

## Debate in Seattle: Why free trade matters

**This paper presents the background to one of the issues which was to be discussed before the December 1999 fiasco at Seattle. It shows, for only one issue, why the demonstrators – from environmentalist groups in rich countries – are harming the economic development prospects of poorer countries.**

**The proposed Seattle agenda issue:**

**“Article XX of GATT should be modified to legitimize the use of unilateral trade measures that discriminate between “like” products solely on the basis of PPMs.”**

### **I Recent opinion on the proposal**

“PPMs” are Process and Production Methods. The proposal would permit import bans on goods by countries that do not approve of particular PPMs, irrespective of the characteristics of the good itself.

At the March 1999 World Trade Organisation (WTO) High Level Symposium on Trade and the Environment the opinion of participants ranged from support to neutrality to rejection. In approximate order, supporters were to be found among the non-governmental organisations (NGOs), neutrals included other NGOs and the United States government, while those opposed were to be found in the European Union and the developing countries.

### **To illustrate...**

...the following written statements were made in March...

#### *Greenpeace*

“The WTO approach is far too narrow in that (PPMs) are not considered relevant for discerning between products.”

#### *Sierra Club*

“...allow countries to regulate imports from other countries based on the way a product is produced.”  
On the other hand (and less extreme)...

#### *USA*

(Against the background of the ambiguity of *Shrimp-Turtle* – see below) “...this belies the notion such measures (PPMs) are *a priori* out of bounds under WTO rules...the Appellate Body has helped shed important light on the application of WTO rules.”

#### *World Wildlife Forum*

“WTO members should begin the process now of forging new rules that respect the environment without closing markets.”  
While at the other end of the spectrum...

#### *Leon Brittan – European Community*

(On PPMs) “...it is clearly undesirable for each WTO member to take whatever trade measure it sees fit, based on its view of the acceptability of (the PPM) in third countries...(it) is subjective and therefore arbitrary.”

#### *European Community*

“...enforcing PPM-related requirements through trade measures should clearly be excluded. In particular, the unilateral use...should be *a priori* ruled out.”

#### *Dominica, Honduras, Egypt and Pakistan*

(Joint statement) "...any effort to reopen (the PPM) rules would pave the way for unilateral measures that would seek to impose domestic standards on the international community...(this) would be a recipe for protectionism and restriction of market access for developing countries' exports – with inevitable negative consequences for sustainable development."

#### *India*

(A PPM rule change) "...would not only be unnecessary for environmental protection but would also be trade restrictive, thus acting as an avoidable non-tariff barrier."

And elsewhere "...the most important issue...is poverty alleviation."

And "...PPMs as a basis for the use of trade measures would be unacceptable."

#### *Malaysia*

"There is no necessity to amend Article XX."

And later "...such an amendment would only...impede the market access opportunities for...developing country members." "(This) amounts to a unilateral imposition of one country's requirements and standards upon another sovereign country."

#### *South Africa*

The addressing of "environmental issues...must be commensurate with a country's level of development."

And later "...developmental issues and economic growth will take priority over (the environment)...because market access (is) critical...in an appropriate sequencing to achieve developmental objectives."

## **II A note on "sustainability"**

Sustainable development according to the Brundtland Commission (World Commission on Environment and Development) 1987 report *Our Common Future*, implies "meeting the needs of the present generation without compromising the needs of future generations". At best there should then be net investment and growth, and at worst, no disinvestment and decline. Societies cannot realistically leave untouched and preserve all natural resources. They must choose between one land use and another, minerals in the ground in exchange for man-made physical capital and so on. Provided society's stock of capital (including human capital) increases in size and productivity, this will more than compensate for depletions of natural capital. (Productivity implying increased impact on incomes, health and abilities to appreciate and choose over a range of aesthetic pleasures.)

## **III The current status of sustainability in the WTO**

The Brundtland Commission reported in 1987. The Uruguay Round was launched in 1986, but the environment was not on the agenda. However, when the Round was finally signed in Marrakesh 1994, the preamble to the agreement setting up the WTO declared its objective to be:

"expanding...production and trade, ...with the objective of sustainable development, seeking both to protect and preserve the environment...consistent with (members') respective needs...at different levels of development."

Simultaneously the Committee on Trade and the Environment (CTE) was established in Marrakesh. This and other factors are now ensuring that the environment is no longer a peripheral agenda item in current and future trade negotiations.

#### **IV Current principles of WTO agreements**

The assumption is that all gain from trade, with specialisation in production by those who have the relevant comparative advantage as the source of these gains. Four regulatory principles follow from these assumptions:

- 1) Most favoured nation (MFN) treatment – non-discrimination at the border.
- 2) National treatment – non-discrimination against imported goods in the internal market.
- 3) Reliance on tariffs rather than quotas – minimising discretionary treatment
- 4) transparency of regulations.
- 5) Reciprocity – compensatory benefits required if benefit balance is disturbed.

