

International Concerns of Environmental Law

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Abstract: Being a social animal and being interdependent upon the natural cycle, humans on this planet earth walk day by day in the search of his source of survival, thus when man begins to develop he formulated the Social contract theory, which brought it in to a form of trading which he tends to surrender to one sovereign, the wise man, he who provides him with what he need. Thus slowly and steadily it develops in to vast commercial activity and as a result it begins the era of manmade laws, their formulation, interpretation and execution. And for this reason the trade and environment debate now has a familiar ring. It refers to the need for, and the challenges of, reconciling increasingly free international trade with the prerequisites of environmental protection.

Keywords: Environmental Law, International Concerns

I. INTRODUCTION

The debate has its origins in the apparent contradiction between two premises. Some argue that free international trade is a precondition for realizing environmental protection and social progress. The opposite view holds that unlimited free trade damages the environment, inter alia through a lack of internalization of the environmental costs caused by manufacturing. In this view, corrective mechanisms are necessary, if not to limit trade, then at least to ensure its environmental outlook. It argues that environmental protection is a main task for humanity that requires far-reaching cooperation in the international community, including the possible use of trade sanctions to encourage environmentally friendly behavior. Trade and the environment emerged in the 1980s, as states' and people's awareness for environmental issues grew.¹ Preamble of the WTO Agreement states that sustainable development is an objective, "seeking both to protect and preserve the environment".ⁱⁱ The early 1970s saw significant international legal developments regarding the intersection of trade and environmental issues, notably the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora.ⁱⁱⁱ

II. INTERNATIONAL AGREEMENTS.

International trade agreements are primarily aimed at the removal of trade barriers. International environmental agreements, on the other hand, partly contain obligations for

countries to restrict the trade with certain dangerous goods (like chemicals or waste) or components of the natural environment (like protected species). This leads to a certain tension between trade and environmental agreements. There is also the risk that international trade agreements narrow the scope of states to establish environmental protection measures. This is especially discussed critically in the context of the negotiations about the Transatlantic Trade and Investment Partnership (TTIP).¹

III. INTERNATIONAL EFFORTS TO ADDRESS ENVIRONMENTAL CONCERNS

On a global basis International Efforts to Address Environmental Concerns began in 1973, the most notable being the Declaration of the United Nations Conference on the Human Environment.² Prior to this period, international environmental protection efforts generally took the form of agreements to conserve exhaustible natural resources for their economic value, rather than their ecological value. In 1947, the General Agreement on Tariffs and Trade³ made room for the conservation of exhaustible natural resources by providing a general exception to GATT obligations in Article XX (g). However, the wording of this GATT provision did not limit the exception to conservation for economic value alone. A central issue in the trade and environment debate concerns the use of trade barriers by one country to induce changes in the environmental policies of another. Such trade barriers might be used in the context of a multilateral environmental agreement, such as CITES, which requires restrictions on trade

¹ Christiane Gerstetter, The Relationship between International Environmental and Trade Agreements (Senior Fellow in Ecologic Institute's legal team Hofgeismar Germany)

² Declaration of the United Nations Conference on the Human Environment (Stockholm), (1972)

³ General Agreement on Tariffs and Trade, 15 April 1994

in endangered species, or the Montreal Protocol on Substances that Deplete the Ozone Layer,⁴ which requires signatories to restrict trade in ozone-depleting chemicals. When such trade barriers are applied to other signatories of the same multilateral environmental agreement, their use is not controversial. However, when trade barriers are imposed unilaterally by one country to induce another country to change its domestic environmental law, the matter becomes much more complicated, both in terms of international politics and international law.

IV. OBJECTIVE OF THE WORLD TRADE ORGANIZATION.

The fundamental objective of the WTO is to reduce barriers to trade in order to increase global welfare through the efficient allocation of resources based on the concept of comparative advantage. Differences in the level of technological, economic and institutional development affect the ability of developing countries to implement both international trade obligations and international environmental obligations. The preamble recognizes that levels of economic development affect the priority given to environmental protection and that improving environmental protection requires enhancing the means for doing so. This is consistent with Principle 11 of the Rio Declaration, which states that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. The Rio Declaration represents a statement of principles reflecting the broad consensus achieved among the nations of the world in 1992, as the Uruguay Round was drawing to a close. As such, it provides evidence of the circumstances surrounding the drafting of the WTO preamble.

