

Trade and environment; challenges

- Use of multilateral trade regulations to achieve environmental goals
 - Montreal Protocol
 - CITES
 - Biosafety Protocol
 - Rotterdam Convention
 - Minamata Convention
 - Basel Convention
- Use of unilateral trade regulations
 - US – Shrimp / Turtles case
 - EC – Hormones case
 - EC – Asbestos case
 - Brazil – Retreaded Tyres case

Trade and environment: objectives

- A convergence of objectives?
 - Sustainable development as a common denominator?
 - Acknowledged in the preamble to the WTO
 - WTO / MEAs: Mutual supportiveness
 - The debate over “savings clauses” in MEAs
- Negotiations: “win-win(-win)”
 - The Doha mandate: was it helpful?
 - WTO vs. MEAs – overlap of parties, no change to WTO
 - Environmental goods and services
 - Environmentally harmful subsidies – fisheries
 - CTE: environmental measures, TRIPS and labelling
 - Trade in domestically prohibited goods
 - Environmental impact assessment of trade

Mutual supportiveness

- Environmental measures seen as efforts to correct market failures
 - Long term vs. short term
- Trade rules as leading to economic effectiveness
 - Is environmental sustainability a consequence of economic effectiveness?
- Rules on trade in MEAs
 - Examine this in detail
- Rules on environment in the WTO

Positive measures to protect the environment under WTO?

- Division of work between WTO and MEAs
 - Trade measures under MEAs vs. environmental measures under WTO?
 - Support trade in environmental goods and services
 - Prevent environmentally adverse policies
- The question of "compensatory measures" – the responsibility of whom?
 - International or domestic responsibility?
 - Identify relevant and necessary measures
 - Ensure that relevant measures are available
 - Ensure that measures are implemented
 - Ensure co-ordination

EIA of trade negotiations

- Main issue in the OECD, taken up by the EU
- Assessment of regulatory consequences, including effects on availability of measures
 - Examples: New rules on services – requirement to follow international standards / new rules on investment
- Assessment of actual effects in various sectors
 - Effects of increased trade
 - Effects of “deregulation”
- Identification of “compensatory measures”
 - Measures to offset potential consequences

Overview of rules of WTO I

- Trade in goods vs. trade in services
- Obligation to reduce border measures
 - Quantitative restrictions (GATT art. XI, services: GATS art. XVI – market access)
 - Tariffs / other border duties (GATT art. II)
 - Other custom formalities (separate agreements)
 - Export subsidies (GATT art. VI, SCM agreement)
- Rules on non-discrimination
 - National treatment and most favoured nation treatment (GATT art. III, TBT and SPS agreements, GATS art. XVII)
 - Explicit and implicit discrimination

Overview of rules of WTO II

- Minimum requirements concerning internal regulation
 - Duty to avoid unnecessary restrictions on trade (TBT agreement art. 2.2, SPS agreement art. 2.2)
 - Encourage use of international standards (TBT agreement art. 2.4, SPS agreement art. 3.1)
 - Regulation of use of subsidies for agricultural purposes (Agriculture Agreement)
 - Duty to protect intellectual property rights (TRIPs Agreement)
- General exceptions
 - Art. XX of GATT and Art. XIV of GATS
- Conclusion: Broad range of measures can be regarded as "trade measures"

Why "trade measures" in MEAs

- Carrots vs. sticks
 - Why have MEAs preferred "carrots"?
 - The problem of non-parties; free riding
- Four main reasons
 - Trade generates the environmental problem
 - Trade measures are the most effective ways to deal with the problem
 - Prevent non-parties from undermining the environmental objectives (i.e. offset benefits of non-compliance)
 - Punish non-compliance

Trade measures in CITES

- Trade in endangered species as a problem
 - Linked to overexploitation
 - Less significant than other factors(?)
- Between parties
 - Ban combined with a system of prior informed consent
 - Three lists - sustainable use vs. conservation
 - Appendix 1 - trade ban, but exemptions, Appendix 2 - export permit, Appendix 3 - concern of country of origin
- Vis-à-vis non-parties
 - Only trade when documentation comparable to the one required between parties

Montreal Protocol

- Objective: Phase out production and use of ozone depleting substances (ODS)
 - Differentiated responsibilities for developing countries
- Between parties
 - Established a licensing system for trade
 - Ban on export to parties in non-compliance
- Vis-à-vis non-parties
 - Ban, with exception if non-parties comply with the requirements of the Protocol
 - Extend to products made with but not containing ODS, but not applied in practice

Basel Convention

- Main objectives:
 - Prevent export of hazardous wastes to countries that cannot treat it appropriately
 - Treat the wastes close to the source
- Establishment of lists of relevant waste
- Between parties
 - Prior informed consent
 - Ban on export to developing countries - not in force
- Vis-à-vis non-parties
 - Transboundary movement must comply with the the obligations (art. 9)

Rights under WTO in disputes

- Key provision: VCLT art. 31.3(c)
 - «There shall be taken into account, together with the context: ... any relevant rules of international law applicable in the relations between the parties.»
- Between parties to the MEA
 - The MEA is likely to prevail - *lex posterior* / *lex specialis*: will a case be rejected?
 - Unclear obligations under the MEAs
 - Lack of appropriate dispute settlement mechanisms
- Between a party and a non-party to the MEA
 - The WTO Agreement is likely to prevail
 - The main question is to what extent account will be taken of the MEA under the general exceptions

Unilateralism (Rio decl. princ 12)

- What is unilateralism?
- Why may unilateralism be necessary?
 - Lack of willingness to deal with environmental problems
 - Transboundary effects
 - Time and irreversibility
- Problems related to unilateralism
 - Tool of the powerful
 - Cover for protectionist policy / self-interest
 - Undemocratic
 - Long-term effect - undermine efforts to protect the environment
 - Disagreement concerning the existence of an environmental problem

Relevant WTO case law

- US – Shrimp Turtles case
 - Extraterritorial and unilateral
 - Degree of unilateralism reduced?
 - Unresolved
- EC – Hormones case
 - The role of science – similar case: EC – Biotech
 - Importance for the TBT and SPS agreements – the issue of international standards
 - Length and complexity of case: Unresolved

Relevant WTO case law

- EC – Asbestos case
 - Non-discrimination and general exception
 - Multilateralization through Rotterdam Convention?
- Brazil – Retreaded Tyres
 - The relationship to MERCOSUR
 - The importance of applying similar or the same policy measures to domestic and FTA-originating products as to foreign products (chapeau of Article XX)
 - Similar case: US – Gasoline