#### **V GATT Article XX – the existing main exceptions to WTO principles**

Governments can take unilateral measures under Article XX which breach the above principles in order to meet their own national goals. Article XX originated in the 1947 agreement and continued into the 1994 Round. In particular: Article XX(b) allows measures “necessary to protect human, animal or plant life or health” and Article XX(g) permits measures “related to the conservation of exhaustible natural resources” provided the measures are taken in conjunction with restrictions on domestic production or consumption.

In either case, to qualify as exceptions, the measures taken must not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or be a disguised restriction on international trade. (This is the *chapeau* or headnote provision.)

By and large exceptions permissible under this Article would apply only to products and *not* to PPMs.

However, two sources of activity have further amplified the apparent interpretation of Article XX. One is the development of legal interpretations and case precedents. The other was the drawing up of two Agreements building on the Tokyo Round Technical Barriers Code (namely the Agreement on Technical Barriers to Trade – TBT, and the Agreement on Sanitary and Phytosanitary Measures – SPS).

#### **VI Case experiences**

The American Marine Mammals Protection Act insisted that imports of tuna cease unless importers had a programme to stop dolphin slaughter which is as tough as America’s and unless the average dolphin kill was no more than 1.25 times that of US vessels.

The US, unwilling to implement its own Act against the largest exporter, Mexico, and in the knowledge that it breached GATT rules, was taken to court by the Earth Island Institute of California. Compelled to observe its own law and so to impose an embargo, the US was taken to a GATT trade panel by Mexico, Venezuela and Vanuatu, with a predictable outcome.

The Panel ruled that imports and domestic products should be compared, not regulations that had no effect on the product. The Panel argued that the Article XX(g), exception only applies when the resources lie within the country’s own jurisdiction. The dolphins in question did not. Further, the embargo would have to be shown as aimed at conservation and as the only course open. Since offending Mexican fishers could not know the US catch in advance so as to calculate the permissible 1.25 kill ratio, and since no attempt had been made to negotiate a multilateral environmental agreement (MEA), the restriction was deemed to smack more of trade protectionism than dolphin conservation.

## **Shrimps – Turtles**

The Earth Island Institute was soon back in court demanding implementation of an embargo on US imports of shrimps from French Guyana caught in ways that also trap rare turtles. The US government was ordered to apply its own laws in 1996 banning imports from all countries that do not use turtle excluder devices. In January 1997 India, Pakistan, Malaysia and Thailand complained to the WTO.

The WTO Settlement Panel ruled in April 1998 that the embargo was a “threat to the multilateral trading system” and did not fall within the ambit of Article XX. NGOs were informed that they could not under WTO rules submit unsolicited briefs of an *amicus curiae* type to the court.

Six months later the WTO Appellate Body rejected the Panel’s reasoning (but not the decision). *Amicus curiae* briefs were deemed not disallowed by WTO rules. Second, Article XX(g), referring to “natural resources” should not be restricted (as the Panel suggested) to non-living resources. Third, the Appellate Body did reject the embargo under the Article XX chapeau. (Seven grounds were given for this ruling, *viz.*, “the embargo required all exporters to adopt US policies, “unjustifiably coercive”; the US took no account of different conditions in other Members’ territories; the US appeared more concerned with influencing foreign regulations than with influencing fishing methods as such; the US did not seriously attempt to reach an MEA; the USA discriminated by requiring differing phase-in periods for different importing countries; it favoured some countries by helping transfer turtle-friendly technology more willingly than to others; and it did not follow “transparent” due process.

Predictably the outcome pleased no one. NGOs continue to believe turtles are endangered. Developing countries believe that protectionist environmental arguments can now legitimately be deployed at WTO level to support unilateral trade measures based on non-product related PPMs to protect a resource outside the sovereign jurisdiction of the plaintiff.

## **VII Technical Barriers to Trade (TBTs) and Sanitary and Phytosanitary Measures (SPSs)**

Article XX(b) refers to measures “*necessary*” to protect human and other life or health.

Thus the exception can refer to technical standards or performance standards of imported *products*. The TBT Agreement has as its intent the misuse of Article XX by importers who might set standards as disguised trade barriers. To the extent that a standard relates to Process and Production Methods (PPMs) the aim of that standard must relate to a product characteristic (e.g. good manufacturing practice in pharmaceuticals is necessary for product safety). Further, product regulation, and not PPM regulation, restricts the relevant authority to protection of human and other life or health to areas within their own jurisdiction. Thus steel produced in South Africa would be judged under the TBT Agreement on its characteristics as steel, not on the level of pollution omitted by a steel smelter in South Africa. In other words, like the Article XX(g) decision on tuna, like products must be compared with like products, as defined by interchangeability, not as defined by a PPM. And the exceptions are applicable only within the juridical area, and cannot be used for a protectionist purpose.

