
Green Showdown at the WTO

William H. Lash III

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On December 9-16, 1996, the inaugural World Trade Organization (WTO) Ministerial Conference was held in Singapore. While numerous items were on the agenda for this historic meeting, the debate on the relationship between trade and the environment offered the most challenges and opportunities. The discussion highlighted eloquently the differences between North and South as well as forced the WTO to consider whether it will be true to its mission.

This paper analyzes some of the trade and environmental issues raised during the WTO conference. It first provides some historical perspective on the insertion of environmental issues into trade policy.

The GATT, WTO and Environmental Disputes

The initial green assault on the global trading system may have been the U.S.-Mexico tuna dispute of 1990, when the United States imposed an embargo on tuna exported from Mexico. Mexican fishermen's use of "purse-seine" nets without dolphin protection measures violated the Marine Mammal Protection Act, according to U.S. authorities.¹ Although the Mexican fleets did not follow U.S. fishing practices, the tuna exported were in compliance with Mexican law and international fishing requirements and posed no health threat. Regardless, the United States prohibited imports of Mexican tuna.

A General Agreement on Tariffs and Trade

William Lash is an adjunct fellow of the Center for the Study of American Business at Washington University in St. Louis and associate dean and director of the Law and Economics Center at George Mason University School of Law in Arlington, Virginia. The views expressed are those of the author.

(GATT) panel, however, disagreed with the U.S. ban.² As a GATT signatory, the United States was bound by the concept of "national treatment."³ Under national treatment, once imported goods cross a nation's border they must be treated the same as domestically produced items; therefore, Mexican tuna could not be discriminated against by the United States solely because it was harvested differently from U.S. tuna.

The GATT panel also recognized that, although America was free to restrain trade to protect the environment or natural resources within its own borders, it could not seek to extend these actions extraterritorially. The panel seemed to recognize the dangers of fostering a form of creeping U.S. eco-colonialism.

Large environmental organizations recognized that the fledgling World Trade Organization was an attractive target as well as a bully pulpit for their issues.

Other environmental cases brought to the GATT panel were similarly viewed as pretexts for protectionism. However, large environmental organizations⁴ recognized that the fledgling World Trade Organization was an attractive target as well as a bully pulpit for their issues. Although these groups were losing their environmental challenges, the setbacks steeled their resolve and gained support at home by raising chimerical threats of the loss of U.S. sovereignty. In the process, they recast the issue as a case of WTO bureaucrats exceeding their authority with the ultimate result of which would be overturning U.S. environmental laws.

The Committee on Trade and the Environment

From its inception the WTO has tried to balance the goals of promoting trade and protecting the environment. The agreement establishing the WTO recognizes that:

Relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁵

WTO members also formed the Committee on Trade and Environment (CTE) to study the relationship between these issues. They acknowledged,

that measures necessary to protect the environment may conflict with the provisions of the Agreement [the General Agreement on Tariffs and Trade].

Accordingly, the Committee on Trade and the Environment was charged to "identify the relationship between trade measures and environmental measures in order to promote sustainable development," and,

to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and nondiscriminatory nature of the system.

They specified that "the Working Party shall also examine the relevance of inter-governmental agreements on the environment and their relationship to the Agreement."⁶

Some environmental lobbies are pressing for more involvement of environmental nongovernmental organizations in the World Trade Organization.

Some environmental lobbies are pressing to have the CTE become a standing body of the WTO. They are also pressing for more involvement of environmental nongovernmental organizations (NGOs) in the WTO, including having a voice in dispute settlement. Other environmental groups, such as Friends of the Earth, have been even more militant and have called for the elimination of the CTE. They prefer dissolving the committee and moving it to the United Nations as a part of the UN Commission on Sustainable Development. In a joint press release last July, Friends of the Earth, the World Wide Fund for Nature, and Greenpeace International announced that they have monitored the progress of the CTE "with increasing alarm."⁷

Environmental Labeling

The trade-environment debate also focuses on environmental labeling-including information on recyclability, biodegradability, or "environmental friendliness" of a product on an affixed label. The earliest global call for eco-labeling was in Agenda 21, the document resulting from the Rio de Janeiro Earth Summit in 1992. Agenda 21 urged governments to expand "environmental labeling . . . to assist consumers to make informed choices."