V. CONFLICTING POLICIES OF GLOBAL TRADE LIBERALIZATION AND GLOBAL ENVIRONMENTAL PROTECTION

The preamble of WTO does not spell out methods for enhancing the ability of members to protect the environment, in the context of the WTO mandate this likely means raising incomes through gains from trade, enhancing technological capacity through technology transfer and technical assistance, and institution building through training and studies. All of these methods are features of the WTO system. The fundamental premise of the WTO system is that trade liberalization will raise incomes. Technology transfer is promoted indirectly through TRIPS.⁵ The liberalization of trade in environmental technologies and services provide

further means of enhancing the ability of members to improve environmental protection. All of these methods of enhancing environmental protection are in conformity with the fundamental WTO themes of trade liberalization and special treatment for developing countries. They also are consistent with Principle 9 of the Rio Declaration, which states that states should cooperate to strengthen endogenous capacity-building for sustainable development through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies. The WTO preamble establishes a hierarchy of objectives that is reflected in both the language used and the order in which objectives are laid out. The preamble uses distinct language for environmental protection and sustainable development. Seeking environmental protection only means making an effort in this regard. Moreover, the order of appearance of this objective implies that environmental protection is secondary to the objective of raising incomes through trade liberalization, in the context of the WTO mandate. In contrast, sustainable development is more closely integrated into the economic objectives set out in the preamble. The underlying premise is that the fundamental objective of trade liberalization is consistent with the concept of sustainable development. Allowing sustainable developments means interpreting trade obligations to permit measures that have this aim, whether through the interpretation given to trade obligations or through the interpretation of exceptions to those obligations. The phrase 'in accordance with sustainable development' implies mutual adaptation and harmony of the objectives of trade liberalization and sustainable development. Mutual adaptation means that the concept of sustainable development should accommodate trade liberalization and that trade obligations should accommodate sustainable development. Arguably, this means that the interpretation of trade obligations, not only the exceptions to those obligations, should accommodate the concept of sustainable development.

VI. MEASURES RELATING TO CONSERVATION

Article XX (g) has played a central role in GATT and WTO cases involving environmental issues. GATT panels tended to interpret XX (g) as restrictively as Article XX (b). In Canada - Measures Affecting Exports of Unprocessed Herring and Salmon,⁶ a GATT panel examined regulations under the Canadian Fisheries Act 154 that prohibited the export of unprocessed herring and salmon from Canada. The GATT panel concluded that 'the export prohibitions were contrary to Article XI: 1 and were justified neither by Article XI: 2(b) nor by Article XX (g)'.¹⁵⁵ The panel developed a 'primarily aimed at' test in its interpretation of the words 'relating to' under

⁴ Montreal Protocol on Substances that Deplete the Ozone Layer, September 1987

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994

⁶ Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, GATT BISD, 35th Supp

GATT Article XX (g). This test characterized the purpose of a measure by comparing its effect on the environment to its effect on trade. If the measure is not an effective means of environmental protection, but is an effective trade barrier, then the measure does not 'relate to' environmental protection and is treated as a simple trade barrier rather than an environmental measure. Canada advised the United States that it would accept the GATT decision and remove the export restrictions, but added 'that our conservation and management goals cannot be met unless we continue to have a landing requirement'.⁷ The United States considered that such a requirement would seem 'designed to have the same effect as the GATT illegal export restrictions'.⁸ The Canadian government replaced the export prohibitions with new regulations requiring the same fish, plus a few additional species of salmon, to be landed at stations in the west coast province of British Columbia. Once landed, the regulations required the completion of catch reports, reporting of landings, on-site examination, and biological sampling.⁹ The United States challenged Canada's landing requirement as an export restriction that was designed to favour Canadian fish-processing plants, this time under the new Canada-United States Free Trade Agreement.¹⁰ Canada said the measure was necessary to ensure accurate data collection for the purpose of managing the resource. The relevant obligations and exceptions in the FTA mirrored those of GATT 1947.

VII. CONFLICTS BETWEEN GENERAL AGREEMENT ON TARIFFS AND TRADE AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

An important issue is whether any distinction should be made between trade measures taken pursuant to multilateral environmental and conservation agreements and those that are not. There is nothing in Article XX (g) of WTO that explicitly distinguishes between measures applied as part of an international agreement and other measures.¹¹ The relevance of the distinction between measures taken under MEAs versus measures taken unilaterally was raised in the Shrimp case.¹² The Appellate Body stated a clear preference for measures taken under international agreements over measures taken unilaterally, but upheld a unilateral measure because serious efforts to conclude an international agreement had failed. However, with respect to their parties, MEAs fulfill the key requirements that were imposed on the United States with

respect to its unilateral measure in the Shrimp case. Most MEA trade measures can be characterized as addressing the protection of transboundary or global resources.⁹³ where a country does not have a territorial nexus with the environmental problem; the MEA provides a legal nexus and may provide evidence that the subject matter is global, if not transnational. MEAs thus provide the jurisdictional nexus and cover subject matter that qualifies MEA trade measures for provisional justification under Article XX (g). The conclusion of the MEA fulfils the duty to negotiate. However, the fulfillment of the requirement for flexible and transparent application of the measure cannot be assumed with respect to the implementation of MEA obligations in national law. MEA trade measures must therefore remain subject to WTO scrutiny.

