

# **WTO and Sustainable Development (A chapter in "The WTO and East Asian Regional Integration")**

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The relationship between trade and sustainable development is complex and challenging. In this short paper, I shall focus on one component of that challenge: the relationship between trade and environment. I shall argue that, contrary to general opinion, the environment has made significant progress in the World Trade Organization (WTO). This arises not so much from the progress in environmentally-related negotiations nor from the regular work of the WTO Committee on Trade and Environment (CTE), but from the work of the Dispute Settlement Body (DSB) and, in particular, the Appellate Body. While this has led to charges of 'judicial activism' on the part of the Appellate Body, I argue that the Appellate Body is simply fulfilling its mandate to clarify and interpret WTO law and to fill gaps left by negotiators.

## **Environment – a fraught topic in the WTO**

Environment is a sensitive topic in the trade context. Although the fear is receding somewhat, the environmental community is still concerned that trade rules will be used to challenge and roll back environmental achievement at both the international and domestic levels. At the domestic level, to the extent that environmental regulations, norms or standards impinge on the freedom to conduct business, they are vulnerable to challenge as unwarranted interference with open trade. At the international level, Multilateral Environmental Agreements (MEAs) that use trade measures to encourage and enforce compliance appear especially open to challenge, even though the trade measures contained in these agreements have been agreed by consensus by all parties and many of these agreements have more members than the WTO itself.

Developing countries are also by and large circumspect about the environment in WTO. This is in part because they fear – with some justification – that it will be used for protectionist purposes by those countries with more stringent environmental requirements. They see environment as an area where the rich countries have a comparative advantage. It is also, however, because many of them already suffer from limited capacity in handling a complex and overloaded WTO agenda and are reluctant to see the agenda complicated further by what they regard as extraneous topics. Finally, many developing countries, while conscious of the importance of environmental management, do not see it as having a high priority in the trade context. They resist attempts to push environment higher on the trade agenda when so many issues of greater priority to them remain unresolved.

How, then, did environment make its way into the WTO?

In some ways, opening space for environment in the new WTO was inevitable. The WTO was set up soon after the Earth Summit in Rio, at a time when the environment was at the peak of its political momentum, a momentum that has subsided since. Politicians worldwide were scrambling to demonstrate their dedication to the environment, using every public platform available to show they were in tune with public sentiment. Many of them carried this opportunistic enthusiasm into the *General Agreement on Tariffs and Trade* (GATT), which at the time was concluding the Uruguay Round of multilateral trade negotiations.

At the same time, the message to the environmental community was that they had to think in terms of harnessing the market to achieve global environmental objectives, and not go on counting on heavy-handed and inefficient government action. Trade, not aid, would bring about an economy more concerned with the efficient use of resources, better able to value environmental services, and in which the general upgrading of technology and standards of production would lift the world onto a new environmental plateau. The environmental community, buying into this message, held out some not-unjustified hope that the soon-to-be-created WTO would be open to partnership with them in pursuit of their shared objectives.

Sure enough, the Preamble to the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") – which concluded the Uruguay Round and established the WTO – includes a strong statement on the need for the trading system to be compatible with and supportive of the wider goal of sustainable development. While this was in no way intended to make trade liberalization subservient to sustainable development<sup>1</sup> the formulation has been referred to with increasing frequency as one of the few statements that articulate the goal that trade liberalization is intended to serve. Indeed, the statement was repeated in even stronger form in paragraph 6 of the Doha Ministerial Declaration<sup>2</sup>, in which it is acknowledged that not only can open trade and sustainable development be compatible and mutually supportive, they must be.

Even if the Rio Summit had never taken place, or if skeptics had effectively blocked all mention of environment and sustainable development in the texts establishing the WTO, the new organization would have had no choice but to deal with environmental issues – whether domestic policies and regulations or relations with the complex and growing international regime on the environment. It is an inescapable fact that trade and environment can never be self-contained compartments. Inevitably, they overlap and, at a minimum, the WTO is obliged to deal with the issues that arise in this area of overlap.

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<sup>1</sup> The chief negotiator for Japan in the Uruguay Round, Ambassador Nobutoshi Akao, explained in a personal comment that the Preamble was used to park issues about which one or several delegations felt strongly, but around which there was no consensus.

