on the TRIPS Council to examine the Agreement’s relationship with “the protection of traditional knowledge” (paragraph 19). This mandate arises from concern that patents are being granted in developed countries over innovations based on traditional knowledge of communities in developing countries, without any effort to share the benefits with them as required by Article 8(j) of the Convention on Biological Diversity. There is also concern over the absence of

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<sup>45</sup> Declaration on the TRIPS Agreement and Public Health, WTO Doc. (WT/MIN(01)/DEC/W/2), para. 4.

<sup>46</sup> *Id.*, at para. 6.

<sup>47</sup> See WTO 4<sup>th</sup> Ministerial Declaration, *supra* note 3, para. 19.

<sup>48</sup> See, for example, Communication from Brazil, WTO Doc. (IP/C/W/228), paras. 21 and 22. (stating “... patents over a Member’s genetic resource, but granted outside its territory raises the issue of potential conflict with the principle of the sovereignty of the Contracting Parties of the CBD over their own genetic resources” and that “amending Article 27.3(b) of TRIPs to accommodate principles of the CBD will be a necessary outcome of the review of that Article. Failure to clarify this relationship may turn out to be detrimental to both instruments.”)

<sup>49</sup> See Communication from the United States, WTO Doc. IP/C/W/209, pp. 5-6

<sup>50</sup> Convention on Biological Diversity, reprinted in 31 I.L.M. 818, Article 16.5.

appropriate systems to offer positive protection for traditional knowledge. This latter subject is currently being discussed in an intergovernmental committee at the World Intellectual Property Organization (WIPO). The involvement of at least three institutions (WIPO, the WTO's TRIPS Council and the Convention on Biological Diversity) in these discussions raises considerable challenges of coordination and coherence.

The implication of the TRIPS Agreement for agricultural practices is a fourth major sustainable development issue. At least two legal and policy questions arise here. One concerns the implications for agriculture of Article 27.3(b), which requires Members to protect plant varieties either by patents or by an effective *sui generis* system. Some countries have proposed that the International Convention for the Protection of New Varieties of Plants (UPOV) be designated as the effective *sui generis* system for the purposes of the TRIPS Agreement. Others, mostly developing countries, believe that they should maintain flexibility to develop their own *sui generis* systems, and that the most recent version of UPOV 1991 may run counter to traditional agricultural practices, such as saving and sharing of seeds by farmers. A second question is the relationship between the TRIPS Agreement and the newly agreed International Treaty on Plant Genetic Resources for Food and Agriculture, which has the objective of the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use. WTO Members have yet to explore how this new treaty may affect their discussions of plant variety protection under Article 27.3(b) of the TRIPS Agreement.

Finally, the effect of the TRIPS Agreement on the development, transfer and dissemination of technology has also been identified as a major concern for sustainable development. As noted in Agenda 21, "access to and transfer of environmentally-sound technology are essential requirements for sustainable development".<sup>51</sup> The TRIPS Agreement includes in its objectives "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" (Article 7). The agreement also contains specific provisions requiring developed countries to establish incentives for technology transfer to least developed countries (Article 66.2). Despite these references, many developing countries remain unconvinced that the Agreement, in fact, promotes technology transfer. To explore the relationship between WTO rules technology transfer WTO Members have agreed to establish a Working Group on trade and technology transfer (paragraph 37 Ministerial Declaration), and to review of the TRIPS Agreement in light of its objectives and principles, including the Article 7 reference to technology transfer (paragraph 19 Ministerial Declaration).

## **J. Multilateral environmental agreements**

MEAs are inter-governmental agreements to address shared environmental problems such as climate change, biodiversity loss and ozone depletion. The policies and rules embodied in MEAs and in the WTO intersect in many ways; they touch on issues of scientific uncertainty and precaution, intellectual property, biodiversity conservation, and protection of traditional knowledge, as well as on transboundary movement of living modified organisms, endangered and invasive species, and hazardous wastes and chemicals, to name a few. Clarifying competences, realizing synergies and resolving tensions between these evolving regimes is an essential step towards developing a coherent framework of governance for sustainable development. A number of MEA-related trade issues are addressed in other sections of this note. This section addresses one discussion of importance in this area: the WTO's ongoing negotiations on the relationship between WTO rules and "specific trade obligations" in MEAs.

Negotiations on the relationship between existing WTO rules and specific trade obligations set out in MEAs are mandated by paragraph 31(i) of the Doha Ministerial Declaration. Many MEAs include measures designed to protect the environment that have trade implications.

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<sup>51</sup> Agenda 21, N. Doc. A/CONF.151/26, adopted June 14, 1992, paragraph 34.7.

