

The Greening of the WTO

Michael M. Weinstein and Steve Charnovitz

SAVE THE TURTLES

ANYONE who has followed the negative press coverage of the World Trade Organization over the last few years would be shocked to learn that the WTO has started to develop an environmental conscience. With only a few tweaks, it can turn greener still.

The most memorable assault on the WTO's environmental record came at its 1999 meeting in Seattle, where antiglobalization demonstrators dressed as sea turtles to highlight the alleged damage wrought by the organization's policies. Similar protests have dogged multilateral trade meetings ever since. But a careful look at the WTO's record shows that such attacks are unwarranted. The organization is in fact developing constructive principles for accommodating both trade and environmental concerns. A series of rulings by the WTO's dispute-resolution bodies—judicial panels that settle conflicts among member states—has established the principle that trade rules do not stand in the way of legitimate environmental regulation.

The gradual greening of the WTO throughout its seven-year life reflects changes made to international rules when the organization was created in 1994. In particular, the preamble to the WTO agreement noted the importance of protecting the environment and the need for enhanced means of doing so. Environmental sensitivity has also been heightened by the stalwart efforts of environmentalists in and out of

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government to influence the system of global trade. The environmental movement has, in fact, achieved most of the goals it pursued in the early 1990s—although the need to keep their supporters energized makes some groups loath to say so.

Moreover, and contrary to what protesters often claim, further progress can take place within the current system. This is reassuring, because modest reform is the only politically realistic way to further the green agenda. The WTO's rules can be changed only by a consensus of its 142 members, and many developing nations want no part of a costly environmental program they regard as an imposition by the wealthy industrialized powers. Radical demands in this area would increase friction between rich and poor countries and sabotage efforts to start a new round of global trade negotiations—a round that the WTO's director-general proposes be focused on the needs of the poorest countries. Moderate proposals, backed by sound public explanations, have a much better chance of achieving significant results.

As the WTO struggles to handle environmental concerns, one issue looms above all others: the organization needs to figure out how to manage the clash between its open trade agenda and unilateral attempts by some member governments to protect the environment through trade restrictions. The WTO must strike a balance between two extremes. Cracking down too hard on the use of environmental trade restrictions invites environmental damage. But excessive leniency in imposing sanctions invites two other abuses: pressure on poorer countries to adopt standards that are ill suited to their strained economies, and suppression of trade that will lead to higher prices and stunted growth.

SEDUCTIVE SANCTIONS

TRADE POLICY must have an environmental dimension because the environment is a global collective resource. To manage it properly, governments must cooperate on all policies—including trade—that can threaten fisheries, forests, air quality, and endangered species. Without collective agreements, countries will be tempted to lower their environmental standards in an effort to increase their competitive advantage. The question is not whether there should be some form of



AP/WIDE WORLD PHOTOS

*From soup to nuts: Protesters at the WTO meeting,
Seattle, November 29, 1999*

international cooperation on environmental issues, but what kind of cooperation there should be, and under what institutional auspices.

Purists want environmental regulations left to specialized agencies, whereas many environmentalists want them enforced by the WTO. The argument for using the WTO is simple, for unlike most other international organizations, the WTO has a mechanism for enforcing its rulings: trade sanctions. The WTO convenes panels of experts to rule on trade disputes among member governments. If the losing government refuses to comply with the ruling, the panel authorizes the winning government to impose trade sanctions.

The recent transatlantic flap over hormones shows how the system works. Claiming that beef from cows fed with artificial hormones posed a health hazard, the European Union (EU) blocked imports of such beef from the United States in 1989. The U.S. government brought the dispute before a WTO panel, which ruled in Washington's favor.

The panel, however, had no power to change Europe's laws. All it could do was authorize the United States to retaliate—which Washington did, by imposing stiff tariffs on meat products, cheeses, and several other European exports. Punishment through sanctions was quick and easy. That is why environmentalists, along with organized labor and many other groups, want to use the international trading system to advance their missions.

