Does Free Trade Undermine International Rules Protecting the Environment?

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Does Free Trade, as Implemented by the World Trade Organization, Undermine the International Rules Protecting the Environment?

'We live, it is said, in a shrinking world – a world of globalisation'.[1] The paradox of globalisation is that it has increased the uniformisation of social life globally while also increasing fragmentation. What once was 'general international law' has been transformed into a field of specialist systems, including 'trade law' and 'environmental law'.[2] This receives legal significance in this essay, which seeks to demonstrate that the emergence of specialised and relatively autonomous regulations, legal institutions and spheres of legal practice produces several instances in which the World Trade Organisation (WTO) undermines international rules protecting the environment. Liberalised trade can only fully contribute towards greater well-being through the close integration of trade and environmental policies.[3] This essay does not discuss reform; rather, it attempts to outline key areas where these two specialist systems appear to conflict. It adopts a particularistic regime-based approach to describe international law's structure as the sum of interrelated regimes.[4] While both regimes have rules and principles enshrined in all international law sources – treaties, customary law, general principles[5] – each system has distinct objectives, often pointing in different directions. It concludes that the trade, environment, globalisation and legitimacy challenges cannot ultimately be answered through the WTO as it stands.

The WTO was created to promote free trade: to remove barriers between countries, to allow them to concentrate on products with a comparative advantage, leading to maximum international productivity.[6] This, however, often challenges rules protecting the environment. Although the WTO has shown an increasingly open approach towards environmental issues,[7] free trade is still the Organisation's backbone and trade liberalisation its main goal.[8]

As such, the WTO's rulings are – not surprisingly – far from those stating the predominance of such concerns over free trade protection. The Marrakesh Agreement Establishing the WTO did mention that the objectives to liberalise trade would be performed 'through protecting and preserving the environment' – though 'in a manner consistent with the respective needs and concerns of its Members at different levels of economic development'.[9] One might argue that the WTO was conceived as a trade organisation, and its Members agreed to that mandate. Indeed, many of its Members are developing countries that have resisted including environmental protection concepts – such as sustainable development – in the WTO.[10]

The WTO's dispute settlement system was not designed to resolve challenges regarding trade and environment, legitimacy, globalisation and international law's fragmentation.[11] Although it does adjudicate trade-environment disputes, their resolution involves scrutinising the trade-friendliness of environmental laws – not whether the WTO Member's actions/laws are appropriately green.[12] Perhaps, if international law was less fragmented, the latter would have been possible.

International environmental law, on the other hand, 'provides the global institutional means for engaging the global ecological challenges'. Consisting of a loose affiliation of treaties, principles and customs, it is a complex evolutionary system of law, further complicated by a dizzying array of stakeholders.[13] There is considerable tension between the

environmental goals and the rapid growth in international trade that places pressure on the earth's ecosystems.

Before entering into the discussion of the areas that are undermined, it should be emphasised that existing WTO rules were not drafted to address environmental problems and policies, leading to what Low, Marceau and Reinaud describe as the 'legal awkwardness' that follows.[14]

Interaction between Environmental Rules and the WTO

WTO Treaty Provisions on the Environment

There are several provisions in the WTO Agreements that address the environment; amongst them are the Agreement on Agriculture's qualified exemption from the required subsidy reduction commitments[15] and the Agreement on Trade-Related Aspects of Intellectual Property Rights environmental exception with regards to patents.[16] This essay will focus on other provisions with a more debatable favourable impact on the rules of environmental protection. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) [17] contains ecological and environmental conditions as criteria for its risk assessment, and the Agreement on Technical Barriers to Trade (TBT Agreement)[18] recognises the protection of the environment as a legitimate objective. However, the General Agreement on Tariffs and Trade (GATT) 1994[19] is primarily directed at securing free trade in goods through two principles of non-discrimination: the 'most favoured nation' (MFN) principle[20] and 'national treatment' principle.[21] The former prevents Members from affording more favourable treatment to goods of one Member over the other, and the latter from affording more favourable treatment over 'like' goods of domestic producers. The most relevant restriction based on these principles is the WTO's restriction of process and production methods (PPMs) – one of the knottiest controversies in the trade-environment debate.[22] PPMs refer to any activity undertaken in the process of bringing goods to the market.[23] These may address a product's environmental effects through its life-cycle – and as such limit the above provisions' effect, since the SPS Agreement lacks an environmental exception to the MFN principle, for example.