Indeed, among the primary purposes of some MEA is regulating the transboundary movement of a particular category of product, such as hazardous waste, living modified organisms, or dangerous chemicals. By establishing procedures for prior informed consent, national technical regulations and border measures (such as bans or quotas), MEAs help to address the externalities associated with the production, transboundary movement and use of these products. Trade-related measures variously serve to regulate trade in environmentally harmful products; remove economic incentives that encourage environmental destruction; promote compliance with an MEA's provisions; and encourage broad country participation to reduce the potential that non-parties to undermine a treaty's objectives.

While many MEAs embody trade-related environment measures, none use the term “specific trade obligations”, giving rise to a definitional challenge for the WTO that affects the negotiation’s scope. A second challenge is that the WTO’s mandate provides protection for the “balance of rights and obligations” embodied in WTO agreements, but includes no similar protection for the balance of rights and obligations embodied in the MEAs. Third, the negotiations address what is among the least controversial aspect of trade-related measures in MEAs – i.e. those that are specifically mandated and apply only between parties – as opposed to non-specific measures, and measures applying to non-parties to the MEA, which have been the source of greater controversy within the trading community. When addressing this aspect of the Doha mandate, it is hoped that WTO Members can build on past WTO practice, including the 1996 CTE Report stating WTO Members should consider resolving disputes “over the use of trade measures they are applying between themselves pursuant to the MEA ... through the dispute settlement mechanisms available under the MEA”. They may also wish to consider the outcome of the *Shrimp 21.5* Appellate Body decision that upheld certain trade measures (unilaterally applied) “as long as ... ongoing serious good faith efforts to reach a multilateral agreement” exist.<sup>52</sup>

In addition to these issues, a number of the other environmental mandates in the Doha Ministerial Declaration raise legal and policy issues of relevance to the MEAs. These include negotiations for “procedures for information exchange” between MEAs and WTO bodies and “criteria for observer status” (discussed in the next section), and the call for the CTE to pay particular attention to “labeling requirements for environmental purposes” and “the effect of environmental measures on market access” (paragraph 32 of Ministerial Declaration) which may, for instance, influence the development of labeling and documentation for living modified organisms under the Cartagena Protocol on Biosafety.<sup>53</sup> Similarly, mandates on fisheries subsidies (paragraph 28 and 31), reduction of tariff and non-tariff barriers to environmental goods and services (paragraph 31(iii)), and the relationship between trade and transfer of technology (paragraph 37), may also affect issues covered by MEAs.

## V. Organizational Issues

Legal and policy issues such as those discussed above are often created and ultimately resolved by organizations, and other institutional arrangements. Organizations perform the function of developing, interpreting and executing rules to achieve agreed objectives. Where more than one body is responsible for defining objectives and related laws and policies in a particular arena – such as trade and the environment – then an examination of organizational linkages and issues is required.

Organizational linkages exist at a number of levels. At the national level, relationships exist among trade and other non-trade ministries. At the international level, relationships exist among formal bodies of trade and other non-trade international organization. They also exist among the secretariats of international organizations. Of the many organizational issues, this note discusses three briefly here: 1) the role of *integrated assessments* in helping to develop sound policies; 2) the function of *information exchange and observer status* in promoting

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<sup>52</sup> *US-Shrimp 21.5*, *supra* note 13, para. [ ]

<sup>53</sup> *See*, Cartagena Protocol on Biosafety, *supra* note 25, Article 10.

communication and cooperation between different organizations; and 3) the importance of coherence between approaches to *compliance, enforcement and dispute settlement*.

#### **A. The role of Integrated Assessments**

Integrated assessments provide a powerful tool for examining the material effects of trade liberalization on economic, social and environmental systems; for exploring the legal and policy implications of trade rules for other systems of law and policy at the local, national, regional and international level; and for identifying opportunities to increase institutional cooperation at and between all levels.

“An integrated assessment” according to UNEP “considers the economic, environmental and social impacts of trade measures, the linkages between these effects, and aims to build upon this analysis by identifying ways in which the negative consequences can be avoided or mitigated, and ways in which positive effects can be enhanced.”<sup>54</sup> The UN Sub-Commission on the Promotion and Protection of Human Rights has encouraged governments “to undertake comprehensive and systematic studies, in consultation with United Nations and regional human rights mechanisms and relevant civil society organizations, of the human rights and social impacts of economic liberalization programmes, policies and laws.”<sup>55</sup>

Assessments can be conducted before, during or after trade negotiations, and focus on implications for a sector (such as agriculture, forestry, fisheries or mining), a country or other geographic region, or a particular social or environmental system. The ultimate goal of assessments is to enable countries to implement integrated policies that optimize the sustainable development gains from economic liberalization. The importance of assessing the impacts of trade rules and liberalization was recognized in the WTO’s 4<sup>th</sup> Ministerial Declaration, which encourages “expertise and experience [to] be shared with Members wishing to perform environmental reviews at the national level” (paragraph 33).

