Environmental Trade Sanctions

What Is At Stake

Alan Oxley

Trade sanctions on environmental grounds would undermine the capacity of the world trading system to contribute to global prosperity and growth in developing countries.

In November last year, the members of the World Trade Organisation (WTO) agreed at Doha to launch a new trade round, the Development Round. That outcome is good news for trade liberalisation and world economic growth. At one stroke, the obligation to reduce trade barriers was put on the policy table of every one of the 142 members of the WTO. The WTO membership is now committed to policies which will speed recovery from recession and which will support growth in the developing world.

In the aftermath of the terrorist attacks on peace, prosperity and civilisation on September 11, the agreement at Doha to continue to build global economic interdependence is an affirmation by the nations of the civilised world of their intention to continue to cooperate for the common good of all. The postwar multilateral trading system established by the General Agreement on Tariffs and Trade (GATT) has underpinned unprecedented economic growth and prosperity. The first beneficiaries of this system were the industrialised nations of the West. The second will be developing nations. But can the full promise of prosperity for the developing world be delivered?

The new threat to liberal trade

At the initiative of the EU, the WTO Ministers decided at Doha to include environmental issues in the mandate for multilateral trade negotiations for the first time in over 50 years. Most WTO members were opposed but concurred to secure agreement for the launch of new negotiations. This compromise gives the EU an opportunity to exert dramatic leverage at the September 2003 meeting in Mexico. Since the issues on which the EU has been historically most reluctant to move—agriculture and garments and textiles—are issues of the greatest importance to developing countries, it is easy to see the EU holding progress in those areas hostage at the 2003 meeting to commitments to negotiate rule changes on environmental issues. This could be very detrimental to prospects for the Round.

At the same time, new questions have arisen in the WTO about how far the provisions for exemption from GATT rules permit extension of trade controls into the territorial jurisdiction of other parties, or permit trade to be restricted on the basis of how a product is processed or produced where the justification is to protect the environment. A ruling by the WTO Appellate Body in the shrimp/turtle case (see box overleaf) that the US is permitted to maintain unilateral trade sanctions against several countries on environmental grounds has altered the conventional wisdom that GATT rules did not allow such actions, creating an important precedent for the wider use of trade sanctions to coerce other nations to comply with US or EU environmental standards and to legitimise new grounds to protect uncompetitive industries.

The well established position is that the WTO cannot get into the business of ruling on the legitimacy of how a product is made. In the first place, it does not

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have the technical competence to deal with non-trade issues, as shown by its handling of the shrimp/turtle trade dispute. Second, if it did get into this business, it would become the focus of every political, religious, or ideological interest group within the metropolitan powers. Labour rights, animal rights, religious freedom, women's rights, will become issues used to justify denial of entry of a product into a market. International trade will become, as it was in the inter-war period, highly politicised. In such a situation, commercial interests will be quick to use the cover of the environment, or labour rights, or religious freedom, to secure protection against imports, and those commercial interests will be prepared to provide financial support for these causes. Just such an alliance was manifest in the campaigns within the US, against the WTO, which preceded the Seattle Ministerial meeting in December 1999, and which culminated in massive street demonstrations.

What is driving EU policy

The aim of the EU in securing agreement to include the environment as a mainstream issue in the WTO negotiations is to legitimise trade sanctions to impose environmental policies extraterritorially. This reflects the disposition in the EU's institutions of government towards centralised command and control, rather than free market policies and the subsidiarity principle—delegating authority to subsidiary organs—as the means of improving the environment. The result would be a weakening of the free market structures of the WTO, all in the pursuit of poor environment policy.

The greater efficiency of the subsidiarity principle and of encouraging free market forces to serve public policy interests applies to environment policy as much as in any other area. This is why the free market systems of the West increased prosperity, and raised social and environmental standards, while the command and control systems of the communist bloc destroyed both physical and social capital and degraded the environment.

The dominant philosophy behind EU environment policy is to improve the environment by fiat. Compliance with policies is secured by sanctions. It is EU policy to invest environment officials with executive power to regulate by the use of political discretion, not to establish regulators who monitor adherence to technically-based standards. It is also EU policy to place the cost of environmental protection on producers, rather than on consumers or the community generally. Where such policies impact on trade, WTO rules impede their use. This is why leading environmental NGOs want the WTO rules changed.

