

Trade and the Environment

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1. INTRODUCTION

Until the 1980's environmental protection was not a central issue in trade negotiations. As an example, there is no reference to the environment in the text of the General Agreement on Tariffs and Trade (GATT). The main understanding was that the issues of the environment and trade belonged to different universes. In recent years they have begun to be seen as interconnected, due, on the one hand, to a growing interest in environmental themes, and, on the other, to the perception, sometimes mistaken, of the harm caused to natural resources by the increase of economic activity. International trade, considered the mainspring of economic development, has begun to be seen, in some countries, as the environment's natural enemy. Part of this tendency is explained by the global implications of both environmental and trade policies, the impact of which goes beyond national borders. Just as resolution of many environmental problems requires international cooperation - as in the case of the decrease of forest areas, loss of biological diversity, climate changes and erosion of the ozone layer - also in the sphere of international trade a broader area is now covered by multilateral agreements supported by the WTO, which now has a binding conflict resolution mechanism.

Beginning in the 1980's and '90's, the tension between free trade advocates and environmentalists has increased, with the appearance of new cost-related controversies, as a consequence of the implementation of measures for protection of the environment. In effect, the 'polluter pays' principle, contained in the Agenda 21 - approved at the United Nations Conference on the Environment and Development (Rio 92), while determining the responsibility for environmental damage, did not clearly determine how such costs were to be calculated and, therefore, internalized by countries. In the opinion of free trade advocates, certain environmental regulations border on economical irrationality and are often unsupported by scientific proof. On the other hand, environmentalists are suspicious as to the environmental repercussions of certain aspects of trade liberation. More rigorous environmental regulations also imply higher costs, and may negatively affect the competitiveness of companies that apply them. This leads to a discussion that partially reproduces the north-south cleavage, when one considers the risk of the environmental norms defended by the developed countries turning into non-tariff barriers, even if the original objective is not necessarily protectionist in nature.

The tuna-dolphin case, judged at the GATT in 1990, during the negotiations of the Uruguay Round, was an important milestone in the context of the tension between the trade and environmental agendas. The North American ban on importing Mexican tuna, based on the rationale of the accidental capturing of dolphins, was considered discriminatory by the panel, for being extra-jurisdictional and based on the method of production (infringing the 'similar product' clause), and for not exploring other means, considered less restrictive to trade, to reach the same objective. From the environmentalists' point of view, the decision made by the panel prioritized trade obligations over commitments referring to the environment.

Environmentalists began doubting the capacity, then of the GATT and now of the WTO, to judge commercial disputes involving measures for the protection of the environment. To them, GATT's article XX (which stipulates that nothing in the text of the agreement should be interpreted in such a way as to impede the adoption or implementation of necessary measures for the protection of the environment and of human, animal or vegetable health) should be revised in order to allow the accommodation of environmental concerns. The creation of the WTO Committee on Trade and the Environment (CTE) and the reference to the importance of sustainable development in the preamble of the Marrakech Agreement reflect, in a way, a concern for establishing a relationship between international instruments for environmental protection and the multi-lateral trade system. It must be pointed out, however, that the WTO does not implement environmental agreements. The CTE restricts itself to analyzing the relationship between environmental and commercial measures, in order to promote sustainable development. For that, the committee is charged with proposing possible amendments to or changes in the rules of the WTO, if necessary in order to highlight the positive synergies between trade and the environment. Nonetheless, the CTE has never reached the point of recommending any change in the rules of the WTO, since its members could not reach consensus.

The concept of common but differentiated responsibilities, consolidated in Agenda 21, adds to the difficulties related to the definition of norms and application of environmental policy. According to this principle, industrialized countries bear a moral responsibility in relation to many ecological problems brought about by centuries of economic activity. Based on this argument, developing countries argue that they should not bear the obligation to invest in environmental programs in the same proportion as developed countries, due to their history of utilization of natural resources.

