

The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak

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This contribution to the ongoing debate on the impact of the World Trade Organization (WTO) on the environment provides a more positive view on its past record than many critics would have it and yet is rather pessimistic with respect to the future. In particular, it argues that the existing negative impact of the WTO on environmental protection is hugely over-rated. At the same time, the WTO has done little to promote environmental protection so far and there is little hope that this is likely to change in the future. The responsibility for this impasse lies with the member countries of the WTO, however, not with the organization itself. The developed countries in particular are to blame for supporting a greening of WTO rules only partially and only where it furthers their own interests. They have also failed to persuade developing countries that such greening need not be detrimental to their economic development aspirations.

Negative Impact of the WTO on Environmental Protection is Over-Rated

The WTO has done much less to hinder or damage environmental protection policies than its critics believe. I will try to demonstrate this with respect to four main points.

(a) WTO Jurisprudence does not have a Bad Environmental Record

WTO jurisprudence has become increasingly environmentally friendly. There is, as Brack and Branczik¹ note, “continued failure to make any substantial progress in rewriting WTO rules—but significant changes in the way in which existing rules have been interpreted to deal with environmental concerns.” The WTO agreements put few restrictions on environmental regulation of consumption externalities, which refer to damage to the environment or human health con-

1. Brack and Branczik 2004, 1.

nected to the consumption of goods. The one important exception is if the damage is highly uncertain and somewhat speculative, a point to which I will come back in the next section. Otherwise as long as these restrictions are applied fairly, even-handedly and without discrimination against foreign producers, they are compatible with WTO agreements even if they completely ban a certain product. This follows from the appellate body ruling on the case “European Communities—Measures affecting asbestos and products containing asbestos” from 2001.² The appellate body rejected Canada’s contention that asbestos fibers and non-asbestos fibers are to be considered “like products” in the meaning of GATT Article III. Just in case it also made clear that even if they were like products, the European Union would still be justified to ban asbestos products with recourse to the exception clause contained in GATT Article XX. Where WTO disputes have decided against measures aimed at consumption-externalities, this has been because the measures served more to protect domestic industries than the environment. Telling examples for this are the cases “United States—taxes on automobiles”³ and “United States—standards for reformulated and conventional gasoline.”⁴ As DeSombre and Barkin⁵ have succinctly put it:

The reason that the WTO, and the GATT before it, usually ruled against regulation that claimed environmental exceptions to international trade rules is that the regulations were not particularly good; they were either clear attempts at industrial protection dressed up in environmentalist clothes, or they were poorly thought through and inappropriate tools for the environmental management intended.

Production externalities refer to damage to the environment or human health connected to the production of goods. GATT panels used to decide against regulations aimed at so-called process and production methods (PPMs) *outside* the regulating country’s own proper jurisdiction—see the famous case of “United States—restrictions on imports of tuna” caught without dolphin-safe nets.⁶ However, the 1998 appellate body ruling and the follow-on 2001 arbitration panel decision in the by now equally famous case of “United States—import prohibition of certain shrimp and shrimp products” harvested without sea turtle excluder devices changed things fundamentally.⁷ The appellate body ruled that regulations aimed at PPMs in foreign countries need not necessarily violate WTO rules as long as the country imposing the restrictions has undertaken good-faith efforts at reaching a multilateral agreement, has applied the restrictions in a fair, non-arbitrary and non-discriminatory manner, giving affected countries some flexibility in how to achieve the aim of natural resource protection. Since the United States had not complied with these requirements at

2. WTO 2001a.

3. GATT 1994a.

4. WTO 1996.

5. DeSombre and Barkin 2002, 18.

6. GATT 1993; 1994b.

7. WTO 1998a; 2001b.

the date of ruling, the appellate body ultimately decided that the import ban was in violation of WTO rules.⁸ However, the arbitration panel dismissed Malaysia's complaint three years later that the efforts undertaken by the United States in the meantime were not sufficient steps into the direction of rendering the import ban compatible with WTO rules.⁹ The United States had started to negotiate in good faith international agreements on sea turtle protection and allowed shrimp to be imported on a shipment-by-shipment basis if it could be shown that sea turtles were not harmed even if these shipments came from countries, which had no comprehensive policy of sea turtle protection. With its ruling, the panel basically upheld for the first time trade restrictions aimed at PPMs outside a country's proper jurisdiction. That this ruling has not gained more widespread recognition among environmentalists, rightly prompted DeSombre and Barkin¹⁰ to contend that:

it was almost as though those campaigning against the WTO's record on trade and environment were loathe to admit that the organization could come up with a positive ruling in what had otherwise appeared to be a string of failures for environmental interests within the realm of free trade.

(b) Misunderstandings about the Dispute Settlement Process

In addition, there is some widespread misunderstanding about the dispute settlement process and its implications. Critics such as Thomas¹¹ find fault with the provision that an appellate body cannot reconsider the fact finding process itself and are limited to examining whether the panel has interpreted the WTO rules adequately in the light of its own fact finding process. However, this is not so different from the judicial system of most countries where similarly higher courts often restrict themselves to examining whether the lower court has applied the law correctly, but will not commence a new fact finding process.