Multilateral environment agreements (MEAs)

The approach preferred by the international community on collective action to improve the environment is to seek international agreement among Governments to take common action, negotiate international environmental agreements for that purpose, and

THE SHRIMP TURTLE CASE:

The EU did not get all that it wanted at Doha, but conclusion in October of long-running litigation by India, Pakistan, Malaysia and Thailand against unilateral trade sanctions imposed by the US on environmental grounds in favour of the US creates some of the grounds to use trade sanctions to enforce environmental standards which the EU has been seeking.

The shrimp-turtle case began in 1996, when India, Pakistan, Malaysia and Thailand appealed against a trade ban imposed by the US on shrimp imported from Thailand on the grounds that its shrimp boats did not use the Turtle Excluder Devices mandated by US legislation on American shrimp trawlers. The Disputes Panel found against the US on the grounds that members of the WTO were not entitled to set unilateral conditions on access to their markets because the sovereignty of the WTO membership should not be put at risk in this way.

The US appealed to the Appellate Body (AB) which overruled the panel, arguing that in principle the US measure was consistent with Article XX clause (g) in the GATT allowing exceptions to protect sustainable natural resources. The new reference to sustainable development in the preamble of the WTO (adopted in 1994) and international concern about turtle preservation justified this.

Neither the Panel nor the AB sought to define 'sustainable development', even though the meaning of the term is strongly contested. Some argue that it is synonymous with preserving the environment, regardless of other considerations. Others maintain it means balancing conservation with economic development. The AB findings suggest the former meaning was the one employed by the Panel.

The AB quoted extensively from the 1992 UN Conference on Environment and Development and the WTO Committee on Trade and Environment to demonstrate that sustainable development was endorsed by the international community as a legitimate goal, but ignored the leading conclusions of both bodies that trade measures should not (except as a last resort) be used for environmental management.

The AB deliberately elected not to address whether or not the US was entitled to assert extraterritorial reach when invoking the terms of Article XX. By remaining silent on this point, the AB has opened the possibility that WTO members might have a

implement the commitments in national law. This has been the traditional role of international agreements, and it is an approach that respects the national sovereignty of each government.

The United Nations system fosters international environmental agreements. In 1992 the UN established a global umbrella for world environmental action by creating the UN Commission on Sustainable Development to implement the programme adopted at the UN Environment and Development Summit (the Rio Summit). A UN Environment Programme was also established to administer several Multilateral Environment Agreements (MEAs).

There are six key MEAs, three of which require parties to enforce the environmental objectives of the treaties by banning trade with countries which are not parties to the MEAs. These agreements are the convention banning trade in endangered species, within which a controversial ban on all trade in ivory was enacted (CITES), the Montreal Convention to ban production (and trade) in chlorofluorocarbons to preserve the ozone layer, and the Basel Convention banning trade in hazardous wastes to prevent illegal dumping of toxic waste in developing countries.

It is a radical innovation to negotiate international treaties which impose penalties on non-parties. The United Nations Charter decrees it a breach of the doctrine of national sovereignty on which the UN Charter is based. The Rio Summit stated that trade sanctions should not be used to enforce environmental goals. The provisions in the MEAs do not respect national sovereignty. This creates conflict with WTO provisions and much confusion. Tellingly, most of the MEAs arise from initiatives from Northern Europe.

The clash between MEAs and WTO rules

The conflict between the obligations of countries as members of the WTO and their obligations as members of MEAs has generated much debate and analysis by lawyers. The debate appears complex but in reality it reduces to whether two simple propositions should be accepted. First, trade sanctions should be permitted to enforce environmental policies and, second, imports should be restricted if they are not processed in a way that meets the domestic environmental standards of the importing country. The WTO is a target because it generally does not allow such trade controls.