Assessments at the national level can be complemented by multilateral assessments of WTO Agreements. The General Agreement on Trade in Services (GATS), for example, calls on future negotiation to be guided by guidelines that are themselves prepared in light of “an assessment of trade in services in overall terms and on a sectoral basis with references to the objectives of this Agreement.”<sup>56</sup> At both the multinational and national level, assessments of trade liberalization and trade policy form an essential tool for gathering information about the linkages between trade and sustainable development.

#### **B. Information exchange and observer status**

As well as the negotiations on “specific trade obligations” identified in section IV.J above, the WTO has mandated negotiations for procedures for information exchange between MEAs and WTO, and criteria observer status in WTO bodies.

Procedures for information exchange are an important vehicle for enhancing cooperation and communication between international trade, environment and other bodies. The Doha Ministerial Declaration calls for negotiations on “procedures for regular information exchange between MEA Secretariats and the relevant WTO committees” (paragraph 31(ii)), and also welcomes the “WTO’s continued cooperation with UNEP and other inter-

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<sup>54</sup> See UNEP Reference Manual, *supra* note 4, at iii.

<sup>55</sup> Sub-Commission Resolution 1999/30 (E/CN.4/SUB.2/RES/1999/30).

<sup>56</sup> See GATS Article XIX, and also the *Guidelines and Procedures for the Negotiation on Trade in Services*, adopted by the Special Session of the Council for Trade in Services on 28 March 2001, paragraph 14, (S/L/93). See also Communication from Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe to the Council for Trade in Services, *supra* note 28, calling for assessment of the economic and social impacts of the GATS. In relation to other WTO agreements, see, Agreement on Agriculture, Article 20 (noting that ongoing reform should take into account “the experience ... from implementing the reduction commitments”, and TRIPS Agreement, Article 71.1 (which provides for future reviews of the TRIPS Agreement “having regard to the experience gained in its implementation”).

governmental environmental and developmental organizations (paragraph 6). Negotiations on this issue should build from existing practice, and develop predictable procedures allowing MEAs and WTO to share information across the range of issues with the goal of making trade and environmental policy more mutually supportive.

Reciprocal observer status provides opportunities for governments and secretariat staff to increase their understanding of different regimes, to exchange information and perspectives, and to identify practical opportunities to increase coherence. The Doha Declaration establishes negotiations on “criteria for granting observer status” to MEAs in relevant WTO bodies (paragraph 31(ii)). The goal of these negotiations is to make it easier and quicker for MEAs to receive observer status in WTO bodies. In establishing mechanisms to increase cooperation between MEAs and the WTO, WTO Members may wish to examine the WTO’s agreements with other international organizations such as the World Bank and the International Monetary Fund, which establishes a High Level Working Group on Coherence to oversee cooperation between the three organizations and prepare joint reports, and promotes a range of cooperative activities, including the participation at meetings, information sharing, and contacts between staff on specific projects.

### **C. Compliance, enforcement and dispute settlement.**

A third set of organizational linkages arises out of the provisions for compliance, enforcement and dispute settlement included in MEAs and the WTO. Generally, *compliance* refers to measures designed to assist parties to honor their treaty obligations, and would include technical cooperation and technology transfer. *Enforcement* refers to multilateral measures designed to respond to a party’s failure to comply, and would include suspension of certain rights and privileges or trade-related measures. And *dispute settlement* refers to procedures designed to address bilateral (or plurilateral) disputes between parties, and would include provisions for consultation, good offices, mediation, arbitration or judicial settlement.<sup>57</sup> In each of these areas there are overlaps between the mechanisms in MEAs and the WTO, giving rise to the potential for synergies and conflicts.

The area most likely to give rise to challenges to institutional coherence is dispute settlement. MEA and WTO provisions may apply simultaneously to the same countries and activities. A lack of clarity about the relationship between dispute settlement systems gives rise to the risk of forum shopping, and for the potential for conflicting outcomes. The importance of coherence between MEA and WTO dispute settlement systems was recognized by WTO Members in Item 5 of the CTE’s agenda, which empowers the CTE to offer recommendations on the “relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements”.