Whatever conflicts may occur regarding this issue end up surfacing in the commercial sphere, since negatively perceived instruments, such as trade-restrictive measures, are stressed, instead of positive incentives like financial aid or technology transfers with environmental objectives. Frequently, trade-restrictive measures are considered negative or ineffective for the protection of the environment, especially if they are not accompanied by "positive" instruments such as technical cooperation or investment in training, aimed at the implementation of environmental commitments. The "tuna-dolphin" and "shrimp-turtle" cases, involving the USA and Mexico, and the USA and a group of Asiatic countries, respectively, are examples of extraterritoriality of an environmental measure in the field of international trade. In both cases, the efficiency of the trade-restrictive measure for the natural resources it is trying to preserve is questioned, since the capturing of dolphins and turtles by the countries affected by the embargo continued at the same levels as before the measures were imposed.



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Another tension-provoking factor refers to the mechanisms for implementation of environmental measures, now under the responsibility of national authorities. In the environmental field, there is no international equivalent to the WTO's conflict resolution mechanism, which would partially explain the increasing recourse to trade-related measures within the context of environmental conventions. In the absence of precise rules that could be enforced, the trade sanction mechanism, within the sphere of the environmental conventions, becomes a means of pressure on governments to fulfill the environmental commitments they have made. The lack of an institutional structure to protect the environment – in the same way as the WTO tries to ensure the maintenance of free trade – explains, for the most part, the antagonism between commercial and environmental interests. The idea of creating a global environmental organization has already been debated in academic and political circles, without, however, reaching a consensus as to the convenience of creating such an organization.

It is worth mentioning that the WTO's jurisprudence in relation to environmental concerns and human health has evolved positively, in the sense that the rules are interpreted in a way that is more flexible and sensitive to these interests. In the "shrimp-turtle" case, for example, the Appeal Agency recognized the right of the USA to adopt a unilateral measure to protect sea turtles, in situations involving shrimp fishing, as long as the parts agreed to search for a satisfactory bilateral or multilateral solution. In the asbestos case, it confirmed the right of France to bar the importing of certain products that contain asbestos, based to its alleged cancerogenic effects. In both cases the justification for the exemption to the WTO's rules is based on GATT 94's Article XX. In face of this positive evolution, many countries question the need to alter the WTO's rules, particularly Article XX, since tensions have been satisfactorily settled.

2. THE DOHA ROUND

During the WTO's fourth ministerial conference, which took place in Doha (2001), countries such as Norway and Switzerland, in addition to the European Union, have tried to make the WTO's rules more flexible, in order to accommodate environmental concerns. More specifically, they intended to revise the rules relative to labeling (TBT), precaution (SPS) and the general exceptions to the WTO agreements (GATT 94's article XX), particularly the clarification of the relationship between Multilateral Environmental Agreements (MEA's) and the rules of the organization. These countries' arguments were mainly based on the system's lack of predictability, in the case of commercial disputes that might involve trade measures taken within the domain of the MEA's, due to the potential risk of incompatibility between the trade and environmental agendas. Only the members (and not the conflict resolution mechanism) would be responsible for clarifying the rules in order to eliminate occasional ambiguities. The inclusion of this theme in the agenda of the IV Ministerial Conference was a response to pressures, not only from environmentalist groups but also from consumers, who are increasingly concerned with food quality and its connection to trade. An example is the controversy caused by the moratorium applied by the EU against the importing of transgenics.

On the other hand, a great majority of countries, among which are all the developing countries, the USA, Canada, Australia and New Zealand, maintained the idea that the WTO's relationship between trade and the environment is satisfactory, rendering further clarification unnecessary. In the opinion of these countries, the delicate balance reached at the Uruguay round should not be disturbed by reopening issues that are difficult to resolve, such as precaution, method and process of production (PPM) and the consistency between trade measures taken within the sphere of the MEA's (or even unilaterally) and the WTO rules.