Trade sanctions come at a cost, however. They often backfire, hurting a country's own consumers while aiding a politically powerful group of domestic producers. They can drive up prices and threaten the living standards of workers in both rich and poor countries, as well as provide cover for protectionists. In the beef-hormone case, for example, U.S. sanctions did indeed hurt European farmers and ranchers. But they also raised food prices in the United States, punishing American consumers. And the sanctions have not forced the Europeans to back down. They continue to ban beef produced with artificial hormones.

Trade sanctions are at best crude weapons, and environmentalists should reconsider their enthusiasm for them. Sanctions are ill suited to the subtleties of environmental policymaking and unlikely to persuade developing countries to undertake environmentally sensitive policies. Even if sanctions might ultimately play some role in a few unusual cases, in general environmentalists ought to focus primarily on education, persuasion, and mediation.

LOSING BATTLES, WINNING THE WAR

ACCORDING to its critics, the WTO interferes with legitimate efforts by the United States and other countries to block imports that harm the environment. For example, Lori Wallach and Michelle Sforza of Public Citizen, a group affiliated with Ralph Nader, argue that “in case after case, the WTO is being used to threaten or has upheld formal challenges to environmental safeguards, doing far more damage than occurred under the [pre-WTO] regime.” Using similar arguments, the Humane Society of the United States has labeled the WTO “the single most destructive international organization ever formed” when it comes to animals.

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To prove their case, critics point to several controversial decisions made over the past decade by trade panels, each of which ruled against attempts by the United States to protect the environment through unilateral measures. Reading just the headlines, these decisions may indeed appear to have undermined conservation. But closer inspection reveals a different picture. As Professor John Jackson of the Georgetown University Law Center has said, environmentalists “lost the battles but won the war.”

In the first set of cases, known as tuna-dolphin, two pre-WTO trade panels in 1991 and 1994 rejected U.S. bans on imports of tuna caught with nets that unintentionally also trapped dolphins, a threatened (although not endangered) species. Environmental advocates howled. But the decisions were never formally adopted by the then governing body and therefore established no legal precedent. Besides, the tuna-dolphin panels predate the creation of the WTO and its improved recognition of environmental concerns. Nevertheless, critics of the WTO cite this case as evidence of the threat that trade-dispute panels continue to pose to the environment.

In the second case, a WTO trade panel ruled that the United States had wrongfully blocked imports of Venezuelan and Brazilian gasoline, which the United States claimed violated its clean-air laws. The United States appealed the decision to the organization's Appellate Body, where it lost again. Environmental activists angrily accused the WTO of trampling Washington's right to protect the American environment. But the appellate decision was actually a step forward because it rejected some of the key findings of the lower panel. The appellate jurists found no problem with the U.S. clean-air law itself, declaring it legitimate under the provision of the WTO agreement that permits trade barriers “relating to the conservation of exhaustible natural resources.” They merely disapproved of the regulations the United States used to administer the law, in particular the fact that the rules subjected foreign gasoline suppliers to tougher standards than were applied to domestic suppliers. All that Washington had to do to bring its policy into compliance was correct its administrative procedures, and it has since done so.

The WTO is light-years ahead of where it was years ago in protecting the environment.

In the third case, known as shrimp-turtle, a WTO trade panel in 1998 ruled that the United States was wrongfully blocking imports of shrimp from countries that did not require fishing fleets to use devices designed to safeguard endangered sea turtles. Once again the WTO's Appellate Body upheld the ruling—but once again it rejected some of the lower panel's key arguments. The appellate judges acknowledged that an import ban might sometimes be justified and thus found nothing inherently wrong with the U.S. law in question. But it sharply criticized Washington for using administrative procedures that lacked due process and for making insufficient efforts to negotiate a conservation agreement with the Asian governments filing the complaint. As in the gasoline case, the WTO ruled that the United States needed to change only its procedures, not its law, to bring itself into compliance, and the United States has done so. Last year Malaysia challenged the revised U.S. regulations, but this time the WTO panel sided with the United States. Indeed, the judges went so far as to declare that “sustainable development is one of the objectives of the WTO agreement.” This decision is now under appeal.