The WTO does not permit any member to impose its own policies extraterritorially under the threat of trade bans and it does not permit WTO members to discriminate amongst each other in their trade policies. The apprehension of the Green groups is that one day a WTO member that is not a party to an MEA might secure a WTO ruling that another WTO member has acted illegally under WTO rules by restricting trade in accordance with the terms of the MEA. Greenpeace and the World Wildlife Fund (WWF) have been pressing for a decade for an amendment to the WTO

A WORRYING PRECEDENT

right to deny access by exporters to their markets unless the government of the exporter adopted production and processing environmental methods mandated by the member. Until this point, the vast majority of WTO members would have refused to accept that Article XX created any right to assert jurisdiction in the territory of another member.

The WTO Dispute Panel and the Appellate Body also assumed the competence to assess the environmental importance and effectiveness of the US measures. In so doing they demonstrated an incapacity in understanding and a lack of expertise in handling technical material. They declared that the international community had agreed (in CITES) that migratory turtles were in danger of extinction, but they did not demonstrate that the US measures would be effective conservation measures. They judged the US measures for their preservation value (would it save turtle lives?) not their conservation value (would it conserve the species?). The scientific evidence before the panel supported the preservation value of the US measures, but did not agree on the conservation value.

This result has serious implications. First, the AB has placed the WTO in the business of determining environment policy for the members of the WTO, despite the repeated refusal of the membership, confirmed by Ministers in 1996, to entertain any such outcome. Second, if countries can restrict trade on the basis of how a product is made, it sets at risk the basis of all international trade, the capacity of WTO members to exploit their comparative advantages in the global economy. Third, the ruling ignores WTO member preferences that unilateral trade restrictions with extraterritorial reach should be avoided, and that respect for national sovereignty should be the guiding principle in international endeavours to improve the environment.

The AB has become lawmaker, ruling that economically powerful countries can impose their political will and deny access to their markets to countries which are economically dependent on uninterrupted access to their markets. The real lawmakers in the WTO—the members—would not do this. Something has got to give.

Alan Oxley

rules which would remove the right of any WTO member to take such a case. This is the result the EU is seeking.

Such a result would legitimise discriminatory trade provisions and undermine the core values which have made the GATT-WTO a success. The WTO rules have worked because they respect the national sovereignty of every WTO member. Trade access is guaranteed by its rules which are accepted and applied, in common, by every member, rich or poor, large or small. If the precedent is established that one member, or a sub-set of members, can impose their own conditions for trading with other members of the WTO, the fundamental principle which sustains the whole WTO legal structure will fail.

The eco-imperialist impulse

Trade sanctions make poor environmental policy. Government measures to secure protection of the environment should aim to impact on the source of the environmental degradation. Usually it is at the point of production or consumption. Trade is almost never the cause of degradation. Trying to secure an environmental result with a trade ban is an extremely inefficient and consequently ineffective method.

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This did not dissuade the World Wildlife Fund from promoting trade bans to protect endangered species, despite a vigorously contested argument inside the organisation, with its field officers in Africa arguing strongly against a ban on trade in ivory. Southern African countries which have effective elephant conservation programmes are still opposed to the ban, which inhibits their conservation programmes. Nor did it stop Greenpeace from promoting trade bans in the Basel Convention.

The Basel Convention requires exporting industrialised economies to permit exports of specified materials only if they consider and approve the environment policies of the importing countries. It bans completely trade in other proscribed materials. Basel puts into international law a view of the developing world reminiscent of the European colonial period, one that still permeates the mindset of European NGOs, that the interests of developing countries are better understood and managed by the developed world.

The United States is not a party to the Basel Convention which, until recently, was the most egregious offender against WTO principles. It is understandable that policymakers in Washington would pay little attention to a Convention to which the US was not a party. There is, however, a policy interest in Washington which results in a sympathetic hearing for the EU approach. The collaboration between protectionist interests and environmental lobbyists over the last decade has made respectable the idea that no trade agreement is any good unless it provides for extraterritorial reach with respect to environmental policy. This idea is now part of the basic position of the Democrats and protectionists in Congress. Paradoxically, this gives unintended support to the EU position. Green groups like WWF and Greenpeace understand that this position reinforces their global interest in protecting the MEAs that they have sponsored—CITES and Basel respectively.