VIII. TRADE AND DOMESTIC POLICY.

Trade can impact domestic as well as international policy, weakening the autonomy of nations to define their own environmental and social policies. Concerns have arisen of a "race to the bottom", in which nations reduce environmental and social standards in order to gain competitive advantage. The North American Free Trade Agreement has produced cases in which corporations have challenged environmental regulations as barriers to trade. The Canadian asbestos¹³ industry sought to remove U.S. restrictions on the sale of cancer causing asbestos products, while the U.S. pesticide industry challenged strong Canadian pesticide regulations. In one case, the Ethyl Corporation (based in the U.S.) successfully overturned a Canadian ban on the importation and sale of the gasoline additive MDMA, a chemical suspected to cause nerve damage. Canada was required not only to eliminate the ban, but also to pay \$10 million compensation to Ethyl Corp. for legal costs and lost sales. Trade expansion may also have direct or indirect beneficial effects on the environment. According to the theory of comparative advantage, trade causes countries to become more efficient in their use of resources, thereby conserving resources and avoiding waste. Trade liberalization may also involve removal of distortionary subsidies and pricing policies, improving the efficiency of resource allocation. For example, widespread subsidies on chemical fertilizers and pesticides promote environmentally harmful farming methods – but such subsidies to domestic producers are generally prohibited in trade agreements. Eliminating these subsidies would promote

⁷ Letter of Canadian Minister for International Trade, Pat Carney, to United States Trade Representative Clayton Yuetter, March 21, 1988

⁸ Letter of United States Trade Representative Clayton Yuetter to Canadian Minister for International Trade John Crosbie, May 2, 1988

⁹ Pacific Herring Fishery Regulations, amendment, SOR/89-217, 2384 - 85(Canada Gazette Part II, Vol. 123, No. 10)

¹⁰ Canada-United States Free Trade Agreement, 22 December 1987

¹¹ Submissions of the United States, United States—Restrictions on Imports of Tuna, GATT BISD, 39th Supp, 155, 1991

¹² US -Shrimp, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755

¹³ EC – Asbestos, Canada v. European Communities, WT/DS135/12, 11 April 2001.

both economic efficiency and environmental sustainability. Trade may also encourage the spread of environmentally friendly technology. In energy production, for example, many developing and formerly communist nations are heavily dependent on old, inefficient, high-polluting power plants. Trade can facilitate the replacement of these plants with modern, highly efficient combined cycle facilities or (as in India) encourage a growing wind - power sector. Multinational companies, sometimes seen as offenders in the exploitation of developing country resources, can also introduce efficient technologies into industrial sectors. Multinationals may be responsive to domestic political pressures to develop cleaner industrial processes, which they then disseminate throughout their worldwide operations. On the negative side, globalization of trade can also create “boomerang” effects through the transboundary exchange of externalities. Poor laborers who apply pesticides without safety precautions suffer harmful effects, as do adults and children who drink water from streams polluted by runoff. In addition, harmful effects return to the United States through fruits containing residues of dangerous chemicals.

IX. CONCLUSION

ⁱ Geert van Calster, International Trade and the Environment, (Katholieke Universities Leuven, Belgium)

ⁱⁱ Preamble, Marrakesh Agreement Establishing the World Trade Organization

The relationship between trade and environmental quality is clearly complex. Economic growth based on free trade reduces some negative environmental impacts but exacerbates others. Although the WTO recognizes a special exception to trade rules under Article XX for resource conservation and environmental protection, its panel rulings have interpreted this narrowly. WTO authorities tend to be suspicious of “green protectionism” – the use of trade barriers to protect domestic industry from competition under the guise of environmental regulation. They are also unsympathetic to efforts by nations to use trade measures to affect environmental policy outside their borders. Where effective environmental protection policies are lacking at the regional or global level, national policies are needed to address trade-related environmental issues. Certification and labeling requirements, instituted by governments or by private nongovernmental organizations, can help to promote consumer awareness and “greener” corporate practices in international trade.

ⁱⁱⁱ Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, entered into force 1 July 1975)