The Appellate Body's judgment in the shrimp-turtle case demonstrates that trade law may permit a nation to impose an import ban even when the primary purpose of the ban is to safeguard an endangered species found outside that nation's territory. In terms of environmental protection, that stance is light-years ahead of the tuna-dolphin ruling from ten years ago. Another milestone was reached this year in a dispute over asbestos, a carcinogen. The WTO Appellate Body upheld France's policy of blocking imports from Canada that contain the material—the first time the WTO has approved the use of a trade restriction to protect human health.

PRECAUTIONARY PUZZLE

ALTHOUGH the WTO has begun to embrace environmental protection, it certainly can and should do more. The challenge will be to find an effective middle ground among the rival parties in this debate: environmentalists and free traders, the United States and the EU, and the industrialized and developing worlds.

One proposal favored by European governments and environmental advocates on both sides of the Atlantic is to write a “precautionary

principle” into WTO rules. This measure would protect the right of countries to block imports of products they deem a threat to public health, safety, or the environment even when no existing scientific evidence supports the feared threat. Had this concept prevailed when the beef-hormone case was decided, the Europeans would have won. Lurking behind the proposal to adopt the precautionary principle is the dispute over genetically modified organisms (GMOs). The United States is a large producer of food products incorporating GMOs, and American industry, citing a lack of evidence to the contrary, insists that they are safe. Europeans respond that GMOs are too new for scientists to know what their long-term consequences might be.

Two aspects of the WTO framework bear on this issue. First, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) governs a country’s rules for protecting the health of its people, animals, and plants from listed risks such as toxins, disease, and pests. The SPS requires that these rules be based on scientific evidence showing that a risk to health exists, although scientific certainty is not required. Once a risk has been established, individual countries can set their standards as high as they like. In the beef-hormone case the SPS agreement was invoked successfully against the Europeans because the EU did not produce scientific evidence to support its claims. Another accord, the Agreement on Technical Barriers to Trade (TBT), governs general health and safety standards. The TBT does not require a country to produce a scientifically backed assessment of risk, but it does insist, among other conditions, that standards be set in a way that restricts trade as little as possible to achieve the intended goal.

Neither the SPS nor the TBT threatens legitimate environmental or health measures. Neither puts environmental restrictions into a scientific straitjacket. Both permit countries to set high standards even when the scientific evidence on risk is uncertain. For example, the SPS calls for making the standards provisional and subject to modification once more evidence becomes available. That approach provides for balance and is the reason that the Appellate Body ruled that the precautionary principle already “finds reflection” in the SPS.

Explicitly embedding a precautionary principle in the SPS or TBT sections of the WTO framework would, by contrast, allow countries to block imports on environmental or health grounds in the absence of

any scientific evidence of a significant risk. This would be a step backward. The current WTO rules have not been abused to undermine any country's legitimate environmental or health standards. Furthermore, no one has determined how to define a precautionary principle that would not provide a gaping loophole for protectionism, health fads, or environmental zealotry. Finally, because of the provisions in the SPS and the TBT, the WTO does not need an explicit precautionary principle. What the EU and others should pursue instead is getting future judicial panels to provide plenty of legal room for countries to set high health standards when scientific evidence of risk exists but is uncertain.

IT'S EASY BEING GREEN

THE WTO can take several concrete steps to answer its critics. These need not be dramatic policy modifications, such as an ill-considered adoption of a precautionary principle. Instead, a series of measured, incremental changes could pass the twin tests of environmental effectiveness and political viability.

First, the organization should make some accommodation for multilateral environmental agreements—treaties among groups of countries that can call for trade restrictions to protect the environment. For example, the Montreal Protocol blocks trade in ozone-depleting chemicals with nonsignatory countries, and the Convention on International Trade in Endangered Species (often referred to by its acronym, CITES) bans trafficking in endangered species. Europe has lobbied within the WTO for giving deference to these agreements, a step that could lead the WTO to bless trade restrictions that would otherwise violate its rules.