<sup>2</sup> WT/MIN(01)/DEC/1.

## **Forms of progress in the WTO**

It is now more than ten years since the WTO was established, and we have over a decade of experience in dealing with the trade/environment interface. What have we learned, and how has our vision of this relationship evolved?

Most observers of the WTO, and particularly those with an environmental bias, would say that the trade and environment debate has not advanced very much and that both the work of the CTE and the environmental negotiations in the Doha Round are going around in circles. While a superficial look at the record would tend to confirm this pessimistic judgment, I shall argue that this judgment is, at the least, incomplete. In many ways, I believe that it is outright inaccurate. I would like to suggest that there are other ways to look at the trade and environment issue in the WTO.

First, not only is environment accepted as a relevant topic for WTO deliberations, it was, at Doha, upgraded to become a topic for negotiation. For all of its tentative beginnings, environment is here to stay in the WTO. Nothing guaranteed this outcome. Indeed, several topics admitted to the WTO for clarification – such as trade, debt and finance – have failed so far to progress to the stage of negotiations. Others – for example investment, competition policy, or transparency in government procurement – far from having progressed to negotiation have, in fact, even been dropped as topics for discussion and clarification. Thus there is no guarantee that any topic will be 'upgraded' once it is on the WTO agenda. Yet environment was, a scant six years after it made its way onto the agenda as a topic in its own right. I submit that this is politically significant.

Second, it would be a mistake to regard negotiated outcomes as the only form of progress in the WTO system. Many issues cease to be issues because the presentation of positions of different Members and the debate on these reduce the contentious aspects to a point where no negotiated outcome is deemed necessary – the issue simply goes away. A number of issues on the CTE agenda, considered sensitive at the time, have lost their sensitivity, or at least their sense of urgency. Often, this is because a full airing of the views and preoccupations of the different Members leads to a better understanding of the point of view of each. The sense of threat disappears, and a sense of confidence grows in its place.

Other times, there is an issue, but the Members find another way to deal with it, outside the forum of the WTO, through domestic adjustments, improved information and notification, or in another international forum – for example those provided by the Multilateral Environmental Agreements. This process – that Professor Gregory Schaffer calls 'crystallization' – must be regarded as an important form of progress for which the WTO deserves some credit.<sup>3</sup>

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<sup>3</sup> Shaffer, Gregory C., "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters". Harvard Environmental Law Review, Vol. 25, pp. 1-93, Winter 2001

## **Environmental Progress – the role of the Dispute Settlement Body**

I would argue that the greatest progress for the environment in the WTO has come about as a result of the work of the DSB and more particularly by means of the Appellate Body carrying out its function of clarifying ambiguities in the WTO rules, filling gaps left by the negotiators, and interpreting the intent of negotiators in crafting the legal texts based on close examination of the negotiating history.

It is my contention that, through the DSB, environmental principles and perspectives have made an impressive advance in the WTO in its first ten years. I illustrate this below with three cases.<sup>4</sup>

### The WTO and Multilateral Environmental Agreements

The first relates to the relationship between WTO rules and the MEAs, a subject that has made very little progress in ten years of review by the CTE and four years of specific negotiation under the Doha Round. Indeed, it can be convincingly argued that the negotiating mandate contained in paragraph 31.1 of the Doha Ministerial Declaration is so restrictive that any outcome is likely to represent a step backwards in establishing coherence and mutual supportiveness between the trade and environment regimes.

With one exception, the GATT deemed that international law from sources outside the GATT 1947 was not relevant for the deliberations of GATT panels. The exception – the *Canada – Herring and Salmon* case - referred to the International Law of the Sea to interpret and apply a trade law obligation.<sup>5</sup> Indeed, in the *US – Tuna* cases, the refusal of the Panels to give much regard to applicable environmental legislation came as a shock to the environmental community and served as a wake-up call on the potential of the trade rules to interfere with the pursuit of legitimate international environmental objectives.<sup>6</sup>

It was therefore with some apprehension that the environmental community observed the establishment of the WTO DSB and the decision of the members to give it considerable power to enforce compliance. And it came as an agreeable surprise when the WTO, in its very first case – the *US – Gasoline* case – stressed that the new *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) 'reflects a measure of recognition that the *General Agreement* is not to be interpreted in clinical isolation from public international law.'<sup>7</sup> It is unlikely many of them suspected just how far this new tendency would extend.

