Trade and Environment

JUS5520 International Environmental Law
Today’s lecture: overview and structure

I. Trade and environment: intersectional issues
   • environmental standards, economic competitiveness and sustainable development

II. Trade measures in international environmental treaties
   • potential conflict in the realm of global or regional trade agreements (WTO, GATT, EU, NAFTA, AEC etc.)

III. Unilateral (environmental) measures which limit trade: case law
   • Environmental measures in GATT
   • Health and safety measures in SPS
   • Grey zone: environmental measures in SPS

IV. Investment treaties
   • the case of the TTIP and CETA
I. Intersectional nature of trade and environmental measures

In order to achieve sustainable development, *environmental protection shall constitute an integral part of the development process* and cannot be considered in isolation from it.

*Principle 4, Rio Declaration*

**Making trade and environment mutually supportive?**

*The international economy should provide a supportive international climate for achieving environment and development goals* by...the integration of environmental concerns into decision-making

*Agenda 21*
II. Examples of trade measures in MEAs

a) Agreements to protect wildlife
   • *CITES*

b) Agreements to protect the environment of the importing state from harmful organisms and products
   • *Bamako Convention*
   • *Basel Convention*
   • *Rotterdam Convention*
   • *Biosafety Protocol*

c) Agreements to protect global commons
   • *Montreal Protocol*
   • *Kyoto Protocol*

Conflicts
- *lex specialis*
- *lex posterior*
- *treaty solution*
III. Unilateral (environmental) measures limiting trade

*Agenda 21, para. 39.3 (d)*

- Trade policy measures for environmental purposes **should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.**
- Unilateral actions **to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.**
- Environmental measures addressing **international environmental problems** should, as far as possible, be based on an international consensus.

*Rio Declaration, Principle 12, same language except for:*

- Environmental measures addressing **transboundary or global environmental problems** should, as far as possible, be based on an international consensus.
• General Agreement on Tariffs and Trade (1994 GATT);
• General Agreement on Trade in Services (GATS);
• Agreement on Trade-Related Aspects of Intellectual Property (TRIPs)
• Agreement on Technical Barriers to Trade (TBT Agreement)
• Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)
WTO case law

**Reformulated Gasoline**
- Shrimp/Turtle I-II
- Asbestos (TBT)
- Environmental measures in GATT
- Brazil Retreaded Tyres case

**Beef Hormones**
- Australia Salmon
- Japan Varietals
- Health and safety measures in SPS
- Japan Apples
- Australia Apples

**EC-Biotech**
- Continued Suspension of Obligations
1996 Reformulated Gasoline case

Brazil and Venezuela vs. US

Acts: the US Clean Air Act (Gasoline rule)

Measures:
- individual refinery baselines for domestic refiners
- statutory baselines for foreign refiners

US: GATT Art. XX (b) ‘necessary to protect human, animal or plant life or health’ and (g) relating to the conservation of exhaustible natural resources.
1996 Reformulated Gasoline case

Panel’s findings
- inconsistent with Article III (4) and the obligation of national treatment
- ‘air’ can constitute a natural resource that can be depleted and hence a policy of clear air was policy for conserving exhaustible natural resources in the meaning of Article XX (g)
- that there was no direct connection between the less favourable treatment of foreign refiners through statutory baselines rules and the aim to conserve a natural resource

AB’s findings
- the burden of proof to justify the measure under the chapeau of Article XX rests with the party advancing the measure
- the US could achieve its policy goal by:
  • Setting statutory baselines for domestic refiners;
  • Allowing foreign refiner to use individual baselines;
1998 Shrimp/Turtle case

India, Malaysia, Pakistan and Thailand vs. US


Measures: shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the harvesting nation was certified.

Alleged violations: Art. XI (1) GATT (General Elimination of Quantitative Restrictions), Article XX chapeau
1998 Shrimp/Turtle case

Panel’s findings

• the import ban was inconsistent with Article XI (1) (General Elimination of Quantitative Restrictions) of GATT 1994.
• could not be justified under any of the exceptions in Article XX

AB’s findings

• asked whether section 609 was provisionally justified under Article XX (g) and invoking the principle of sustainable development (as an aid to interpretation) and it found that it was so justified
• asked whether Sec. 609 met the requirements of the chapeau of Art. XX and concluded that it did not because it imposed unjustifiable discrimination and arbitrary discrimination against shrimps to be imported from the claimant states (no engagement in multilateral agreement, e.g. no ratification of the Biodiversity Convention)

plainly discriminatory and unjustifiable
Malesia vs. the US

**Acts:** ‘Revised Guidelines for the implementation of Section 609 of Public Law 101-162 relating to the protection of Sea Turtles in Shrimp Trawl Fishing Operations’

**Measures:** the US did not lift the ban on shrimp import

**AB’s findings**
- confirmed the US’s good faith regarding the conclusion of multilateral agreements
- rejected the claim that the revised guidelines were not sufficiently **flexible** to meet the requirements of the chapeau of Article XX
2000 Asbestos case

Canada vs. France

Acts: French national decree

Measures: banned asbestos and asbestos-containing products subject to time-limited exceptions for certain existing products containing chrysotile fibres….only when no safer substitute was available and provided that all technical guarantees of safety (workers’ health mainly) were in place.