The SPS Agreement is similar, but relates to protection of health, human or other, from the spread of pests and diseases that might arise from imports. It would be legitimate to protect the importer’s population, but not to protect domestic producers from competition.

### **...and the latest state of the debate**

It is argued that GATT is too narrow. (For example, in the Greenpeace statement referred to earlier, they complain that the WTO stance assumes “wood” is just “wood”. No concern is expressed in the WTO about its source, whether from virgin forest or from secondary growth). Is there then a tragedy of the global commons?

The problem is a common one of externalities but is very difficult to resolve. We all benefit when our neighbour’s garden is well-tended. Should we therefore pay him for the external benefits he is conferring? In principle, yes. But the administration costs of assessing and collecting what each of us should pay or receive will exceed the benefits to all of rectifications of that positive externality.

Similarly the costs of enforcing PPMs may well exceed the benefits. The costs of lost trade may be greater than the environmental gains from compliance. When the polluters are poor and have differently constructed and weighted utility functions from those who wish to impose the PPMs then there are major political complications.

Countries at different stages of development tolerate different levels and different types of pollution. They value the costs and benefits differently. This of course is the basis of comparative advantage. It is also the reason why those who place a relatively high value on the environment (e.g. some NGOs) are joined politically by those (countries, trade unions or corporations) who believe themselves to be at a comparative disadvantage in trading terms if they use a PPM which is costlier and apparently more environmentally friendly.

Not all issues involve a global commons. There are three sub-divisions.

- 1) Imports causing damage in the importing country.
- 2) Imports causing damage to the exporting country.
- 3) Environmental spillovers between countries.

Case 1) is relatively easily dealt with under current rules. Taxes and/or regulations applicable to all goods sold (not their PPM) in the importing nation can be applied.

Case 2) is the area currently under dispute due to differing utility functions between political groupings – although a first glance at the wording might beg the question of why should importers care?

Because of differing preferences, however, the relatively more environmentally sensitive political groupings in importing countries might argue that what happens in one country does “spillover” into another. The *mere knowledge* that a PPM is not to my taste may make me less happy than I otherwise would be. Changing that perception by, for example, explaining to those political groupings what the opportunity cost to the exporter would be is one solution. It is a solution dependent on the ability to spend resources to persuade. Developing country exporters may not have the means to do this.

Case 3) deals with measurable spillovers extending across national boundaries. This could, of course, overlap with case ii). Here multinational agreements may be optimal, but it is no easy thing to achieve. Few successful examples exist, and it is worth looking at the difficulties of reaching (or the unusual circumstances surrounding) a successful agreement.

The 1987 Montreal Protocol bound signatories to reduce and ultimately stop consumption of CFCs.

- a) Developing countries were given an easier timetable for phase out (indeed initially an increase in usage was allowed).

- b) A transitional fund for developing countries was established to aid adoption of costlier substitutes.
- c) The thinning of the ozone layer was unambiguously measured and pressures to suspend use of CFCs in developed countries rose.
- d) Only a small number of firms produced CFCs, most of which also produced substitutes (which could be sold at a higher price) and which would remove the companies from the possibility of subsequent consumer law suits from skin cancer sufferers.
  - di) Costs of the change therefore fell on diffusely scattered consumers who paid more.
  - dii) The organisational costs of implementing the change were low.

Successful bans on PPMs through international agreement therefore appear to require a consensus on measurable benefits, low costs of change, costs ultimately borne by consumers, and assistance for producers in developing countries. This coincidence of conditions may be rare.

### **Conclusion**

One corollary might be that unilateral bans on PPMs under a suitably modified Article XX would be easier to achieve than trying to repeat this type of Protocol. But this would take us back full-circle to the growth: environment trade-off and to capricious discretionary interference in trade and so in growth. The issue should not be one of minimising the costs of lobbying for vested interests.

The issue is one of principle and long term benefit for the global community. The lesson from Montreal is that mechanisms and incentives can be devised to meet the goals of all – whilst avoiding unilateral trade sanctions against poorer and less-developed countries.

The challenge is how to devise these mechanisms and incentives without damaging sustainable development and trade. Seattle has pushed the developing world to the bottom of the agenda – fobbing it off (perhaps) with life-prolonging medicines for debilitating diseases such as AIDS, while damaging its chances to earn a living in world markets. What a prospect!

### **Further reading**

*The Economist*, 4 December 1999, pp 15, 53 and 54.

*This Briefing Paper was written by W. Duncan Reekie, E.P. Bradlow Professor of Business Economics at the University of the Witwatersrand.*