

The Trade and Environment Debate: Setting the Scene

By Alan Oxley

Setting the Scene

The trade and environment debate arose as result of pressure from environment groups in the industrialized economies to introduce environmental issues in the WTO. Along with the demand to include labor rights in the WTO and the insistence that NGOs have greater rights of participation in NGO processes, this marked a change in the pattern of deliberation in the WTO and its predecessor, the GATT Secretariat. This change is the addition of non-trade concerns to the work of the institution. Unlike most of the agencies of the system of the UN family in the seventies which routinely accepted debate on political issues unrelated to their core mission¹, the GATT remained focused on its technical brief – regulation and liberalization of trade.

Trade and the environment has become the leading political issue. It will figure prominently at the Doha Ministerial meeting to launch the current trade round and it will figure throughout the negotiations. The reason for this is that the European Community has made inclusion of environment in the WTO a key demand of its negotiating agenda.

Origins of the debate

The Stockholm conference on the environment in 1970 is regarded as the first major international conference on environment issues in the UN system. There was cursory reference to it in the GATT, but it was not until late in the processes of the Uruguay Round² that Western NGOs made an issue of the need to include the impact on trade of the WTO.

The issue which triggered interest was the Tuna/Dolphin dispute³. A GATT panel, acting on a complaint from Mexico, ruled that certain US bans on imports of tuna were illegal. The US banned imports of tuna from countries which did not impose controls on tuna fishing boats to minimize the incidental kill of dolphin like the controls the US required on US tuna boats.⁴

US environmental groups demonized the GATT in the United States⁵ and promoted the adverse impact of free trade on the environment as a populist platform to generate opposition to the North American Free Trade Agreement which was being negotiated in 1990/91. The World Wildlife Fund, possibly understanding the implications of

¹ Virtually every agency in the UN family had lengthy and repetitive debates on Cold War issues, apartheid (generally leading to expulsion of South Africa) and the Middle East.

² The Uruguay Round began in 1986 and ended in 1994.

³ Some analysts attribute the linkage of trade and environment to an American, Mark Ritchie, President of the Institute for Agriculture and Trade Policy who represented protectionist US farm interests at an anti-trade liberalization conference organized in Geneva by the European Community in 1987.

⁴ The ruling was never adopted. Mexico dropped the case. The EU mounted the same challenge. The second panel ruled against the US, but that case was not adopted and lapsed when the WTO replaced the GATT. The same principle was asserted and challenged when the US banned imports of shrimp which did not minimize the incidental kill of turtle.

⁵ They popularized the slogan “GATTzilla kills Flipper”.

GATT rules for the restrictive trade provisions in the Convention banning International Trade in Endangered Species (CITES) and the ban on trade in ivory adopted in 1989, produced initial analyses arguing the need for the GATT to permit discriminatory restrictions on trade to protect the environment.⁶ Greenpeace, which had been sponsoring the Basel Convention to restrict Transboundary Movements of Hazardous Goods, would have also realized its trade bans were contestable under WTO rules. Public Citizen, Ralph Nader's consumer advocacy, and Friends of the Earth, who led the anti-free trade campaign in the United States, raised calls to introduce environment issues in the WTO as the Uruguay Round moved to conclusion in the early nineties. Public Citizen tried to raise fears about the adverse impact on food safety of the new rules governing quarantine restrictions which had been negotiated. There was little support from Governments.

It is worth noting that some of the key positions of the NGOs, particularly legitimization of the discriminatory measures of Multilateral Environment Agreements and greater rights of participation of NGOs in the WTO system, dated from this period.

Differences in perspective

Environmental NGOs in Europe and North America presupposed that the "rainbow coalition" concept of collaboration among NGOs would work in the trade and environment issue.⁷ However they quickly found that developing country governments did not agree that it was in the interests of developing countries to restrict trade on environmental grounds. Developing countries were nearly unanimous in their support for Mexico in the Tuna/Dolphin dispute. And at the UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1994, developing countries did not support key Western NGO proposals, particularly on Forests and Climate Change. In the latter case they rejected suggestions that developing countries should accept restrictions on emissions of greenhouse gases. Developing countries were behind the strong statements in the Agenda 21 Declaration that trade measures should not be used to protect the environment.