WTO Agreements may even outlaw certain forms of non-discriminatory measures essentially on the grounds that there is no objective justification for a particular trade-restricting measure (in certain instances these have been environment-protection measures) – quantitative restrictions in Article XI GATT, the TBT and SPS Agreements.

Some divergence from the WTO Agreements' obligations is allowed, to justify some environment-related PPMs, under headings (b) and (g) of Article XX GATT: (b) necessary to protect human, animal or plant life or health and; (g) relating to the conservation of exhaustible natural resources. In order to be justified, a measure must clearly promote one of these purposes, and cannot constitute 'a means of arbitrary or unjustifiable discrimination between countries…or a disguised restriction on international trade'.[24] The exceptions are limited – Article XX justifies a violation based on legitimate non-trade policy goals, provided that such interests are 'adequately balanced against the objective of free trade'[25] and a Member has the right to determine the level of environmental protection, *provided that the right is exercised in a non-discriminatory manner*.[26]

US-Gasoline[27] is a case in point: although concluded for the protection of an exhaustible natural resource under Article XX(g), the measure constituted an unjustifiable discriminatory trade restriction. The same was declared in the *US Shrimp/Turtle*[28] case, where the Appellate Body (AB) reproved the panel for its 'particularistic', trade-focused approach, but nonetheless concluded that this latter requirement was not met.[29]

It is worth noting that in deciding the latter case, the AB recognised the importance of environmental consideration. However, these 'environment-friendly' rules are qualified to ensure they are not used as a disguised means of protectionism.[30] Moreover, Members cannot be certain the measures they have enacted for environmental protection would be sufficiently 'necessary' under this provision, for the jurisprudence is confusing.[31] The WTO adheres strictly to its mandate of liberalising trade, even at the expense of a country's domestic environmental protection – a clear consequence of international law fragmentation.

Scientific Certainty

The SPS Agreement Article 5.2 requires that available scientific evidence be taken into account when assessing risk to animal or plant life or health. Article 5.7 may allow the measure to be provisionally adopted in the absence of sufficient scientific evidence, but the importance of such eventual evidence is stressed by the fact that this is only applicable for a 'reasonable period of time' until adequate evidence is collected.

This provision may be seen to undermine the environmental general precautionary principle of acting as soon as possible to avoid uncertain but possible harm: where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The WTO rejects this approach, as seen in the *Beef Hormone*[32] case: the EC argued that the precautionary principle, as part of customary international law would allow it to enforce its prohibition on the import of beef in the absence of definitive, scientific proof. The Panel and the AB held that the precautionary principle did not overrule the explicit requirement of a risk assessment in Article 5.1 and 5.2.[33] Though a confusing judgement, it maintained that justification based on scientific evidence is a prerequisite for a state to support its health protection measures – upholding the SPS treaty provisions above any environmental principle. Reaffirming this in *EC-Biotech,*[34] the AB ruled that it was insufficient to point to scientific studies that various harms 'might' result from GMO introduction. This case also determined that 'only those international legal rules to which all WTO Members are party, such as general customary international law or treaties that include all WTO Members, would be *required* to be taken into account (according to Article 31(3)(c))'. [35] In this manner, the WTO promulgated fragmentation, by differentiating international customary law from international environmental law (and other 'special regimes').[36]

Sustainable Development

Sustainable development is a key debate emanating from the trade-environment discussion. Nanda and Pring state that the most significant change in international law over the recent years is sustainable development's emergence as 'the new international paradigm for balancing society's often-conflicting environmental, economic and social aspirations'.[37] In the WTO Secretariat's words, 'the WTO's founding agreement recognises sustainable development as a central principle'.[38] Indeed, it was diligently included in the GATT agreement – in the non-binding preamble. It remains a broad principle, forming only 'an oblique part of the WTO's legal framework'.[39] While it continues to dominate discussion in the international environmental law domain, its legal status is undefined,[40] and can be said to be weak in the face of a treaty. Though referred to in *US Shrimp/Turtle,[41]* sustainable development is not primary to the WTO's function, contributing to its status as a principle, rather than a provision.

One of the WTO's main shortfalls is its lack of transparency and public participation. Interestingly, one of the 'fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making…'.[42] Credit must be given, however, to the WTO's efforts to increase public participation by allowing for the establishment of consultative relations with non-governmental organisations (NGOs), which serve as a link to the public.[43] Environmentalist's major concern regarding the Uruguay Round was the need for increased transparency and procedures for dispute settlement involving trade and environmental conflicts.[44] However, without adequate transparency, and by introducing the provision that panel reports are automatically adopted, the WTO undermines both these concerns, alongside the principle of sustainable development.[45] Schultz explains that the automatic adoption will minimise parties' ability to block the adoption of panel decisions and thus exacerbate the potential for direct conflicts between WTO obligations and environmental protection.[46] This strengthens the notion 'that fragmentation… (is) an unavoidable and durable aspect of the international legal landscape',[47] by creating increasingly self-contained specialist systems.

