

WTO and the Environment

By Alan Oxley

Introduction

The contention of critics of the WTO¹ is that the Organization is inadequate for the purposes of protecting the environment. This is not so. The WTO gives great latitude to members to restrict trade to protect the environment. This is rarely conceded. The contention also slides over another point. The WTO is an agreement for managing trade, not managing the environment or any other area of public policy. If it is to be given the task of realizing other international public policy objectives, such as protecting the environment, its capacity to meet its core function - raising prosperity through trade - will be undermined.

The case to “include” environment in the WTO

There are two general arguments for “including” environment in the WTO. The first is that the GATT is out of date;² when it was drafted, environmentalism was not a public issue. The second is that the environment is of such importance that WTO rules should allow trade restrictions to support protection of the environment.³ A more specific argument is that when the rules of free trade apply to agriculture, exemptions should be made for the “multifunctional” role in society of agricultural producers, including protection of the environment.⁴

It is true the word “environment” doesn’t appear in the GATT. Sustainable development was added as one of the general objectives of the World Trade Organization when it was established in 1994. While “environmentalism” and “ecology” were not common terms in public policy until the nineteen seventies,⁵ governments had been acting for many years to conserve and protect natural resources. The first international institution for conservation, the World Conservation Union (IUCN) was established in 1948. The key difference between 1948 and today is that environmentalism enjoys a higher political priority in most countries and appreciation of its importance is wider in the community.

The contention that the environment is so important that WTO rules should be subordinated to environmental measures is generally argued with four cases. First, the WTO does not permit controls on trade according to how products are processed

¹ The main critics of the WTO are a vast array of environmental, conservation and public policy NGOs and organizations such as Public Citizen, Greenpeace, One World, World Wildlife Fund, Friends of the Earth, Sierra Club to name a few.

² *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001.*

³ *International Institute for Sustainable Development, Principles for Trade and Sustainable Development, Winnipeg, 1994, www.iisd.org accessed July 2001. See also Konrad Von Moltke, Trade and Environment, the Linkages and the Politics, Paper for the Roundtable on Canberra, 25 August 1999.*

⁴ This is the pre negotiation position the European Community is arguing in the lead up to DOHA.

⁵ The first special UN Conference on the environment was the Stockholm Habitat conference in 1972.

or the environmental effects of those processes.⁶ Second, the observance of respect for national sovereignty upon which the WTO is based prevents extraterritorial application of trade measures to protect the environment.⁷ Third, the WTO threatens to invalidate trade provisions in some multilateral environment agreements.⁸ Fourth, the WTO does not give adequate expression to the precautionary principle.⁹

The discussion that follows deals with the extent to which the WTO gives governments scope to protect the environment. The interaction between the WTO and Multilateral Environment Agreements is discussed in the next chapter and the precautionary principle is discussed in Chapter 5.

How the WTO facilitates protection of the environment

There are several provisions in the WTO agreements dealing with environment. There is a reference to sustainable development as one of the general objectives to be served by the WTO in the Marrakech Agreement which established the WTO. There are provisions in the Agreement on Agriculture and the General Agreement on Trade in Services (GATS). However by far and away the most important provisions as far as environmental issues are concerned are Article XX of the GATT and the Agreements on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade.

Article XX of the GATT

The core agreement of the WTO system is the General Agreement on Tariffs and Trade (GATT). The principal purpose of the GATT was to oblige members to use the same rules to regulate trade and to ensure in particular that there was no discrimination in trade. All international agreements need exemptions clauses. These are the mechanisms that ensure that governments retain the capacity to perform essential functions that might be eroded if the basic rules of the treaty are applied.

⁶ *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001.* See also Konrad Von Moltke, “Reassessing Like Products” Paper presented at Chatham House Conference, Trade Investment and the environment, 29 and 30 October 1998 www.iisd1.iisd.ca accessed August 2001.