He also criticizes that the appellate body in the shrimp-sea turtles case made reference to the negotiation history of Article XX and has thus conferred an "open-ended validity to the perspectives of negotiators of that by-gone time."¹² That dispute bodies resort to the negotiation history in interpreting rules is common practice, however. And to infer from this that the appellate body applied anachronistic arguments in its evaluations is highly misleading. To give an example: It is not without irony that the very same appellate body criticized by Thomas¹³ significantly extended the meaning of the terms "exhaustible natural resources," contained in GATT's Article XX. It noticed that while the term might have encompassed merely exhaustible mineral or other

8. WTO 1998a.

9. WTO 2001b.

10. DeSombre and Barkin 2002, 13.

11. Thomas 2004 (this issue).

12. Thomas 2004, 15 (this issue).

13. Thomas 2004 (this issue).

non-living natural resources by the time of drafting in 1947, the words of Article XX(g) “must be read by the treaty interpreter in the light of contemporary concerns of the nations about the protection and conservation of the environment.”¹⁴ Emphasizing that the WTO’s commitment to sustainable development in the preamble of the agreement establishing the WTO “must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement,”¹⁵ it ruled that exhaustible natural resources should therefore encompass both living and non-living resources.¹⁶

Critics like Thomas¹⁷ also often fail to recognize that even though WTO rulings become automatically authoritative unless consensually objected to by all its members, no country can actually be forced to remove the restriction that was found incompatible with WTO rules. What the country needs to be willing to do is to accept retaliatory trade sanctions in response, which it should if it is strongly committed to the environmental or health protection cause underlying the restriction. Admittedly, this is only possible for countries that are strong enough to weather the retaliatory trade sanctions. Thus, the EU has never lifted its import ban on beef from hormone-treated cattle and the United States has never lifted its import ban on dolphin-unsafe tuna. But this is not really an option for poor and small developing countries.

(c) WTO rules have not Deterred Multilateral Environmental Agreements

WTO rules have so far not hindered, let alone blocked, any multilateral environmental agreement (MEA). Most regional or international environmental agreements do not contain any trade-restrictive measures,¹⁸ but some do and they tend to be the more significant ones. It is important to note that no provision contained in a MEA or any trade restriction undertaken in (alleged) compliance with any MEA has ever been disputed at the WTO. This is despite the fact that some provisions in, for example, the Montreal Protocol, the Convention on International Trade in Endangered Species, the Basel and Rotterdam Conventions, the Agreement on Persistent Organic Pollutants and the Cartagena Protocol on Biosafety might well conflict with WTO rules. The same applies to the Kyoto Protocol and follow-up treaties. What this shows is that WTO members have shown great restraint in this area. Of course, the potential for clash creates some anxiety among negotiation parties. Those opposed to the MEA like to raise the concern of a potential clash with WTO rules to further their argument. Given the lack of agreement on how to resolve the potential for clash, recent MEAs are at pains to state that MEA rules do not supersede WTO rules and vice versa. However, to my knowledge it has yet to be shown convincingly that any recently negotiated MEA is less ambitious because of concern over a potential clash with

14. WTO 1998a, paragraph 129.

15. Ibid., paragraph 153.

16. Ibid., paragraph 131.

17. Thomas 2004 (this issue).

18. WTO 1994.

WTO rules, let alone that a MEA was not successfully concluded for that reason. At the EU's insistence, the compatibility between MEA and WTO rules also forms part of the current negotiation agenda, a point to which we return below.

(d) WTO is not Responsible for Lack of Environmental Policies

Where trade exacerbates environmental degradation, the fault lies with non-existing or insufficiently ambitious environmental protection measures. However, the WTO cannot be blamed for this. Much of the anger and frustration of environmentalists is wrongly channeled at the WTO and its representatives, whereas policy-makers in the WTO member countries are truly to blame. As argued above, the WTO puts few hindrances in the way of those enacting strong environmental protection measures and it should not be blamed if policy-makers fail to enact them. No doubt, we continue to observe environmental degradation on a large scale. There is also no doubt that trade liberalization can at times lead to increased environmental degradation if strong environmental policies are not in place. Where massive negative environmental externalities are allowed to exist, trade liberalization can be like a fresh breeze of wind on a house that is already set on fire. But it is the responsibility of the policy-makers from its member states, not the WTO itself, to put these policies in place.

The Major Environmental Challenges at the WTO: A Pessimistic Outlook

At the same time that the WTO's past environmental record is painted too negatively by its critics, there remain major environmental challenges and their successful resolution is highly unlikely.

(a) The WTO does little to Actually Promote Environmental Protection

There is little doubt that the WTO has not done much to promote environmental protection and that much more could be done. There has been very little progress toward removing trade barriers that are detrimental to the environment (so-called win-win options). These include fishery, agricultural, coal and road transport subsidies, all of which are harmful to the environment. But they also include restrictions on trade in environmental goods and services such as air, water and noise pollution abatement technologies, waste water and solid waste management techniques. If these restrictions were lifted the costs of environmental protection would be lowered, rendering strong environmental policy more attractive.