There is nothing inherently wrong with eco-labeling. International trade expert and economist Jagdish Bhagwati notes:

In principle, that's [eco-labeling] fine, because it's a matter of supplying information. The fact is that consumers, who are increasingly interested in environmental issues, want information on how things are produced to be able to make choices. That we can't object to. So let them decide what they want to buy, rather than use trade sanctions to keep products out.⁸

Some forms of environmental labeling are voluntary and are already in effect in the United States. Personal computers sold in the United States may include the Energy Star symbol as an indicator of energy efficiency, while other items have the U.S. Green Seal. Other forms of ecolabels are also popular. For example, Starfish tuna boasts the words "dolphin-safe" on its label, indicating that it uses dolphin-safe methods of harvesting tuna. Of course, under the Marine Mammal Preservation Act, all tuna sold in the United States is dolphin-safe.

The U.S. Federal Trade Commission provides guidelines for environmental claims. Complying with its guidelines can protect companies from possible prosecution for fraudulent environmental claims.

Environmental labeling is perhaps most popular in the European Union. The British paper manufacturer Fort Sterling includes the European Union eco-label on several types of its paper products. In Scandinavia, over 70 percent of paper products boast the "white swan," the seal of the local certifying agency for environmental friendliness.⁹ This type of eco-labeling is designed to increase the attractiveness of the product to environmentally concerned consumers.

Newer forms of eco-labeling will expand the focus of environmental impact beyond the product itself. EU officials explain:

companies are obliged to act on the production process. In all the previous cases

of eco-labeling we have only called for modifications to the product.¹⁰

To qualify for newer EU eco-labels, firms will have to agree to cut chlorine and sulphur emissions and curtail energy consumption during the production process. Additionally, the paper products industry will have to demonstrate that the pulp used to make paper came from environmentally sound forestry practices that maintain bio-diverse forests and reduce water effluent levels.

U.S. producers claim no American firm can currently meet these standards. According to Jack Creighton, CEO of Weyerhaeuser, "in its present form," the new EU eco-labeling "would threaten \$2 billion worth of U.S. pulp and paper exports."¹¹ This potential loss of paper product exports would result in a loss of 34,000 American jobs. The current EU eco-labeling plan for forestry products will favor products from Denmark, Sweden, Norway, and Finland.

Mandatory environmental labeling could create a pernicious new trade barrier.

Mandatory environmental labeling could create a pernicious new trade barrier. For example, eco-labeling assumes that there is a harmonized global standard of production, but many (perhaps most) production processes for competing products vary with the nation of origin. There is a legitimate concern that developed states, the ones pushing for eco-labeling, will use this process to exclude competing products from developing states.

By pushing for global environmental standards, the basic trade doctrine of comparative advantage may be watered down or ignored. For example, assume that two nations are both producing steel.

The advanced western country's steel industry may utilize hydroelectricity or another "environmentally friendly" method of producing energy. Steel producers in developing nations may be using coal or another source of energy that is considered to have a "heavy environmental footprint." Mandatory eco-labeling would require both states to disclose methods of production, and have the developing state run the risk of having its product banned by western nations.

Similarly, as standards for eco-labels increase, developing states will have to struggle to meet newly revised criteria that often eludes even the most technologically advanced producers. Even in environmentally conscious countries such as Sweden, producers lament the prospect of production process changes dictated by international bodies. Carl-Johan Alfthan, technology director of the Swedish manufacturer Modö Paper Husum complains:

We work in a capital-intensive industry. The technical life of equipment is 10 to 20 years. It is not possible to alter this every few years.¹²

Mandatory eco-labeling also gives an opportunity to developed nations to make global sustainable development part of the manufacturing process of less-developed countries. Eco-labels that certify that imports utilized "sustainable processes" in their production may be required. In the European Union, paper producers must document that their products were harvested from wood fiber "that has been grown in environmentally-protected forests."¹³ ASEAN members, including Malaysia, Singapore and Indonesia, are also concerned about the effects of eco-labels, specifically, U.S. "certification of tropical timber and labeling of natural rubber products."¹⁴

Developing countries, in general, have made it clear that they oppose any move toward global standards. If global environmental labeling is required,

who will determine the standards? The WTO is primarily a trade forum and lacks expertise in establishing environmental standards. Allowing voluntary groups and nongovernmental organizations, such as Greenpeace, to set standards would surely thwart global trade. Governments and environmental NGOs that do not have trade as a primary emphasis are unlikely to take a balanced perspective when evaluating trade and the environment.