At the Ministerial Conference of the WTO in 1996, Indonesia, speaking on behalf of the ASEAN countries, led outright opposition by developing countries to inclusion of the environment as a negotiating issue in the WTO.

While developing countries opposed adoption in the WTO of discriminatory trade provisions on environmental grounds, they did not oppose them in subsequent negotiations in MEAs. The EU sponsored a Protocol to the Basel Convention which banned trade in products covered by the Convention between developed and developing countries. This was not opposed by developing countries, although it should be noted most have not ratified it and it has not come into effect.

⁶ Early papers published by the WWF were by Konrad von Moltke, a long-standing activist of the WWF and the International Institute for Sustainable Development in Canada.

⁷ The rainbow coalition united Greens, Reds (socialists), Blues (unions) and Social Development Groups in common cause for change. It rested on the fallacy that the interests of Western NGO Social Development Groups were the same as the Governments of Developing Countries.

Developing countries also led the campaign for the negotiation of the Cartagena Protocol to the Biodiversity Convention. That Protocol imposes trade restrictions on certain GMOs, enacts a very restrictive version of the precautionary principle and establishes procedures which prospectively conflict with operational provisions on the WTO where trade is restricted on quarantine grounds.

This apparent difference in approach can be accounted for by difference in perspectives adopted by trade and environment officials in developing countries. Trade officials in the WTO generally suspect that arguments for introduction of additional restrictions on trade to protect the environment are fresh arguments for protectionism. Environment officials negotiate MEAs in UN sponsored fora. They generally do not give regard to trade interests when they negotiate MEAs. There appears to be little internal policy co-ordination in developing country governments. The same phenomenon is observable in industrialized economies.

There are significant differences towards trade and environment issues among industrialized economies. The European Community has become the leading advocate of the introduction of new provisions on the environment in the WTO. Its position is generally coherent, reflecting the broad direction of environmental regulation in the EU, for example adoption of the precautionary principle and “whole of life cycle” regulation, and reflects strong domestic consumer and economic interests. The EU opposes exercise by the US of unilateral trade sanctions, but supports the discriminatory provisions in MEAs and seeks their legitimization in the WTO. It is generally supported by Switzerland.

The United States does not have a coherent position. It acts to defend measures in US law, such as unilateral trade restrictions (like the bans on imports of tuna and shrimp) in the disputes procedures. As a matter of principle it does not support legitimization of discriminatory trade provisions in MEAs. However, the Clinton Administration gave weak support to the EU position to defend discriminatory provisions in the MEAs. The US has given primacy to provisions of MEAs over trade provisions in NAFTA and included environmental trade provisions in its free trade agreement with Jordan. The US is not a party to the Basel Convention and will not sign the Cartagena Protocol because it is not party to the parent Biodiversity Convention. It is generally opposed to attempts by the EU to accommodate consumer and economic interests under the environment cause and opposes the EU approach to environmental regulation.⁸

New Zealand is closer to the EU position. Canada, Japan and Australia oppose use by the US of unilateral environmental trade sanctions but are generally closer to the US on the general issues. They espouse opposition to discriminatory trade measures in MEAs, but to date have acceded to the key MEAs.

⁸ It needs to be noted that continuity of policy is not a feature of public policy in the US.

Key issues

Fundamental issues

There are several fundamental issues in the trade and environment debate. They are frequently neglected. Discussion of many technical issues is in fact a discussion about these more fundamental issues.

Sovereignty

Discriminatory trade measures breach sovereignty. In formal international law, the principle of respect for national sovereignty is a fundamental principle. It was reasserted as a guiding principle at the Rio Earth Summit. It is the basis upon which the WTO rests. Discriminatory trade measures, whether applied against one country as a unilateral sanction or applied by several, as members of an MEA, against non-members of the MEA breach the principle of respect for national sovereignty.

International lawyers, principally in industrialized economies, point to assertions of jurisdiction by one country into another's jurisdiction to demonstrate that in customary international law the principal of respect for national sovereignty is not ironclad. These contentions are often used by NGOs to argue that notions of sovereignty have changed. They are usually associated with arguments to justify extension to NGOs of an executive right to participate in international fora. The case for customary law changing formal law is largely academic. Governments are unlikely in the near future to alter formal law on sovereignty where it applies to international conventions.