 Alleged violations: Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Articles III, XI and XIII of GATT 1994.
2000 Asbestos case

Panel’s findings
- the **general ban** established did not amount to a “technical regulation” in the TBT definition of the term
- the **temporal exemption** of the decree which temporarily exempted the chrysotile fibres, violated Article III (4) GATT (*less favourable*) but that it was justified under Article XX (b) of the GATT (*necessary to protect human, animal or plant life or health*)

AB’s findings
- the French ban **was a technical regulation**
- regrading the interpretation of the term ‘**like products**’, the following shall be taken into account:
  – The properties, the nature and the quality of products;
  – The end uses of the products;
  – Consumers’ taste and habits with regard to such products;
  – The tariff classification of the products.
Measures on health and safety protection under the WTO/SPS

Article 2.4 Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994, Article XX(b).

Article 3.1 Measures that comply with harmonized international standards are presumed to be consistent with the SPS agreement.

Article 5.1 stricter measures are to be based on risk assessment which takes into account, inter alia, available scientific evidence and relevant processes and production methods, and relevant ecological and environmental conditions.

Article 5.7 In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information.
1996 Beef Hormones case

Canada and the US vs. EC


Measures: prohibition on imports of meat or meat products derived from cattle to which either natural hormones (17β-estradiol, progesterone, testosterone) or certain synthetic hormones (zeranol, melengestrol acetate and trenbolone acetate) have been administered for growth-promotion purposes.

Alleged violations: Article 5.1 (RA) Article 3.3 (provide scientific justification for higher levels of SPS protection than that offered by international harmonized standards) Article 5.5 (arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations)
1996 Beef Hormones case

Panel’s findings
- the EU measure was inconsistent with Article 5.1 (RA)
- the import prohibition was inconsistent with Article 3.1 and 5.5
- stated nevertheless the importance of the precautionary principle

AB’s findings
- overturned the Panel ruling on Art. 3.1 which does not require that states harmonise their SPS measures by conforming those measures to international standard
- article 3.3 SPS Agreement gave member states autonomous right to establish their own level of SPS protection, which might very well be higher than that pursued by international standards
- the EU had not performed a RA that reasonably supported or warranted the import ban
2003 Continued Suspension of Obligations dispute

The EU seeking trade sanction to be lifted in the light of new scientific evidence submitted

Panel

....there must be a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient.

AB

The EU studies did not amount to RA in the sense of Article 5.1
2006 EU-Biotech case

US, Canada and Argentina vs. EU

Acts: Directive 98/44/EC on the legal protection of biotechnological inventions

Measures: a *de facto* moratorium on GMOs by not implementing the decision-making procedure laid down in the directive; decision of several EU member states to restrict the growing and sale of GMOs and GMO food, in the form of a *safeguard measure*.

Alleged violations: Art. 2.2 and 5.1 of the SPS Agreement
Panel's findings

• did not preclude that prudent and precautionary approach could be taken in order to **identify, assess and manage risk** arising for humans and the environmental form GMOs and GMO based products.

• added that the PP should be always subject to reasonable limits and in this case did not provide a justification for a delay.

• referred to the *Biosafety Protocol* which the Panel held, taking into account **Article 31 (3)(c) of the VCLT**, must be applicable to all members of the WTO in order to be relevant for the purposes of interpretation. So the consequence is the **beyond environmental treaties with universal participation, this finding rules out the possibility to refer to international environmental conventions as part of applying SPS or other WTO rules.**
What risk assessment?

“There is no ordinary meaning of RA as it takes its definitions from the institutional cultures in which it operates.”

Winickoff et al. ‘Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law’
“In terms of science/democracy dichotomy, national risk regulations standards are the product of sovereign nation’s democratic processes, and, as such, reflect the values that that nation’s citizenry espouses.”
IV. Investment treaties

WSSD Plan

- greater flows of direct investments in order to support sustainable development activities in developing countries

- in order to encourage such flows, some guarantees ought to be provided

BITs 2750 (1400, EU only)
BITs

1. Guarantees

- protection against expropriation
- protection against unfair treatment

2. Arrangements -- domestic and international -- to seek major protection such as the investor-state dispute settlement mechanisms (ISDS)

- World Bank’s International Center for the Settlement of Investment Disputes (ICSID)
- United Nations Commission on Intellectual Trade Law (UNCITRAL)
TTIP and CETA
TTIP and CETA: main features

• to remove regulatory ‘barriers’ which restrict the potential profits to be made by transnational corporations on both sides of the Atlantic

• a new right to sue sovereign governments in front of *ad hoc* arbitration tribunals for loss of profits resulting from public policy decisions on the basis of a *investor-State dispute settlement (ISDS)*
Areas to be significantly affected by TTIP/CETA

- **Food safety deregulation**
  GMO, Beef Hormones, food additives, food contact materials, drugs

- **Environmental deregulation**
  REACH (vs. TSCA), biocide (vs. FIFRA), cosmetics

- **Public services deregulation**
  Health, education, water
ISDS in liberal constitutional democracies?

- Subsidiarity
- Impartiality and independence
- Constitutional guarantees

“An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege” by Prof. Mattias Kumm

http://www.esil-sedi.eu/node/944
As TTIP and CETA currently stand

“…today’s Empire would not be the Empire of France, Britain, the US or even “the West”. It would be the **global Empire of capital**. In that Empire those enjoying special protection would not be nationals of any country, but foreign investors. And among the colonized would be the citizens of the traditional western heartlands, who find themselves confronted with the unintended consequences of their own hypocrisy.”

“An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege” by Prof. Mattias Kumm

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Thank you! 😊

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