⁷ Steven Shrybman, *Canadian Alliance on Trade and Environment, c/o Sierra Club of Canada, An Environment Guide to the WTO, May 1997, www.sierraclub.ca accessed August 2001.*

⁸ *WWF International, Sustainable Trade for a Living Planet, Reforming the World Trade Organisation, September 1999.* Public Citizen argues the implementation of MEAs by signatory countries is susceptible to challenge as violating WTO requirements. *Lori Wallach and Michelle Sforza, Whose Trade Organisation, Public Citizen, Washington, 1999.* See also *International Institute for Sustainable Development, United Nations Environment Program, Environment and Trade A Handbook, International Institute for Sustainable Development, Canada, 2000.*

⁹ *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001* WWF also urged application of the precautionary principle before the WTO dispute Settlement body in the Shrimp Turtle Dispute and argues for such in the publication above. The European Union has clarified the application of the precautionary principle on its agenda for negotiations in a new trade round. *EC Approach to Trade and environment in the New WTO Round WT/GC/W/194.* “Their principle interest is to secure, beyond its present inclusion in the language of the SPS Agreement, a clearer legal base within the WTO rules for the invocation of the precautionary principle before WTO Dispute Settlement Panels”. *Brown and Jackson (eds), Reconciling Trade and Environment, Transnational Publishers, New York, 2001.*

The most common exemption in most agreements is to preserve freedom of action to protect national security. Article XX specifies what activities are exempt from GATT rules. These exemptions give members very wide latitude to control trade to protect the environment.

Article XX waives members of the obligation to apply fundamental commitments, particularly non-discrimination, in certain cases. They include protection of national security, protection of morals, preservation of national cultural heritage. Of particular importance is the right to waive the rules in order to protect human, animal, plant health and safety.

Article XX.b permits restrictions on trade to protect human, animal and plant life health and safety. Article XX.d permits restrictions on matters not inconsistent with the objectives of the GATT. Article XX.g also permits restrictions if they complement national programs for conservation of resources.

This is the basis upon which health and quarantine restrictions are applied to trade in pharmaceuticals, hazardous products, toxic products and products carrying risk of disease, for example. The capacity of governments to prevent the entry of such products into their national territory in this way enables governments to maintain the integrity of national environmental programs in the vast majority of cases.

Of necessity, exemptions clauses must be limited. If they are too wide, they undermine the effect of the principal provisions of the Treaty. Article XX is limited to a few areas. Members are also bound to utilize the exemptions only to the extent that it is necessary and are obliged to ensure they are not disguised restrictions on trade.

The provision relating to conservation of natural resources (Article XX.g) appears not to have been drafted with living natural resources in mind, however GATT/WTO panels have stated that it is reasonable that it should be so interpreted.¹⁰

Experience with use of Article XX of the GATT over many years revealed weaknesses in some provisions, particularly where the latitude to act was so wide that governments used the provisions to secure economic protection. Actions were taken to reduce the amount of discretion governments had to restrict trade.

Preventing abuse – the role of the Agreement on Sanitary and Phytosanitary Measures (SPS).

Many countries used the quarantine provisions to secure economic protection rather than to protect health and safety. The SPS Agreement was negotiated in the Uruguay Round¹¹ to contain such abuse. It states that if countries base restrictions on trade on recognized international standards,¹² the restrictions are deemed as complying with

¹⁰ This was stated in the second Tuna/Dolphin panel report, although that report was never adopted and it was restated in the Shrimp/Turtle panel report. *United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R. 12 October 1998.*

¹¹ The Uruguay Round of Trade Negotiations, 1986-1994.

¹² Specifically those set by the International Office of Epizooty (which sets veterinary and animal health standards), the International Plant Protection Convention (which sets standards for plant health

the agreement. Countries could apply other standards, but they were subject to challenge by other WTO members to demonstrate that they were based on science and supported by a risk assessment process.¹³ The development of the SPS Agreement coincided with a global trend to shift away from dealing with risk on a “no-risk” basis to “risk management”. The latter approach leads to better use of resources and better enjoyment of benefits.

The requirement that decisions be based on science and a process of risk assessment introduced transparency into decision-making by creating a visible check on abuse of executive discretion. This not only protected the rights of members of the WTO, it also gave assurance to consumers that governments were not abusing their powers.

Preventing abuse II – the role of the Agreement on Technical Barriers to Trade (TBT)

The Agreement on Technical Barriers to Trade (TBT) was negotiated in the Uruguay Round, replacing the Standards Code.¹⁴ It was designed to reduce the scope for countries to use technical standards as disguised barriers to trade. It obliges members to ensure that national treatment and non-discrimination apply when technical standards are adopted as mandatory regulations¹⁵.

Technical standards with restrictive trade effects are permitted for four “legitimate purposes”, (including standards developed for the protection of the environment, for national security requirements, for the prevention of deceptive practices and for the protection of human health and safety and animal and plant health and life), provided the effect is not more restrictive than necessary to meet one of those objectives, taking into account the risk of non-fulfillment. In assessing that risk, the agreement stipulates that relevant elements of consideration are, inter alia, available scientific and technical information, related processing technology or intended end uses of products.¹⁶

Members are also required to base their standards on those developed by international bodies which are presumed to be in compliance with the Agreement.¹⁷ In other cases, and where measures have a significant impact on trade, parties are obliged to notify the measure and provide opportunities to other WTO members to comment.