Effective environmental policy

The trade and environment debate focuses almost exclusively on the legal impact of the provisions of the WTO and the extent to which they affect environmental interests. This is a debate about public policy and its effectiveness, not about law. There is a significant amount of research and literature which points out that the use of trade measures to achieve environmental objectives is poor policy – trade measures are often poor economic tools and ineffective environment policy. This issue is rarely considered.

A closely related issue does receive consideration – what is the appropriate level of environmental management in any economy, particularly developing economies? Economists point out that, like other standards, environmental standards must match the economic capacity in any country. It is rarely environmentally relevant or economically logical to seek to impose industrialized environmental standards in developing economies. Western NGOs, like Greenpeace, however do think it is appropriate for exporting countries to impose environmental standards on developing countries when it comes to management of waste. This is the operating principle of the Basel Convention which Greenpeace promoted.⁹

⁹ It should be noted as well that a developing country NGO, the "Third World Network" in Malaysia was also a promoter of the Basel Convention.

The balance of benefits

There is no a priori reason why any matter should not be permitted as an exception to the basic principles of the WTO. Exceptions to the rules are permitted to protect national security, public health and public morals, for example. If any issue is important enough, grounds for exception should be considered if it is in the international interest and in the interest of preserving the multilateral trading system. The fundamental case for permitting new trade restrictions to protect the environment in the WTO is that it is in the international public interest. To accept this case, the balance of benefits would have to be assessed. Every new exception permitted in the WTO weakens the capacity of the system to serve the public good. The benefit to the international environment public good obviously should be greater than the loss to international trade public good. This is rarely considered.

The leading issues of principle

Most of the trade and environment debate has been about principles rather than issues. The key principles are introduced below

Legitimization of discriminatory trade measures (in MEAs)

The leading MEAs contain trade measures that are discriminatory. WWF has a long-standing position that WTO rules should be “clarified” to protect these provisions from legal challenge under the WTO disputes procedures. This is a key EU objective. Many, including officials in the WTO Secretariat, like to point out that so far there has not been a challenge under WTO disputes procedures to a trade provision in an MEA. (Most legal challenges to measure justified on environment grounds are to US unilateral measures.) A conclusion which is often allowed to be drawn is that there is therefore no substantive problem. While the principle, or breach of it, may not have wide application now, the implications of its extension are significant. The EU evidently think it is of sufficient importance to seek to legitimize it.

Restricting trade on the grounds of production and process

WTO and GATT disputes cases have so far rejected proposals to restrict products on the basis of how they are made or processed, and in the case of the environment, on the impact on the environment of how they are made and processed. The WTO Agreement on Technical Barriers to Trade recognizes “processes closely related to the product characteristics” as grounds to impose technical regulation to meet environmental purposes. However this limited case has not been tested. Western NGOs want the right to restrict trade on the basis of the impact of production and process methods (PPMs) on the environment. Permitting restrictions on these grounds establishes a principle that the elements of comparative advantage, the cornerstone which enables the WTO to enhance economic welfare, can be picked apart. If trade is to be restricted on the basis of PPMs relevant to the environment, the issue of ensuring the principle does not extend to PPMs relevant to other factors (for example labor right and human and political rights) needs to be established. The EU is arguing indirectly for this change to justify “whole of life cycle” regulation. (See below)

Enacting the precautionary principle

The European Union has adopted a general policy of enacting the precautionary principle in EU regulation. There is no standard definition of the “principle”.¹⁰ The EU has stated that the principle is already enshrined in the WTO. The instance is in the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) where the application is narrow, time limited and subject to conditions. Otherwise the SPS Agreement reflects the principles of managed risk, rather than no or minimal risk which is the operating premise of the Precautionary Principle as espoused by the EU. The SPS Agreement requires parties to base technical restrictions on trade on established international standards, science or risk assessment. The EU points to the expression of the precautionary principle in the Cartagena Protocol as a model expression. The version in the Protocol is one of the most far-reaching in any international agreement. The Protocol permits countries to restrict trade on technical grounds without any scientific justification. The US and most other industrialized economies are opposed to blanket adoption of the precautionary principle in WTO agreements.