Developing countries, in general, have made it clear that they oppose any move toward global standards. If global environmental labeling is required, who will determine the standards?

Regional and local eco-labels have historically been drafted without consulting foreign producers and reflect a bias towards domestically produced goods. In Japan, only 2 percent of imports have qualified for eco-friendly labels. In Germany, 17 percent of foreign companies have received this designation. International trade lawyer Gary Horlick points out:

The trade concern is, the people setting the criteria are going to be local. Even if they're acting in good faith, they're going to respond to local needs, which may not be the most environmentally sound overall. If they're not acting in good faith, they're going to tilt it."¹⁵

Businesses in the United States have expressed similar concerns. The U.S. Council on International Business (USCIB) argues that a host of third-party multicriteria eco-labels threatens to mislead consumers, burden industry, and fail to improve

environmental quality.¹⁶ The USCIB asserts that over 25 regional eco-labeling programs operate globally with no common criteria or standards. Companies failing to adhere to these guidelines face inclusion on a McCarthyite "eco-blacklist." USCIB President Abraham Katz notes, "Environmental labeling programs have an undeniable impact on trade and have posed special obstacles to U.S. companies doing business internationally. We believe that in their current form, eco-labels will continue to disadvantage U.S. companies, while rendering little if any benefit to the environment."¹⁷ The coercion of U.S. firms in adopting ISO 9000¹⁸ is a potent reminder of the dangers of third-party criteria.

USCIB has urged U.S. Trade Representative Charlene Barshefsky to fight for eco-labeling rules that are "transparent, truthful, based on sound science and nondiscriminatory."¹⁹ The council believes that European and other environmental labels should be subject to WTO challenges.

Other opponents of eco-labels have joined the Coalition for Truth in Environmental Marketing Information, representing over 2,900 companies and boasting annual sales of more than \$900 billion. This group includes the American Forest and Paper Association, the Grocery Manufacturers of America, the Electronic Industries Association, the American Forest and Paper Association, the National Food Processors Association, the Chemical Specialties Manufacturers Association, the Can Manufacturers Association, and the American Plastics Council.²⁰

The coalition favors providing information and complains that others are promoting "eco-seals." The coalition asserts that these seals are

akin to a food label that simply says "good for you," rather than providing objective information about calories, fat and sodium content.

The coalition maintains that "eco-seals are easily abused as protectionist trade barriers and will re-

suit in numerous international trade disputes."²¹

The European Union approach to eco-labels would extend to the life cycle of the product. This would include an analysis of the raw materials used in assembling a product, manufacturing methods, emissions released when the product is used, and would include an obligation that companies "take back" an item for recycling or reuse.²² An official at the office of the U. S. trade representative asserts:

At this point in time, life-cycle analysis is as much art as science. It's very hard to look at all the impacts that a product has on the environment and then in terms of a labeling scheme weigh one against the other. So there are a lot of methodological questions to consider.²³

The doctrine of transparency is also jeopardized by the inclusion of environmental issues into the WTO. Transparency requires that laws regarding imports and trade be visible and clear. The WTO Agreement on Technical Barriers to Trade recognizes,

that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate.²⁴

However, these restrictions are

subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

Technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks nonfulfillment would create. The recognized legitimate objectives are

national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products.²⁵

Sensing possible defeat at the WTO on the eco-labeling issue, the National Wildlife Federation now claims that,

the WTO is not an appropriate forum to make judgments about the validity of eco-labeling programs or the technical, scientific, and marketing issues underlying those programs.²⁶

Multilateral Environmental Agreements and the WTO

The director general of the WTO, Renato Ruggiero, stated that:

the Committee on Trade and the Environment has done useful work in bringing together environmental and trade interests and [is] beginning to define the basis for a mutually supportive relationship, and concrete results of solid values are within reach; what is needed is the political will to take hold of them.²⁷

The political will he refers to may be more akin to coercion of the type last seen at the Rio Confer -

ence on the Environment. Developing states are well aware that introduction of the environmental issue into the WTO bodes ill for them.