There were strong suspicions as to the true intentions of the Europeans with regard to the environmental propositions. Even though based on an alleged non-protectionist rationale, the true objective of the European Union was said to be to make the WTO's rules more flexible, in order accommodate 'environmental' and 'social' concerns (such as consumers' rights to have access to information through State regulations), and thus avoid potential questioning of its environmental policy with commercial implications for the conflict resolution system. It was feared that if the European point of view prevailed, benefits derived from future advances in the area of agricultural or industrial liberalization might be cancelled out by imposition of non-tariff environmental barriers. Even the USA, a great advocate of inclusion of the environmental theme in GATT/WTO (recall the tuna-dolphin and turtles-shrimp cases, as well as the case on gasoline against Brazil), did not show much enthusiasm for the establishment of rules that leave a very wide margin for precautionary measures, based upon their own experience in contentions with the EU (hormone-beef).

The idea that while attempting to broaden the WTO's "environmental flexibility," these proponents would be working in favor of the environmental cause, must also be questioned. True commitment to the environmental cause is measured by effective implementation of the commitments made under environmental conventions, and not by an attempt to change the WTO's rules. The organization should not be seen as environmentalists' natural "enemy," especially if one considers recent legislation. To the contrary, the increase in trade flows due to trade liberalization tends to generate the resources necessary for the promotion of sustainable development. Developing countries are the first ones to reap benefits from this trend, since they are enabled to invest more consistently in environmental control programs. In effect, along with the high patterns of consumption sustained by wealthier societies, poverty is one of the greatest enemies of environmental preservation. Thus, advocacy of the environmental cause should incorporate the cause of struggle against poverty. For this reason, it is necessary to increase access to markets, especially for the products in which developing countries have a greater comparative advantage.

The negotiations on commerce and the environment launched in Doha comprehend three areas: 1) clarification of the relationship between 'specific trade obligations' taken within the domain of the Multilateral Environmental Agreements (MEA's) and the WTO's rules; 2) institutional arrangements for information exchange between the secretariats of these MEA's and the WTO's specific committees and criteria for accepting observers, and 3) reduction and elimination of environmental tariffs and non-tariff barriers to environmental products and services. Of these three, the most complex and the one that implies greater risks, in terms of altering the WTO's body of regulations, is the first one. The second one has already become, in a certain way, a consolidated practice of CTE, although there are specific problems relating to the admission of some secretariats. As for the third one, due to the "interface" with the area of access to markets, it has been considered within the scope of the two respective negotiating agencies, that is, the group on access to markets for non-agricultural products and the group on services.

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The main theme under negotiation refers to the relationship between multilateral rules of commerce and the specific trade-related obligations contained in the MEA's, and the possible conflicts between these two legal frameworks. Discussions on the issue are concentrated, at the moment, on the definition of "specific trade-related obligations" and their relationship to international trade rules. On one side, led by the European Union are the delegations that propose a broad definition of the term, which would include the so-called "result obligations." According to the proposition advocated by these countries, any measure adopted by a country with the purpose of fulfilling the objective of a certain environmental agreement, even if not explicitly stated there ("result obligations"), would automatically be considered compatible with the WTO regulations. In practice, the acceptance of this approach would imply giving *carte blanche* for the adoption of measures without adequate scientific proof, with the supposed purpose of protection of the environment, which might unjustifiably restrict trade.

Other delegations, among them Brazil, the United States and Australia, defend a more pragmatic approach for treating the issue in the CTE, so as to avoid generalizations, centering upon the comparison, case by case, between the trade devices of the MEA's and the WTO rules. The stance defended by Brazil and other developing countries on the relationship between the Convention on Biological Diversity and the TRIPS Agreement ("Trade Related Aspects of Intellectual Property Rights") is an example of this type of approach. For many countries, there would not be, *a priori*, any conflict between the two legal systems that would justify the need to change the WTO's current rules, especially GATT's Article XX.

The issue of MEA's was extensively debated in the CTE during the first years of its existence. In general, the resolution of the trade-related environmental problems unilaterally is already accepted by member States. An example of this approach would be the recommendation of the Appeal Agency in the 'shrimp-turtle' case, for the USA and Malaysia to try to reach a permanent institutional arrangement, involving all the interested parties, for the preservation and conservation of sea turtles. However, some countries still question the effectiveness and the implications of institutionalizing statements in favor of the environmental cause in the WTO's rules.