Ultimately, what matters in Washington is how many votes in Congress are locked into the position that the environment has to be linked to trade. This political calculus can only be challenged when it can be shown that other US interests are threatened as a consequence. The negotiation in January 2001 of the Cartagena Protocol to restrict trade in certain Genetically Modified Organisms (GMOs) has done just that. The Cartagena Protocol (to which the US is not a party) demonstrates how important US interests are under threat. It also points to the direction in which EU policy is moving and how that threat is set to increase.

EU trade bans on GMOs

The Cartagena Protocol does not mandate trade sanctions like the other MEAs, but it creates other significant conflicts with WTO rules. It is another Greenpeace initiative, a spinoff of its wider campaign to ban GMOs, and it has been adopted by the EU.

Otherwise known as the Biosafety Protocol, it is a protocol to the Biodiversity Convention (to which the US is not a party). The Cartagena Protocol gives importing countries unqualified rights to ban imports of living products which are genetically modified, for example grains, seeds, fruit and vegetables. Importing countries have the legal right to invoke the Precautionary Principle. (The 'precautionary principle' promotes aversion or a 'take no risk' approach rather than a

management or 'assess and manage the risk' approach.) There is no standard definition of the Principle. The version laid down in the Protocol approach is phrased in such wide and general terms that it gives officials in importing countries virtually full political discretion to block imports. The Protocol gives members expressly stated authority to ban imports without scientific justification.

With this provision, Cartagena has created a new and even more serious conflict with WTO obligations. The WTO allows members to restrict imports to protect human health, and animal plant health and safety, but it obliges members, when challenged, to demonstrate that such restrictions are based on science. The US has already had experience with EU efforts to evade this obligation. There has been a long-running dispute over EU bans of imports of US beef from cows fed with feedstock enhanced with hormonal growth promotants. There is no conclusive scientific evidence that such meat can be distinguished from that of other cows, or that it is a threat to human health. The US invoked WTO procedures which, in the absence of any scientific evidence to the contrary, resulted in a ruling that the EU bans were illegal. The Cartagena Protocol would give the EU the right to ban imports of living GMOs without any scientific justification.

Populist anti-science values in trade would be mainstreamed into international regulations.

It is no accident that this conflict exists between Cartagena and the WTO. The promoters of this Protocol were fully aware it would clash with the WTO rules. Before the WTO Seattle Ministerial meeting, Public Citizen, the consumer lobby funded by American businessman Ralph Nader, advocated completion of the Biosafety Protocol so that there would be a basis to undermine the sound science approach in WTO agreements. During the Cartagena negotiations some countries wanted a clause in the Protocol which stated that WTO rights would be unaffected by accession to the Protocol. The EU refused point blank to accept the proposal. Today EU officials point to the Cartagena Protocol and its articulation of the Precautionary Principle as a standard that should be followed and applied elsewhere.

The Protocol is therefore an important precedent for the EU to build its case to restrict trade in response to consumer or protectionist pressure, and to ban imports without scientific justification. Within a couple of decades, virtually every major food product will have GMO variants or contain GMO elements. If the EU gets its way, international markets will be highly regulated and access to the EU will be heavily restricted. The benefits of GMOs, and adequate returns from investment in them, will be denied. Populist anti-science values in trade would be mainstreamed into international regulations. Such a prospect would choke off investment in research in this exciting new field of scientific endeavour, which promises unprecedented gains in agricultural productivity.

Ecolabelling and 'whole of lifecycle' management

The EU also wanted WTO rules altered so that trade can be restricted on the basis of the environmental impact of the way in which products can be produced and processed. In March 2000, the EU issued its 'Integrated Policy Paper'. This reported the intention of the European Commission to apply regulations for 'whole of lifecycle' product management across the EU. It referred to a draft directive which was being developed as a model. This is the Directive on Disposal of Electronic and Electrical Equipment. Under the directive, every producer and major importer of every electrical and electronic product would be responsible for disposal and recycling of the product at the end of its product life.