Sound regulation, standards and eco-labeling.

Making decisions transparent and setting objective criteria by which they could be challenged as provided or in the SPS and TBT Agreements is consistent with the doctrine that regulations should be imposed by governments only to protect health and safety. When Governments regulate for other reasons, they interfere in the market and exercise influence which favours some parties in the economy and damages others. There is large body of standards which aim to improve the quality of goods

and science and Codex Alimentarius (a joint organization of the FAO and WHO which sets standards for human health)

¹³ See Articles 2.2, 3.3 and 5

¹⁴ The Standards Code of 1979 was developed in the Tokyo Round of trade negotiations.

¹⁵ Article 2.1

¹⁶ Articles 2.2

¹⁷ Article 2.4

and services and provide information to consumers. Most of these are national standards and are set by national standard setting organizations. A set of international standards is produced by the International Standards Organization. Well-known quality standards developed by that organization include the ISO 9000 series (to improve quality in organizations) and ISO 14000 (to set quality standards to improve environmental management.). These are voluntary standards and in most countries are developed by private organizations.

When Governments adopt these standards and make compliance compulsory, they become official regulations.¹⁸ If a company requires suppliers to comply with specified standards struck by national standards organizations or ISO, this does not constitute a trade barrier. It is a commercial requirement. However when a government stipulates that unless such standards are complied with imports or exports are not permitted, these are trade restrictions that must comply with WTO rules, including the provisions of the SPS and TBT Agreements.

Where eco-labelling systems are not mandated by governments, but are applied by commercial entities for the information of consumers, these are voluntary standards and WTO provisions do not apply.¹⁹ When an eco-label is mandated under government regulation, then the regulation needs to comply with the provisions of the WTO. As shown in the foregoing, the terms of Article XX and of the SPS and TBT agreements make ample provision for use of eco-labels.

Production and Process Methods

A complaint about the WTO provisions is that trade restrictions on how a product is produced or processed are not permitted. Challenges under GATT and WTO provisions that US restrictions on imports of tuna in cases where fishing methods did not minimize the incidental kill of dolphin were lost. The general point was that the WTO did not permit one member to restrict trade with another on the basis that they did not apply policies which the first party preferred.

The environmental case is that if one method of processing (such as a method of fishing for tuna) causes environmental damage (high levels of incidental kill of dolphin) then an importer should be able to express preference for the product (tuna) processed in a way that does not cause environmental damage (caught using fishing methods that reduced the incidental kill of dolphin).²⁰

WTO provisions generally do not allow trade to be restricted on those grounds. The TBT Agreement recognizes “related processing technology” as a relevant consideration for applying a mandatory technical standard to protect the environment.

¹⁸ The WTO Agreement on Technical Barriers to trade differentiates between standards with which compliance is mandatory, termed “technical regulations” and standards with which compliance is not mandatory, termed “standards”.

¹⁹ The Code of Good Practice under the TBT Agreement applies to voluntary standardising bodies and voluntary standards. There is no legal obligation on these bodies to comply with the Code, however there is an obligation on the central government standardising body take all “reasonable measures” to ensure they accept and comply with the Code. (Article 4 and Annex 3)

²⁰ *Centre for International Environmental Law and Greenpeace International, Safe Trade in the 21st Century – A Greenpeace Briefing Kit, September 1999, www.greenpeace.org accessed August 2001.* See also footnote 6.

However this is a limited application and the extent of its meaning has not been tested.

The general case for not making provision in the WTO for the right to restrict an import according to the environmental effect of the way in which it was processed or produced is that to do so assumes the WTO should include provisions to secure public policy objectives other than trade. There is a difference between allowing exceptions to protect national policies and creating provisions which enable governments to force other to adopt non-trade objectives.

The purpose of the WTO is to enable countries to gain the benefits of an open trading system. If it is to be used as an instrument to achieve environmental purposes, the case in principle is made for it to be used to secure objectives in other areas of international public policy such as health, labor standards, postal services, human rights and air transport standards. If this were to happen, the WTO would cease to be effective in meeting its primary purpose, not just because it would be overloaded with policy objectives which have not intrinsic functional relationship to trade, but because giving members of the WTO the right to pick and choose specific areas in which they could insist on certain standards being met before trade was permitted would undermine the capacity of the WTO to allow members to exploit comparative advantage.