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<sup>4</sup> In discussing these cases, I draw upon 'The State of Trade and Environment Law – Implications for Doha and Beyond', an IISD publication from 2003 by IISD's Howard Mann, and Stephen Porter of the Centre for International Environmental Law.

<sup>5</sup> GATT Panel Report, *Canada – Herring and Salmon*"), adopted 22 March 1988, BISD 35S/98.

<sup>6</sup> GATT Panel Report, *US – Tuna (EEC)*, 16 June 1994, unadopted, DS29/R; GATT Panel Report, *US – Tuna (Mexico)*, 3 September 1991, unadopted, BISD 39S/155.

<sup>7</sup> Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:1, p. 3 at 16.

In the oft-cited *US – Shrimp* case the Appellate Body AB had to determine whether there was a case for Article XX exceptions to be applied. In seeking to define 'exhaustible natural resources' and the application of the *chapeau* of Article XX, they turned to a range of international agreements on the environment.<sup>8</sup> It is striking that they considered not only well-established treaties of global scope and reach, but also relevant regional agreements and, in one case, a convention that was not yet in force. They did so because they felt it was important to determine what had been the intention of the States party to these agreements in seeking to protect exhaustible natural resources. After all, these same States are the Members of the WTO.

It is interesting to contrast the negotiations under paragraph 31(i) of the Doha Ministerial Declaration and the decision of the Appellate Body in the *US – Shrimp* case. In the first, negotiations under a poorly crafted and confused mandate are making very little progress, leaving the threat of conflict between MEAs and WTO rules intact. In the decision of the Appellate Body, by contrast, the WTO-MEA relationship has been given specific and cogent direction in the dispute settlement process, i.e. at the most critical point of potential conflict between the two bodies of law. In the absence of a negotiated agreement on how trade law relates to the environmental agreements relevant to the case, the decision of the Appellate Body in *US – Shrimp* and in other related cases remains the clearest statement of how the WTO rules are to be viewed in their relationship with the international obligations assumed by States under the agreements that make up the environmental regime.

#### WTO and the Precautionary Principle

The second case deals with what is undoubtedly one of the most sensitive issues at the trade and environment interface: how to apply the precautionary principle. The precautionary principle is an established principle of international environmental law, but it is regarded with extreme circumspection in the WTO, even if the 'precautionary approach' is given a small space in the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*.

The *EC – Hormones* case forced the Appellate Body to focus on this provision in the *SPS Agreement*. In considering how much scientific evidence is sufficient to justify a measure, it noted that responsible governments commonly act from a perspective of prudence and precaution where there is risk to human life.<sup>9</sup> It further ruled that measures taken by governments could be based on a minority scientific opinion.<sup>10</sup>

The *Australia – Salmon* case went on to lay down specific guidelines for what constitutes a proper risk assessment.<sup>11</sup> These do not include a minimum threshold of risk, leaving it to governments to decide what level of risk warrants a precautionary response.

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<sup>8</sup>Appellate Body Report, *US – Shrimp*, paras. 130-131.

<sup>9</sup>Appellate Body Report, *EC – Hormones*, para. 124.

<sup>10</sup>Appellate Body Report, *EC – Hormones*, para. 194.

<sup>11</sup>Appellate Body Report, *Australia – Salmon*, para. 121.

Finally, the *Japan – Agricultural Products II* case sets out a rigorous set of conditions for the use of temporary measures in the absence of full scientific certainty, thus effectively defining (and limiting) the use of the one key embodiment of the precautionary principle in the *SPS Agreement*.<sup>12</sup>

Taking these three cases together, it can be said that the Appellate Body has set in place a set of daunting procedural requirements for use of the precautionary principle – some of which may effectively place use of the precautionary principle beyond the reach of some developing countries. However, a government that has fulfilled these criteria is free to choose its desired level of acceptable risk, and there is no minimum threshold of risk necessary to justify their decision to put these measures in place. Combined with the ability to base measures on minority scientific views this leaves significant scope for the application of the precautionary principle.