A few issues should be initially resolved, such as the definition of an MEA. A few criteria are suggested, for example: a) being open to the participation of all interested countries; b) a balanced representation in terms of regions and levels of economic development; and c) an adequate representation of countries that consume and produce the good covered by the MEA.

Another problem mentioned in the Doha Declaration refers to the fact that the paragraph explaining the distinction between the WTO rules and the "specific trade obligations" contained in the MEA's clearly sets apart the countries that are not members of the "agreement at hand." As is known, the USA has failed to adhere to several environmental instruments, such as the Basil Convention on Dangerous Residues and the Kyoto Protocol, contrary to many developing countries, including Brazil, which are parties to many environmental conventions, and therefore subject to specific commitments in this matter. If the WTO negotiations over this concrete point perchance evolve towards the establishment of effective commitments in terms of "specific trade obligations" within the domain of certain MEA's, these will apply only to a circumscribed number of countries (the parties in the MEA's), creating, in fact, a dual system of obligations and rules, set apart in accordance with the compliance with environmental instruments. Countries considered "up to date" with their environmental obligations, for being parties to MEA's, would therefore be punished, by having the WTO commitments added to their existing ones. Needless to mention, this hypothetical result would end up causing an effect contrary to what is desired, functioning, in practice, as a disincentive for countries to adhere to environmental instruments, and might even cause other countries to denounce existing ones.

3. BRAZIL'S INTERESTS

Brazil's position on the issue of trade and the environment is characterized by a balanced approach. We have stated, at the CTE and in other forums, our satisfaction with the existing rules, which seem capable of accommodating environmental objectives without disregarding concerns over the continuation of trade liberalization. The balance is delicate. This has been observed by members and confirmed by the conflict resolution mechanism ("shrimp-turtle"/"asbestos"), which has shown political sensibility in relation to the growing interest of public opinion in environmental themes. Our position has been based, to a point, on the motto: "if it ain't broken, don't fix it."

However, in face of the negotiations launched at Doha, it might be in the interest of Brazil to show the importance the government gives to the environmental theme. This more aggressive stance may be instrumental, also, in laying bare the contradiction between the supposedly pro-environmentalist position at the WTO of certain developed country partners, and the unsatisfactory implementation of made commitments made by them in the framework of the MEA's. The best way to promote the objective of sustainable development seems to be strengthening the environmental agenda, emphasizing the positive and not the negative measures. Ideally, different environmental controversies should be resolved in MEA's. the WTO's action should be circumscribed to specific cases, which would be treated in the sphere of environmental agreements, since they would include trade-related issues with a potential for conflict between the two legal orders.

At the same time, it will be necessary to do a more prospective exercise, in terms of legal implications for the multilateral trade system, creating an exception to the rules of the WTO for specific trade-related obligations, seen under certain MEA's (independently of the form it may take - amendment, interpretative code, code of good conduct or consultative mechanism). One of the concerns that should be kept in mind would be the impact of this possible exception upon unilateral environmental measures, inasmuch as it might represent a significant precedent for extraterritorial initiatives, based on arguments in favor of environmental conservation. The distinction between commercial measures allowed in MEA's and their implementation in concrete cases should not be overlooked. The exception, if created, would require examination under the GATT 94's article XX (which determines which environmental measures should not be applied in such a way as to constitute an arbitrary or unjustifiable discrimination among countries in which the same conditions prevail; that is, a disguised restriction to international trade). It will also be necessary maintain the current relationship between agricultural negotiations and those related to trade and the environment. Possible progress in the former might be undermined by the imposition of environmental barriers. Recent evidences of the EU's interest in introducing the theme of environmental labeling in the negotiations during the V Ministerial Conference show that they may intend to try to annul new possibilities for access to markets by imposing technical barriers to trade. ■