Limits of patents

NGOs assert that patent law in industrialized economies under sanctions from the WTO TRIPs agreement permits patents to be issued on natural life forms and this is denying developing countries the opportunity to protect biodiversity and to secure for themselves the benefits of their natural resources. There is new environmental principle in this debate. At contest is the established function of patent law. Under effective patent law, natural forms cannot be patented. The assertion of economic rights in patent law is to argue against the principle of national treatment. Defence of this lies not in intellectual property law, but in foreign investment law restricting foreign companies the right to establish.

Key issues

One of the peculiar features of the trade and environment debate is that so much of it has been about principles and less about issues. The development of technology to produce Genetically Modified Organisms (GMOs) has at last introduced a significant issue into the debate

Recognizing whole of life cycle regulations (ecolabelling)

The European Community has announced its intention to develop regulations obliging producers to be responsible for the cost of the environmental impacts of their products for the whole of their life.¹¹ The economic critique of trying to improve the environment by this means is powerful. Producers could for example be held responsible for costs they do not incur, for example the polluting effects of the energy consumed in the production process. There are a number of proposals for ecolabelling schemes which would serve as the certification that the whole of life

¹⁰ From a logical standpoint, the “Precautionary Principle” it is not a “principle”. It is a statement of political intent.

¹¹ In March 2001, it released its “Integrated Product Policy”.

cycle regulation is being observed. The regulations would apply to imports and would prospectively create circumstances where imports would be restricted according to the processes and production methods used to manufacture them. The EU wants such arrangements legitimized in the WTO. Few other industrialized economies supports this.

Food safety

The food safety issue is not new. The advent of GMO technology has brought an environmental dimension to it. There is a long established precedent in the WTO for restricting food products on grounds other than the scientific justifications for protection of health and safety upon which the WTO SPS Agreement is based. The obvious needs to be stated here. WTO rules as they apply to industrial products do not fully apply to food and agriculture. Under the cover of economic protection, any number of justifications for restrictions on trade have been employed. These are now slowly being wound back as agricultural reform in the WTO proceeds.

In recent years the EU has sought to justify restrictions on food imports on the need to respond to consumer interest. They have been rebuffed in the disputes processes because no scientific grounds existed to justify the restrictions.¹² The EU similarly wants to restrict imports of products with genetically modified organisms. Deliberation on this issue in the WTO has been limited. Negotiation of international standards on releases of GMOs is proceeding in the Codex Alimentarius¹³. Codex is one of the organizations whose standards are recognized in the WTO SPS Agreement.

The EU is largely responsible for an articulation of the precautionary principle in the Cartagena Protocol which would create the non-scientific grounds to restrict trade that it has so far sought without success in the WTO. The EU has proposed that a wider understanding be established about the use of the precautionary principle in the WTO. The US and most other industrialized economies are opposed to adoption of the precautionary principle in the WTO and Codex. However most of joined the consensus over the terms of the Cartagena Protocol. (The US was not a party to the consensus since it is not a party to the Biodiversity Convention)

Management of Toxic substances

Prevention of dumping of toxic waste became a cause celebre after European companies were found dumping toxic waste in West African countries. Greenpeace used the case to advance its philosophy that every country should be responsible for managing its own waste. The response was the Basel Convention which shifted responsibility for controlling imports of hazardous substances from the importer to the exporter. The Convention obliges parties not trade on products covered by the Agreement with non-parties. The Protocol bans trade between industrialized economy parties and developing economy parties. Each exporter sets its environmental standard when permitting exports. All three provisions create circumstances where parties can discriminate among trading partners. There are

¹² The WTO ruled that restrictions on beef fed with feedstock with hormonal growth promotants were not justified under WTO rules.

¹³ A joint WTO/FAO body which sets international standards on food to protect human health.

doubts about the environmental effectiveness of the trade controls but to date, no country has chosen to challenge them under WTO provisions.