Had use of the precautionary principle been debated in the Committee on Sanitary and Phytosanitary Measures, or in the WTO General Council, it is inconceivable that a result anywhere close to the one effectively achieved by the Appellate Body could have been secured. Indeed, sensitivity on the introduction of the notion of precaution in the work of the WTO is such that the subject is virtually taboo. And yet the Appellate Body dealt with it sensibly, lucidly and unambiguously.

#### The WTO and PPM distinctions

Third and finally, probably the single most sensitive issue in the trade and environment is the issue of Process and Production Methods (PPMs), or factors relating to how a product is made unrelated to the characteristics of the product itself. From the environmental perspective, how a good is made is of central importance. From a developing country perspective, dictating how a good is produced is an intrusion on sovereignty. It is generally agreed in trade circles that allowing such distinctions in the WTO would create a substantial avenue for protectionist measures dressed up in environmental clothing. Indeed, as noted above, the *US – Tuna* panels, consistent with GATT practice, ruled that only the characteristics of the final product are relevant under GATT law.

In the *US – Shrimp* case, however, the Appellate Body turned this approach on its head. While import bans are still clearly prohibited under GATT 1994 rules, PPM-based considerations at least have a chance to justify themselves under the General Exceptions (Article XX) of GATT 1994.

Of course, the Appellate Body does not offer a blank check to relax the basic rules of non-discrimination for either PPM or extra-territorial measures. In the *US – Shrimp* case, the Appellate Body sets out a number of criteria which would have to be met for such measures to be justified as Article XX exceptions.

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<sup>12</sup>Appellate Body Report, *Japan – Agricultural Products II*, para. 89.

The first is to ascertain whether the measure qualifies under the scope for exceptions intended by the drafters of GATT. This concerns principally the justification for extra-territorial measures, and establishes that there must be a 'sufficient nexus' between the country taking the measure and the cause (in this case, migratory and endangered sea turtles) for which the measure is taken.<sup>13</sup>

The second, which affects both PPM and extra-territorial considerations relates to the chapeau of Article XX, and considers whether the measure is being applied in an arbitrary or unjustifiably discriminatory way, or as a disguised restriction to trade. The tests used in *US – Shrimp* insist that:

The measure must be flexible – referring to the objective to be achieved but not to the way in which it is achieved

The State employing the measure must demonstrate that it has made efforts in good faith to negotiate an agreement with the parties affected by the measure; and

It must allow a reasonable phase-in time to adopt the PPM measure.<sup>14</sup>

The *EC – Asbestos* case, which intervened between the first and second Appellate Body rulings in *US – Shrimp*, turned on exceptions for health, not environment, but the decision is significant in considering whether PPMs may be considered relevant to determining whether two products are 'like' in the sense of Article III of GATT 1994. The Appellate Body ruled that the carcinogenicity of a product (in this case asbestos) was relevant to whether or not it was a 'like' product when compared with alternatives available for the same purpose. It argued, among other things, that the carcinogenicity would affect the way in which consumers viewed the product.<sup>15</sup>

So, while it surely cannot be argued that the Appellate Body has thrown open the door for PPM distinctions in considering the 'likeness' of products, it is equally clear that it does not regard such distinctions as taboo. Rather, the Appellate Body appears to feel that, at least in certain cases, members should have the opportunity to argue for Article XX exceptions on grounds that include such distinctions, and that it is helpful to offer some guidance on how such arguments will be considered.

### Lessons for trade and environment

What accounts for this fundamental change in approach between the GATT and the WTO? It is clear that, because the reach of trade policy now extends deep into the realm of domestic policy and affects so many sectors once the sovereign domain of national decision-making, the coherence between trade rules and rules in other areas has become increasingly important. Thus, in interpreting trade law, the Appellate Body must seek and consider statements – like the Preamble to the *WTO Agreement* – in which the purpose of trade policy and the intent of the negotiators are articulated. For the same

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<sup>13</sup>Appellate Body Report, *US – Shrimp*, para. 133.

<sup>14</sup>Appellate Body Report, *US – Shrimp*, paras. 158-186.

<sup>15</sup>Appellate Body Report, *EC – Asbestos*, para. 113.

reason, there is growing pressure to ensure that trade law is to the extent possible supportive of what governments have agreed to do in other fora.