The European Union, egged on by its environmental lobbies, is pushing for a WTO agreement that would exempt trade restrictions that are sanctioned by multilateral environmental agreements from WTO challenges. This blanket unilateral authority would cover approximately 180 such agreements currently in force.

*Compensation is a better
alternative than coercion.*

Many multilateral environmental agreements (the Montreal Protocol on Ozone Depletion, the Convention on International Trade of Endangered Species, and the Basel Convention on Toxic Waste), include trade measures. The European Union maintains that "trade measures can be necessary to achieve the environmental objective of these agreements."²⁸ Signatories to such agreements should be able to comply with the GATT without being considered in violation of trade agreements when involved in disputes with other signatories. However, some environmental groups would allow provisions of multilateral environmental agreements to replace WTO principles for evaluating trade barriers.

Such environmental agreements, however, should not be used as a standard for nations that have not agreed to be bound by their terms. If an environmental agreement calls for banning certain imports based upon scientific evidence that these imports are a threat to human health, the ban will survive WTO challenge even when applied to imports from non-signatories. A multilateral ban lacking these elements should be open to WTO challenges.

In the event that a WTO challenge is successful, the imports would not be automatically allowed into the objecting state. The importing state may still

comply with its obligations under the multilateral environmental agreement. Instead the objecting state will have an obligation to offer either compensatory trade privileges or face retaliatory tariffs from the challenging country. Compensation is a better alternative than coercion.

Environmental Barrier to Trade

The host of the December ministerial meeting, Prime Minister Goh Chok Tong of Singapore, urged his guests to "discuss green standards against the larger context."²⁹ Some guests ignored and will continue to ignore his admonitions. For example, the World Wildlife Fund (WWF) has been trying to garner support for tax incentives to favor environmental friendly production processes. The WWF proposes that domestic governments grant tax relief to environmental friendly producers. In the alternative, importing states should impose frontier levies on goods produced by nonenvironmentally approved methods.³⁰

This proposal flies in the face of WTO principles. By imposing a tax or tariff on the border for certain imports, trade will be diminished to the detriment of the developing states. Additionally, tax incentives of the type proposed may constitute an actionable subsidy under the WTO Agreement on Subsidies and Countervailing Measures. This subsidy would come at a time when the WTO has been phasing out most domestic subsidies.

Other green trade restrictions would similarly impose tariffs in the name of the environment. European regulations currently require paper products to include a certain minimum content of recycled waste paper. Exporters who fail to meet this standard face either higher tariffs or, in some instances, outright prohibition of their imports.

Imposition of this artificial standard, in the name of sustainable development, imposes undue costs and constraints on exporters from developing nations. States with healthy lumber industries may

find that it is more economical to produce paper without having to meet a set minimum recycled paper content. It is doubtful that many of the least developed states have a recycled paper industry large enough to satisfy the European requirement for recycled content.

The West has no right to insist that developing states rush headlong into closing the gap in environmental quality before they close the gap in economic development.

Demands that all WTO member states employ the highest level of environmentally sound technology could push the least developed nations into widespread acts of piracy of intellectual property. Intellectual property protection was one of the most divisive issues of the Uruguay Round of GATT negotiations. The least developed states agreed to the provisions on intellectual property after being assured of a long phase-in period. If the highest level of environmentally sound technology is required as a condition to export to the West, it is unlikely that the poorest countries will have this technology or refrain from exporting. Instead, piracy and compulsory cross licensing will be their response, triggering further WTO disputes and financial damages to technologically advanced countries.

Another issue on the environment trade agenda is "eco-dumping." Developed states with high environmental standards assert that they face unfair competition in global markets from exporters in developing states who operate free of such stringent regulations. These nations assert that the WTO should be responsible for leveling the playing field. This old argument is no more persuasive now than it was several years ago.

First, the argument assumes that the developing states have a conscious plan to sacrifice envi-

ronmental quality as a trade tactic. In reality, many of these countries lack the financial or technological capability to meet Western environmental standards. Second, the idea of imposing tariffs on exports because of their method of production or a nation's level of environmental quality is a threat to national sovereignty. As Jagdish Bhagwati states, "It wouldn't be fair for me to say: 'You are not charging what I consider to be a sufficiently high pollution-tax rate on your industries.'"³¹

Food, housing and education may simply be higher priorities than environmental protection in developing countries than in the West. President Clinton has recognized that "only a prosperous society can have the confidence and the means to protect its environment."³² Recent studies substantiate this assertion. According to a report by Gene Grossman and Alan Krueger, a nation's environmental quality improves after it reaches an annual per capita income of \$4,000 to \$5,000. This study by Princeton University and the National Bureau of Economic Research analyzed air pollution in urban areas of 42 nations. Not surprisingly, Grossman and Krueger demonstrate that pollution is directly correlated to low per capita income.