Protecting Wildlife

CITES is the original MEA with discriminatory trade provisions. The Convention was negotiated in the midst of an active debate within the conservation community and WWF in particular about the effectiveness of trade bans for conservation purposes.¹⁴ The debate continues, with Zimbabwe in recent years seeking a waiver from the trade ban in order to sell down ivory stocks because domestic conservation programs were so successful that herds of elephant had to be culled.

Restoring the Ozone layer

Trade bans were imposed in the Montreal Convention and Vienna Protocol to ban production and consumption of fluorocarbons to protect and restore the Ozone layer. There has not been much controversy over these bans, but there is debate about the necessity or effectiveness of the trade bans to the purpose of the convention.

Transboundary pollution

A broad justification for the need for discriminatory bans in the MEAs and the unilateral trade bans by the US is that these are necessary instruments to deal with transboundary pollution and desecration of the global commons. The argument is weak. The traditional means by which countries act collectively to alleviate an international condition is to agree to common measures and implement them in national law. This approach addresses all problems which qualify as transboundary pollution or the need to protect the global commons. This is an issue which raises the fundamental issues set out earlier on.

Protection of Biodiversity

It has become common recently to erect “protection of biodiversity” as a new leading environmental goal. The Biodiversity Convention which was finalized at UNCED sets out national policies countries should adopt to protect biodiversity. The proposition has lately been invoked to support the case to alter intellectual property law, but it introduces no new elements. Similarly it has entered the rhetoric of the trade and environment debate, but there is no cogent case that trade is intrinsically related to the issue of protecting biodiversity.

The fora

The focus of attention in the trade and environment debate is the WTO. It has been argued that a new environmental body which corresponds to the WTO is required. A WEO (World Environment Organization) was mooted by some NGOs.¹⁵ Others have

¹⁴ According to one historian of the environmental movement, WWF offices in Europe opposed trade bans in ivory on the grounds that they were ineffective but were overruled by WWF US who considered their capacity to raise funds in the US would be compromised by acceptance of hunting of elephants. (See F.Pearce, *Green Warriors*, Bodley Head, 1990).

¹⁵ It was even supported by a former Head of the WTO, Mr Renato Ruggerio.

proposed an environmental equivalent of UNCTAD. These ideas seem to reflect a misunderstanding of what the WTO does and how the UN system operates.

The WTO is a narrow body of law which focuses on just one sector of economic activity which is regulated by most governments – trade. There is no comparability with international management of the environment in this respect. Environmental impacts are caused by all manner of economic activity. There could be no remit for a global environment body comparable to the WTO's, unless there was a single global authority which sought to manage global economic activity, like a single government. This is well beyond the realms of reality.

Major environmental treaties are usually negotiated by conferences established by the United Nations General Assembly. Once established, the secretariats for the conferences tend to be established in UNEP, the United Nations Environment Program, a unit of the UN Secretariat which reports annually to the Economic and Social Council.

The supreme organ for environment issues in the United Nations is the UN Conference on Environment and Development (the Rio Earth Summit) which was held in 1994. It was technically a special session of the UN General Assembly. It has the authority to bring all environmental activity in the UN System together. It established the UN Commission on Sustainable Development, a standing elected body, to supervise the implementation of the Agenda 21, the program adopted at UNCED.

In the way in which the WTO is tasked to consider the issue of interlinkage between the MEAs and the WTO, one would have expected that the Commission on Sustainable Development would carry a matching brief. This does not seem to be the case. This is pity since UNCED was clear that trade measures should not be used to manage the environment.

Future issues

It is clear that trade and environment issues will remain a controversial issue during the next trade round. The issues over which the principles discussed above will be raised are likely to be food safety (GMOs) and whole of life cycle environmental regulations. Intellectual property will be prominent for political reasons. If the Kyoto Protocol on greenhouse emissions is ratified, it is likely there will be sharp focus on the issue of use of discriminatory trade measures.

One might anticipate that at the end of the next trade round, the EU will attempt to leverage acceptance of its environmental interests in return for its accepting the rest of the package of negotiations.

Attention will need to be paid to the WTO Dispute Settlement processes. The Appellate Body has shown an inclination to make law on trade and environment issues in directions in which it is unlikely the majority of members would be willing to move.