In the absence of any recommendations by the CTE, the relationship between WTO and other dispute settlement systems remains unclear. Determining which forum should decide which matter requires an examination of factors including explicit treaty language on dispute settlement<sup>58</sup>, general treaty language on the relationship between treaties<sup>59</sup>, and general principles of law, such as the duty of good faith and *res judicata* (the principle that the same matter cannot be decided twice). How these factors play out in a particular dispute will require an analysis of all relevant rules and evidence.

While explicit guidance by governments is preferable, there are less direct approaches to reducing the potential for conflict. According to the joint UNEP-WTO paper strengthening compliance mechanisms in MEAs would “enhance the effective implementation of MEAs,

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<sup>57</sup> I note that the terms *compliance*, *enforcement* and *dispute settlement* are not mutually exclusive, nor are they used consistently in the literature. For example, it is possible that a measure (such as technical assistance) may be used for both compliance and enforcement purposes.

<sup>58</sup> See, for example, SPS Agreement, Article 11.3.

<sup>59</sup> WTO Dispute Settlement Understanding, Article 22.1.

and ... prevent MEA-related disputes from arising in the WTO dispute settlement system”.<sup>60</sup> Additionally, the WTO could “put less focus on judicial settlement of disputes, and more on mediation and conciliation combined with technical assistance and capacity building for implementation.”<sup>61</sup> In the event an MEA-related dispute does arise at the WTO, the DSU also includes a number of mechanisms that allowing the dispute settlement system to consider environmental factors. These include the use of procedures for good offices, mediation and consultation (Article 5) to encourage dispute avoidance and to ensure participation by MEA Secretariats and other experts; use of experts on an *ad hoc* basis under Article 13(1); establishment of Expert Review Groups under Article 13(2) and Appendix 4 to provide non-binding advisory opinions; and increased use of environmental experts as panelists.

## VI. Conclusion

Moving human behavior onto sustainable development pathways is a complex and important task. World population has trebled in the last 70 years to 6 billion people, and is projected to peak at around 9 billion in 2050. Economic integration is bringing markets, societies and cultures together, benefiting some, but leaving many marginalized. The scale of human impacts has breached planetary ecosystem limits, unbalancing the climate and depleting biodiversity, with uncertain implications for all. Achieving a minimum level of well-being for all in 2050 and beyond, while avoiding serious environmental and social dislocation, will require significant foresight, careful planning, and a degree of humility. Among other things, it will entail agreeing goals and ensuring that policies, laws and organizational arrangements at all levels – including those in the field of international trade – work systematically towards them.

Achieving this requires articulating more clearly what trade is for. Historically, trade liberalization has been regarded by some in the trading community as an end in itself, with environment and development seen as secondary and often conflicting objectives. This tendency has obscured issues, limited scope for dialogue, and hindered a synthesis for sustainable development. Recently, more enlightened actors in the trading community and elsewhere have begun to discuss the need for a new synthesis – for an analytic framework that retires the tired triumvirate of “trade, environment, development”; elects sustainable development as its governing principle; and employs trade meaningfully as a means of securing specific development goals that reduce poverty, balance economic, social and environmental objectives and maximize contribution to sustainable development.

At the international level, many of these goals have been agreed in documents such as Agenda 21 and the UN Millennium Declaration. The WTO’s preamble itself identifies trade liberalization as a means to the end of “raising standards of living ... in accordance with the objective of sustainable development, seeking both to protect and preserve the environment” with “positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” Yet, as noted earlier, insufficient effort has been made at the multilateral level to systematically assess the effects of trade and trade liberalization on real people and communities. Work is now underway by various UN bodies, such as UNDP, UNEP and the UN Human Rights bodies, to identify the role of trade in helping to achieve goals in their respective areas. These efforts, undertaken in cooperation with the WTO, should be institutionalized and expanded.

Ensuring trade promotes progress towards sustainable development will ultimately require a more systematic effort to understand the complex interdependencies between trade and other facets of the world we live in. To promote sustainable development and to give effect to the goals set out in the WTO preamble, trade must support the viability of social, economic and

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<sup>60</sup> Joint Paper by WTO and UNEP Secretariats, entitled *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, WTO Doc. WT/CTE/W/191, para.141.

<sup>61</sup> *Id.*

environmental systems and maximize its contribution to human wellbeing, with an emphasis on the needs of the poorest countries and communities. Trade and trade rules must complement other laws and policies in optimizing individual and collective behavior to promote social and economic development and to protect the environment. And all actors and organizations involved in trade policy-making – particularly the WTO as the preeminent international trade body – must work cooperate closely to achieve clearly identified outcomes, and to ensure that the multilateral trading system forms part of a balanced and coherent architecture of governance for sustainable development.