WTO and the Environment: Case Studies in WTO Law

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1. Overview:

1. Trade and Environment: the Debate
2. The Multilateral Trading System
   - World Trade Organization
   - Principles
   - Dispute Settlement
3. Environmental Issues
   - Clauses
   - Examples
   - Cases
2. Trade and Environment Debate

The Fragmented Structure of Public International Law:

• Horizontal structure
• Sovereign Equality of States
• Equality of Sources (Art. 38 ICJ St.)
• Environmental Law and International Trade Law
  • Develop in separate fora / Rule of Presumption
• Both:
  • Global concern
  • Proliferation of treaties
  • Building of regimes, incl. compliance structures
3. MEAs and WTO law

- Difficult implementation of MEAs that use trade restrictions or Trade Related Environmental Measures (TREMIs):
  - Providing comparative advantages
  - Treating imported goods less favourably
  - Restricting access to markets
  - Favouring goods from certain countries (MEA member states)
4. Trade and Env.: Example

Vienna Convention for the Protection of the Ozone Layer, Art. 2 para 1

“The Parties *shall* take appropriate measures... to protect human health and the environment against adverse effects resulting....from human activities which modify...the ozone layer.”

Montreal Protocol, Article 4: Control of trade with non-Parties

1. As of 1 January 1990, each party *shall ban* the import of the controlled substances in Annex A from any State not party to this Protocol.
5. Unilateral Environmental Measures and WTO law

- Rules on international trade could frustrate attempts to protect resources and the environment beyond areas of national jurisdiction (extra-territoriality).

- Trading system could prevent nations from adopting measures to protect their domestic environment (e.g. environmental standards for products and services etc.).

- Trading system could obstruct efforts to compel other countries to adopt high environmental standards.
6. The WTO

- Result of the Uruguay Round: January 1995
- International Organization
- Governing Bodies: Ministerial Conference and General Council
- 153 members
- Purpose:

  ‘ to facilitate the implementation, administration, and operation as well as to further the objectives' of the WTO Agreements ‘
7. The WTO

Preamble:

‘all trade relations should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.’

(1994 Marrakesh Agreement, Preamble, para 1)
8. Dispute Settlement System

• Compulsory

• Administered by the Dispute Settlement Body (DSB)

• Jurisdiction: Art. 1 (‘covered agreements’) listed in Appendix I of the DSU

• Interpretation: Art. 3.2 DSU: in accordance with customary rules of interpretation of public international law (= reference to the VCLT)

• P: general international law: Art. 31.3(c) VCLT "application of any relevant rules of international law applicable in the relations between the parties"
9. Dispute settlement system

• Legal effect: Panel and Appellate reports are binding on the parties to the dispute (if adopted by the DSB), no precedent

• Consultations, adjudication by panels (ad hoc), appeal to the Appellate Body (standing body)

• Decisions must be implemented within reasonable time, otherwise subject to sanctions
10. Rules and Principles

Aim:

• Reduction of trade and market access barriers
• Promotion of non-discrimination
  • border measures, tariffs, quota, customs regulations, import licensing, certification
  • national regulations and practices that have a protective effect
• focus on explicit, government imposed trade obstacles
11. Most Favoured Nation (MFN)

GATT 1947
Part I, Article I: General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind ..., any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
12. National Treatment (NT)

GATT 1947
Article III:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
13. ‘Environmental’ Provisions:

- **GATT Article XX**: policies affecting trade in goods for protecting human, animal or plant life or health are exempt from normal GATT disciplines under certain conditions.

- **Art. 2.2 Technical Barriers to Trade (TBT)** (i.e. product and industrial standards), and **Art. 2.1. Sanitary and Phytosanitary Measures (SPS)** (animal and plant health and hygiene): explicit recognition of environmental objectives.

- **Agriculture**: environmental programmes exempt from cuts in subsidies.
14. ‘Environmental’ Provisions:

- **Subsidies and Countervailing measures (SCM):** allows subsidies, up to 20% of firms’ costs, for adapting to new environmental laws.
- **Intellectual property:** governments can refuse to issue patents that threaten human, animal or plant life or health, or risk serious damage to the environment (TRIPS Art 27).
- **GATS Article XIV:** policies affecting trade in services for protecting human, animal or plant life or health are exempt from normal GATS disciplines under certain conditions.
15. Art. XX GATT: Environmental Exceptions:

**Article XX: General Exceptions**
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ....

(b) necessary to protect human, animal or plant life or health;

....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...
16. Cases:

• European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 12 March 2001
• Brazil - Measures Affecting Imports of Retreaded Tyres 7 December 2007, WT/DS/332AB/R
17. EC-Biotech

Case:

• Facts of the case
• The matter of Risk: GMOs and scientific uncertainty
• SPS and TBT Agreements
• DSU Art. 3.10
• Cartagena Protocol on Biosafety
• Precautionary Principle
• Status Quo
18. Suggestions

• Need to protect environmental interests

• Suggestions:
  • Amendment of Art. XX (b) to extent the ‘necessity’ test so as to include trade measures that are ‘reasonably necessary’ for the protection of the domestic environment (would remove the strict requirement of ‘least trade restrictiveness’)
  • Amendment of Art. XX as to include a general exception for multilateral environmental agreements and measures that are reasonably related and reasonably necessary to the object and purpose of these agreements
19. Conclusions

- no synthesis of trade and environment

- important role of general public international law:
  principles of treaty interpretation, general principles: Sustainable development, precautionary principle, good faith, equity – but also these principles are evolving/developing
21. Conclusions

- need to closely observe the development of International Environmental Law (and other areas of law, e.g. Human Rights issues) in order to interpret the provisions of the WTO Agreements according to Art. 31.3. VCLT “interpretation together with subsequent agreements between the parties (31.3.a) and any relevant rules of international law (Art. 31.3.c)

- The stronger IEL becomes, the more does it have the potential to be upheld against WTO claims