(b) WTO Rules Fail to Include the Precautionary Principle Adequately

The WTO's treatment of scientific uncertainty of environmental or human health damage is highly ambiguous and in dire need of resolution. The precau-

tionary principle allows preventive measures to avoid harm to the environment or human health even in the absence of definite scientific evidence. Such cases arise where such evidence is very difficult or even impossible to provide due to uncertainty and ignorance about future consequences. The incorporation of the precautionary principle within WTO rules is fundamentally unsatisfactory. First, the precautionary principle is currently found only in one WTO agreement, namely in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). This needs to be rectified since WTO members should have the right to justify trade-restrictive environmental or health protection measures with recourse to the precautionary principle outside the limited confines of this agreement. Second, in its current form, the SPS Agreement allows measures taken with recourse to the precautionary principle only provisionally, thereby ignoring the persistence of scientific uncertainty. Such uncertainty exists, for example, with respect to the dangers that mad cow disease (BSE), beef stemming from hormone-treated cattle or genetically modified organisms (GMOs) represent to human health. The SPS Agreement requires member states enacting restrictions to somehow “prove” with the help of a scientific risk assessment the existence and relevance of the dangers. However, given the high degree of uncertainty on either the likelihood of harm or the size of harm, such a requirement is wishful thinking.

A consequence of this very unsatisfactory treatment of scientific uncertainty within WTO agreements is that the WTO’s jurisprudence has become tainted by decisions that seem insensitive to environmental and human health concerns. This is why, for example, the appellate body upheld the panel’s finding that the EU import ban on beef stemming from hormone-treated cattle is in violation of WTO rules, even though the ban extends to domestic beef producers equally.¹⁹

(c) The Greatest Challenge: Overcoming the Current Impasse

The WTO’s predecessor, the GATT, has had a so-called Group on Environmental Measures and International Trade since the early 1970s, but it lay dormant for two decades. The Committee on Trade and Environment (CTE), established at the Ministerial Meeting in Marrakesh in April 1994, has discussed many issues over ten years now, but without any conclusive or definite results. The CTE has not become a frontrunner in triggering environmentally friendly reform of the multilateral trade regime, but a forum for rather fruitless discussions. The usual outcome of the CTE meetings is an agreement on members’ disagreement on the relevant issues.

True, the Doha declaration from November 2001 for the first time explicitly introduced the environment on the agenda for negotiations. However, on closer inspection, the commitment to negotiations is confined to the relation-

19. WTO 1998b.

ship between WTO rules and MEAs and to tariff and non-tariff barriers to environmental goods and services. All other items are relegated to further discussions in the CTE, which as argued above will lead to little. Furthermore, as Brack and Branczik²⁰ point out, it could happen that after the failure to reach any agreement on the negotiations in Cancun in 2003, WTO members might want to reduce the negotiation agenda to a more restricted set of topics. If that were to happen, the environment could fall off the agenda again.

More fundamentally, the problem is that there is not enough support among WTO members to render the organization and its rules more environmentally friendly. Practically all developed countries are in favor of some greening, partly by conviction, partly due to pressure from civil society. But their support is partial. For example, the US and Canada are most reluctant to assign any more prominent role to the precautionary principle and the EU is highly reluctant to reduce agricultural subsidies. But the greatest and almost unanimous opposition comes from the developing world. Their representatives do not trust the alleged idealistic intentions and suspect that the greening of WTO rules is old protectionism in new environmental disguise.²¹ Marching arm in arm with United States trade unions in the streets of Seattle at the Ministerial Meeting in 1999 was a silly thing to do for environmental groups. However, developing country opposition to a greening of WTO rules is rooted in a much deeper frustration with the distribution of benefits from the WTO agreements, which are regarded as biased toward developed country interests. Perhaps the greatest challenge then is to reform the WTO rules in a way that is beneficial to developing countries and therefore acceptable to them. If environmentalists and developed country representatives do not succeed in convincing developing countries that more environmentally friendly trade rules need not be detrimental to their economic development aspirations, then any progress at the WTO will be relegated to the panels and appellate body in the resolution of environmentally relevant disputes.

It will be of tremendous interest to see how the panel and appellate body will decide in the pending complaint of the US, Argentina and Canada against the EU five year de-facto moratorium on GMOs. The complainants argue that GMOs are perfectly safe, whereas the EU points towards scientific uncertainty about the health and environmental consequences of GM products. The problem for the panel and appellate body should the dispute not become resolved in the interim is that if they decide in favor of the complainants they jeopardize the substantial progress that WTO jurisprudence has made toward accommodating environmental concerns. If they decide against the complainants they risk being accused of exceeding their competence and stretching the interpretation of existing WTO agreements to the extent of changing their substance (from rule interpreter to rule maker). This complaint was already leveled against

20. Brack and Branczik 2004.

21. Neumayer 2001; and Williams 2001.

the appellate body in the shrimp-sea turtle case discussed above. However, that these bodies fill the void is a logical consequence of the WTO member states' failure to lead the WTO-environment relationship out of its current impasse.

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