The European position makes good sense in cases where trade controls are imposed by one signatory against another according to rules set out in a multilateral agreement both have ratified. But the issue becomes knottier when a signatory applies trade restrictions to a nonparty. Permitting this type of sanction would turn the WTO into a tool for coercing nonsignatory countries to join, or at least adhere to, the agreement in question. Complicating the matter further is the question of what precisely constitutes a multilateral environmental agreement. If two countries form a cartel and erect import barriers to

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protect domestic industry, should the WTO go along blindly so long as the countries label their agreement “environmental”? Although such shenanigans cannot be allowed, the EU makes a strong case for putting the WTO on the side of multilateral environmental cooperation. But a complete plan for doing so remains elusive.

Another needed step would open the WTO dispute-resolution process to public participation. The WTO’s newfound sensitivity toward the environment has shallow roots. Several times the Appellate Body has had to overrule misguided judgments by lower panels, and nothing guarantees that future appellate jurists will be as wise or as shrewd as their predecessors. Environmentalists have been able to pull WTO jurisprudence away from the tuna-dolphin rulings, but advocates need to remain vigilant and fight any sign of backtracking if the trade body is to continue on its green trend. Yet WTO rules make public oversight difficult by keeping most deliberations secret, thereby breeding distrust. The organization has made some efforts to answer its critics. Recently, panels have been permitted to review unsolicited “friend of the court” briefs submitted by nongovernmental organizations. Yet this practice is hotly contested within the organization and may not continue. For reasons of both sound jurisprudence and sound public relations, the WTO ought to routinely accept briefs by independent experts.

Additionally, the WTO needs procedures specially crafted to handle environmental disputes. The shrimp-turtle case showed that the United States exploited its market power too quickly by imposing unilateral sanctions, and that the Asian plaintiffs complained to the WTO too quickly rather than examining their own fishing practices. When environmental disputes are brought to the WTO, the organization’s director-general should push the parties, publicly if necessary, toward mediation. If that fails, then the WTO should steer the dispute to an appropriate environmental forum before getting involved itself.

The WTO should also explicitly authorize “eco-labeling.” The EU wants to clarify WTO rules for labeling goods, protecting a country’s right to require disclosure of potential health, safety, or environmental threats so that consumers can decide for themselves what risks to take. But labeling can create problems. For example, simply telling consumers when beef contains artificial hormones suggests that the hormones are dangerous, even though the scientific evidence says otherwise. For this

reason, the U.S. Food and Drug Administration carefully regulates labels on food and drugs and prohibits claims that it deems misleading or scaremongering. On balance, however, giving countries wide latitude to label products would be a smart reform that would keep markets open while allowing countries to respect the wishes of concerned citizens.

The WTO should also appoint a commission of experts to monitor future trade negotiations in order to inform countries of the potential environmental impact of the measures under discussion. The goal would be to press negotiators to take account of environmental consequences before trade accords are signed. Such a review process would increase public confidence that environmental concerns had not been ignored.

Pressuring countries to adopt clean technologies would be another effective measure. This step would require member countries to lower tariffs and remove needless regulations that impede imports of pollution-control equipment and other environmental technologies and services. In addition, the industrialized countries should comply with an existing WTO rule calling for the transfer of technology to the developing world.

The WTO also needs to root out environmentally harmful national subsidies. Government subsidies to domestic fishing industries worsen the depletion of fishery stocks. Subsidies to other sectors, such as agriculture, can cause harm by encouraging overuse and excessive consumption of other natural resources. In 1999, the U.S. government joined several other countries in proposing that the WTO consider curbing fishing subsidies. The proposal was shelved after the failed Seattle conference. The initiative needs to be relaunched, and the WTO should combat other subsidies that harm both trade and the environment.

Defer to multilateral environmental agreements. Invite legal briefs from outside experts. Mediate before litigating disputes. Monitor the environmental impacts of proposed trade agreements. Allow eco-labeling. Promote technology transfer and trade in environmental services. Curb environmentally damaging subsidies. None of these ideas sounds earth-shattering, because none is. Radical steps are not needed. For seven years, the WTO has moved toward a responsible environmental posture. The best way to continue that green trend is for the industrialized powers to latch onto a modest set of reforms that are affordable for developing nations, protect the environment and public health, and keep zealots and protectionists at bay. 🌍

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