What lessons can we draw from the three cases above? First, it is evident that the fortress walls that characterized the GATT have to a large extent broken down with the WTO. The trade policy community can no longer act as if the values, laws and practices agreed by States in other areas do not exist or apply inside the walls of trade policy. Just as the scope of trade policy has expanded well beyond the scope of border measures and manufactured goods to address key priorities of domestic policy, so the dispute settlement system must take account of the overlap between trade policy and regulation, and relevant policy and regulation in other areas. Indeed trade law, on its own, may be too narrow to deal with the complex relationships that affect trade policy, particularly in the domestic arena.

The second is that the lack of progress in discussions and negotiations is no guarantee that an issue will remain blocked in the trade regime as a whole. It may, as we have seen, move to the DSB for clarification. Or it may move to other trade fora outside the WTO, just as aspects of trade-related intellectual property rights are under active discussion in the World Intellectual Property Organization, the Convention on Biological Diversity, and in the International Treaty on Plant Genetic Resources for Food and Agriculture. While, on balance, negotiated outcomes are preferable to Appellate Body decisions, in the absence of the former, we may end up with the latter. Perhaps this should serve as a stimulus for more active concession-seeking in the relevant negotiations.

Third and finally, there is a growing awareness that trade policy is no longer limited to border measures affecting traded goods. Instead, it now reaches deep into the domain of domestic policy, affecting the choices that governments have traditionally regarded as subject to their sovereign decisions. This means that trade policy must now find a peaceful coexistence with environment policy, a process which I have suggested is advancing well in the WTO. Indeed, the fact that it has progressed so far in respect of the trade and environment relationship (as compared to, say, trade and labour rights) reflects the strong public support for environmental values in most countries, and the reality that support for trade liberalization will be undermined if it continues to ignore this public sentiment.

#### What does this mean for the Doha negotiations?

What can we expect from the current negotiations on environment and sustainable development in the WTO? Most likely we will see no dramatic breakthroughs. We may well reach a limited agreement on accelerated liberalization of specific classes of environmental goods and services. And we may see some advance on disciplining the subsidies that currently encourage over-fishing.

I very much doubt that there will be much progress on the other environmental issues being discussed. For one thing, there is no significant negotiating group presently insisting on clear deliverables in the environmental area. The European Communities, the original *demandeurs* of environmental negotiations, has clearly shifted its sights to the



more commercially important areas of industrial tariffs and services, and appears to believe that it can achieve their environmental objectives better by other means.

Of course, this is no guarantee that the environment will remain a forgotten detail on the Doha Agenda. Indeed, the environment is and will always be an end-game issue in the WTO. Once the central structure of a new trade deal is clear, issues such as the environment will be brought forward if needed to give scope for the final trade-offs necessary to secure the central deal.

I would argue, however, that those interested in environment and sustainable development in the WTO should not focus on the Doha negotiations with a microscope, but instead step back and take both a longer and broader view of the multilateral trading system. They will be obliged to conclude that, contrary to first appearances, and somewhat counter-intuitively, the environment has secured for itself an established and honourable place in the multilateral trading system. Early resistance to the environment has reduced, shifted form, and is now focused not on whether environment should or should not be in the WTO, but on how to ensure that legitimate environmental aspects of trade are dealt with in a way that does not open scope for protectionist measures. This is an objective to which most environmentalists could subscribe.

As I have tried to indicate, while both the work of the CTE and the environmental negotiations under the Doha Agenda have yielded scant results to date, many aspects of the link between the trading system and the complex international environmental regime have been clarified and the level of apprehension at a possible clash between the two have receded. In some ways it is regrettable that the *Chile – Swordfish* case was settled 'out of court', because it would have shed light onto how the DSB approaches issues for which more than one juridical forum arguably had standing.<sup>16</sup> Nevertheless, the work of the Appellate Body to date has underlined strongly that it does not see itself as the sole, isolated arbiter of all law governing trade. The Appellate Body has made clear that trade law will be interpreted in light of the intentions that States have made manifest both in trade policy fora and in other fora relevant to trade policy.

The notion of sustainable development found its way into the *WTO Agreement*, and emerged strengthened in paragraph 6 of the Doha Ministerial Declaration. The Appellate Body has demonstrated that it considers sustainable development to be of central relevance in determining both the context in which the trade rules play out and the overall goal that the trade rules are intended to advance. In doing so, they may have pointed the way towards the path WTO must take in the future.

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<sup>16</sup>WT/DS193/3.