The proposal's political appeal relies upon consumers believing that manufactures and distributors will accept and absorb the economic burdens of the policy. But it can only work if imports are subject to the same cost burdens as domestically produced products and one effect of this policy will be clear. The EU will diminish the global competitiveness of every industry which is regulated in this way. This is why the EU wants changes to the WTO rules to permit 'ecolabels'. The ecolabel will be the certification that whole of lifecycle regulations are being followed. To ensure that imported products, which do not have to bear the extra cost of 'whole of lifecycle' management, do not have a cost advantage in the market over domestic products, the imported product will not be allowed to be sold unless it qualifies for the ecolabel.

The problem for the EU is that until recently WTO rules have not permitted restrictions of this kind. If

the WTO gets into the business of ruling on how a product is made, then this is a very slippery slope indeed. Labour rights, animal rights, religious freedom, women's rights, any number of the elements of what is perceived to constitute comparative advantage in any economy, can be picked out to justify denial of entry of a product into a market. The recent decision in the trade dispute over US sanctions against imports of shrimp raises the possibility that in some circumstances trade might be controlled on such grounds.

Next, Kyoto trade sanctions?

For some time think tanks in Europe have toyed with the idea of proposing trade sanctions to enforce Kyoto Protocol obligations. The Shrimp Turtle decision in the WTO has left some wondering if that sets a precedent that the EU could follow by employing unilateral trade sanctions against imports which were greenhouse unfriendly (products produced with energy which generated greenhouse gases) and justified on the grounds that the sanctions support a domestic programme to conserve an exhaustible natural resource. While legal analysts are cautious about jumping to conclusions, this was the justification for allowing the US to maintain trade sanctions against certain shrimp importers.

The Kyoto Protocol to the UN Convention on Climate Change obliges parties listed in Annex B of the Protocol—most are industrialised economies—to reduce emissions of greenhouses gases, particularly carbon dioxide. To achieve the targets, industrialised economies will have to impose taxes on energy consumption, particularly of carbon based fuels. This will significantly reduce their competitiveness against countries which do not increase their energy costs. According to the Kyoto Protocol, developing countries are not obliged to increase their energy costs. The United States has said it will not accept the Protocol while developing countries do not have comparable obligations. It is hard to believe that the EU, disadvantaged by self-imposed carbon taxes, would not consider invoking a right to restrict trade on environmental grounds to protect itself against the competitive advantage of industries in the United States, and other countries, not so burdened by high energy costs.

'Progressive' think tanks in Europe are considering arguments that the EU could impose trade sanctions on carbon emitters. This would result in a major trade dispute with the US which European trade officials would hesitate to instigate. European environment officials would be less concerned. They have consistently demonstrated lack of appreciation, if not disregard, for the realities of global economic life.

Conclusion

The acceptance by the trade ministers at Doha of the EU's demand to include the environment in the negotiating round is a significant breakthrough in a long-term campaign to secure new rights to use trade sanctions to achieve environmental objectives. The EU might argue its motive is to protect the environment, but the other side of the same coin is that it is an instrument which would facilitate the protection of European industry and agriculture from international competition.

The strategic implications of EU policy go to the heart of how the WTO succeeds. Every country trades on the basis of what it can best make or provide. It works when the rules for trade regulate that and nothing else. If countries want to improve the environment (or any other sphere of activity—respect for human rights, compliance with labour standards) through international action, they should do so by negotiating policies and measures to that end in a purpose-built international agreement through which each member commits to apply those measures in national law. If multilateral trade laws are used to enforce non-trade purposes, their capacity to serve their trade end and to benefit the common good is lost.

Respect for national sovereignty must be restored as a key principle underpinning the WTO rules. Use of trade sanctions to secure extraterritorial compliance with national environment standards must be rejected as fundamentally contrary to the modus operandi of the WTO. If this does not occur, global markets will be divided with new instruments applied for protectionist purposes and environment policies will be developed which are intended as much to punish business as to improve the environment. Increasingly poor and ineffective environment policy will be the result. The opportunity presented by the Doha Development Round of multilateral trade negotiations to deliver the benefits of greater prosperity to the developing world will also be severely undermined.

This article is based on two lengthy reports: *A Study of the Trade and Environment Issue* by Alan Oxley and Kristen Osborne (June 2002) and *The WTO Doha Development Round* by Alan Oxley (February 2002). Both are available at www.apec.org