The case to alter the WTO to permit trade restrictions on environment grounds is loaded anyway. Those who make that claim are obliged first to explain why more normal means of achieving international agreement to meet international public policy objectives are not used. The United Nations Conference on Environment and Development (UNCED) in 1994 laid down some principles on trade and environment.²¹ They stated that the preferred international approach to protecting the environment was to create multilateral agreements expressly for that purpose in which members would agree to adopt commonly agreed measures in their national law or practice. They also stated that use of trade measures to protect the environment should be avoided. To apply this approach in the case of the tuna/dolphin issue, rather than have one country threaten a trade sanction unless another complied with its preferred environmental (fishing) policy (as was the US position) to achieve international environmental protection, all countries fishing in the region would enter an international agreement to required their fishing fleets to use the same fishing techniques, as they now do in a regional fishing agreement.²²

The proponents of the sanction approach would argue that were it not for the coercion, the regional agreement would not have been adopted. This may be so, but this is to justify the morally-odious and internationally-censured option of applying coercion because it disregards the national sovereignty of nations simply on the grounds that the more normal approach of seeking an international agreement is too slow. In the case of the effect of dolphin in the Eastern Tropical Pacific region, there was no case for urgency. The species concerned were not endangered.

²¹ See Annex The UNCED Trade and Environment Principles

²² The Agreement on *International Dolphin Conservation Program* 1999, Inter-American Tuna Commission.

In every instance where the case to secure the right to restrict trade on production and process grounds, the preferred option exists for the nations concerned to come together to negotiate an international agreement to apply in national law common standards for the product and process concerned.

The case for extraterritorial reach

A related contention by environmentalists is that degradation of the environment in the global commons requires extraterritorial reach²³. Who will protect the atmosphere, the high seas, the migratory species? This argument does not go far. Again the regional fishing agreement in the Eastern Tropical Pacific demonstrates the point. Countries can oblige nationals to follow national law outside national jurisdiction. Fishing fleets in that region are obliged by national governments to apply common national fishing policies laid down in the regional agreement. That global common is protected by that means.

What to do about the countries which do not comply, the fishing fleets in the area which are from countries not party to the agreement? This is not a new issue in international relations. If a country feels that it wants to apply some form of encouragement to another to adopt common policy, there other options. Why not offer incentives? If pressure is chosen, why use trade sanctions given the welfare benefit of creating a global trading system in which members are not permitted to discriminate among each other? Why look to other areas of public policy such as restricting entry of nationals or threatening to cease to collaborate in another area of common bilateral interest?

Other environmental provisions

In the Agreement on Agriculture, there is scope to permit subsidies which are for environmental protection. This was part of the Agreement on Agriculture which was negotiated in the Uruguay Round. Re-negotiation of that agreement has begun. The European Union has indicated that it wants general provisions to permit trade restrictions on environment grounds. Others, such as members of the Cairns Group coalition of agricultural exporters want to minimize the extent to which such measures can create new grounds for protection of economic interests.

There is a general recognition in the General Agreement on Trade in Services of sustainable development as an objective of the Agreement.

Subsidies

There is clear evidence around the world that payment of subsidies by Governments diminishes the regard in which users of resources hold them. Subsidies to farmers encourage overexploitation of land, subsidies of fertilizers encourage over use, for example causing excessive levels of nitrates in the water table in European Community farmlands, subsidies to forestry and fishery resources result in poor management, and in all these cases, there is environmental degradation.

²³ Steven Shrybman, *Canadian Alliance on Trade and Environment, c/o Sierra Club of Canada, An Environment Guide to the WTO, May 1997, www.sierraclub.ca* accessed August 2000.

The WTO Agreement on Subsidies and Countervailing Measures restricts the extent to which governments can pay subsidies. It therefore creates a positive framework to foster sustainable management of resources. It does not apply to subsidies to agriculture which are covered by the Agreement on Agriculture. Much higher levels of subsidies are permitted in agriculture. There is a commitment by member of the WTO to negotiate further reductions.

Conclusion

There are no cases where it can be said WTO procedures prevent effective protection or management of any environmental asset. The campaign to “Green the WTO” is basically a political campaign by the environment in the system of multilateral trade rules. Trade measures are not effective tools for managing the environment. Multilateral agreements that set common standards to be applied domestically is a much more effective approach to protect the environment. The welfare benefit that the WTO creates is very large. Creating a general right to restrict trade on environmental grounds threatens the capacity of the WTO to provide that benefit and advocacy of that right shows a fundamental disregard for the welfare benefit of the WTO system.

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