Multilateral Environmental Agreements (MEAs)

The fact that the WTO neglects the question of how MEAs with trade restrictions affect WTO provisions can be seen to undermine these agreements. According to Schoenbaum, since the United Nations Stockholm Conference of 1972, the world community has placed emphasis on MEAs to deal with international environmental problems.[48] To date however, no provisions have been utilised to effect a waiver of WTO provisions in respect of MEAs and 'the position is unlikely to change in the future'.[49] Clarification of MEAs legal status within the WTO context is urgently needed.[50] Were international law to be unified and harmonised amongst the separate specialist legal systems, one

might expect such coordination. Nevertheless, fragmentation makes such dilemmas are ever-prominent.

Committees and Mechanisms

At the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the GATT contracting parties formally established a Committee on Trade and Environment (CTE), under the WTO's auspices. Regrettably, the pace of progress has been exceedingly slow,[51] illustrating that the CTE is merely a 'symbol of the institutionalisation of environmental issues into WTO processes'.[52]

Moreover, the Trade Policy Review Mechanism, an existing WTO body (incorporated in Annex 3 of the Marrakesh Agreement) is an under-exploited body. Had the WTO wished to attend to the environmental challenges it faces under its mandate, its role could have been extended to help address essential new issues – such as greenhouse emissions and other environmental policies with an impact on trade[53] – by making the WTO overall more transparent. Reluctance to do so illustrates that the WTO's overriding concerns outweigh environmental rules.

Need for change?

The international trade regime has previously extended its reach into new areas, such as services and intellectual property.[54] Issues that are pertinent to its function of trade liberalisation have been addressed – as is possible with the trade-environment debate. Unfortunately, under the current mandate, the WTO dispute settlement mechanism is limited in its ability to do so. Some suggest that this may even be inhibiting consensus on how to tackle the issue – the fact that there are no inherent or logical limits to the WTO system.[55]

However, international organisations do not operate in a vacuum[56] – stated in the AB's first case, *US-Gasoline*.[57] The text of articles such as Article XX was drafted in 1948 and has not been amended since.[58] The challenge is therefore, as expressed by Kulovesi, to figure out how two highly specialised international law areas 'could coexist in harmony and interact in a constructive way that does justice to their equally valid but not necessarily fully compatible claims of authority'.[59] To streamline PPM guidelines in this way for example, or make sustainable development more applicable is immensely challenging ('one of the great challenges of the 21st century'[60]) and controversial. From a political perspective, any stretching of the WTO regime's boundaries by the dispute settlement system also risks irritating Member States and jeopardising their faith in the this global system.[61] Legally, WTO treaties are recognised sources of international law and not soft-law principles.

However, this consequence of fragmentation must be addressed. To remain legitimate, the WTO must respond adequately to modern, pressing environmental challenges by altering its mandate. Recognising that fragmentation is a reality, this will certainly be balanced with the WTO's values and purpose.

Conclusion

Fragmentation has been named one of the past decade's most provocative international legal issues.[62] As illustrated, WTO free trade rules have repeatedly undermined international rules of the environment. Even if coincidentally benefiting both free trade and environmental protection, it is within WTO constraints. However, one can refrain from criticising the WTO dispute settlement mechanism as its decisions comply with the mandate under which it operates, which, due to the current fragmentation of international law, does not cover environmental protection. Nonetheless, this should not eclipse the need for change, especially since environmental problems that threaten humanity – such as climate change – demand international cooperation. Schoenbaum calls the WTO to give specific recognition to environmental values, as necessary.[63] Perhaps international environmental law must also be strengthened, through the establishment of sufficiently powerful institutions to represent non-economic concerns[64] and penetrate specialist systems.

This essay does not seek to resolve this critical issue, but merely to demonstrate that the need for cohesion is explicit for both sides. As both international environmental and trade law have proved their ability to be evolutionary,[65] this task, though challenging in the context of international law's fragmentation, 'is possible, but by no means

automatic…trade and environment policies should support each other in achieving their objectives'[66] – in the interest of all life on this planet.

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