The West has no right to insist that developing states rush headlong into closing the gap in environmental quality before they close the gap in economic development. The developing states shrewdly recognize that the green issue may simply be a pretext for erecting still another more sophisticated trade barrier.

Perhaps one of the most hypocritical proposals advocated during this debate was the U.S. call for environmental review of trade agreements. The United States suggested that WTO member governments,

endorse the usefulness of governments conducting environmental reviews to help identify the potential environmental impacts of trade agreements and recommend options

to enhance the positive, and reduce the adverse, impacts, particularly when environmental costs were not internalized in the price of traded products.

The United States asserted that these reviews would "promote informed decision making and public involvement and provide important information to policy makers to address trade and environment concerns."³³

This suggestion is hypocritical in light of earlier vigorous U.S. government resistance to claims by environmentalists that environmental impact reviews for trade agreements such as NAFTA and GATT were required under the National Environmental Policy Act. The call by U.S. officials for environmental reviews for WTO is hypocritical because it is a process which these same officials previously rejected.³⁴

Not all recommendations made on trade and the environment are contrary to WTO principles. For example, Hong Kong has advocated a "building block" approach to improve transparency in environment trade discussions. The Hong Kong approach includes:

1. Collective clarification of member's notification obligations;
2. Establishment by the Secretariat of a database of WTO notifications of environment-related trade measures;
3. Setting up national inquiry points; and
4. Covering environmental-related trade measures in trade policy review reports.³⁵

This approach provides WTO member states with information that can be used for fruitful discussions and negotiations, free of coercive trade measures. It is hoped that, by establishing such a trade and environment "early warning system," future trade

disputes can be avoided.

The final CTE report stated that members of a multilateral environmental agreement (MEA) would not resort to the WTO dispute on trade measures settlement mechanism without exhausting all remedies available under the MEA. The United States opposed this provision.³⁶ The U.S. delegate to the CTE maintained that the U.S. view would give more "teeth" to the dispute process in the environment-trade cases.

The WTO report also expressed the consensus view that members commit not to "introduce trade measures inconsistent with the WTO or protectionist trade restrictions or countervailing measures in an attempt to counter environmental policies."³⁷ The U.S. opposition to this statement eloquently demonstrates that developing states' fear of "green" duties and other trade barriers is not chimerical.

The WTO Ministerial Conference will have left many advocates of expanding the link between trade and the environment angry and frustrated. The CTE refusal to legitimize trade measures of MEAs and impose trade programs were surprisingly positive results. The World Wildlife Fund proclaimed that "the tenor of discussions within the CTE is apt to raise concerns and even fears of a step backwards."³⁸

However, it is premature to predict definitively for free trade. The developing states must continue to hold fast to their opposition to environmentally based trade restrictions. Environmental lobbies and the European Union will continue to push their green agenda at the WTO.

The European Parliament recently advocated the establishment of a United Nations agency to monitor MEAs.³⁹ The EU also supports a more activist WTO, featuring increased input from environmental NGOs. A code of environmental conduct for transnational companies is included in their proposal.

Conclusion

As stated by the chairman of the GATT Council on the United Nations Council on Economic De-

velopment in 1992:

GATT's competence is limited to trade policies which may result in significant trade effects for GATT contracting parties. In respect to neither its vocation nor of its competence is the GATT equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environmental.⁴⁰

Given this rather clear and perceptive statement, it is hard to understand the current fervor for expansion of the WTO into such disparate issues as eco-labeling and multilateral environmental agreements. With issues involving trade and investment policy at stake in the discussions, insistence on an environmental agenda will exacerbate the North-South split.

The WTO meeting in Singapore failed to resolve most of the issues discussed. One notable and unsurprising result was the institution of the Committee on Trade and the Environment as a permanent body of the WTO. The CTE will continue to examine the relationship between trade liberalization, economic development, and environmental protection. No substantive progress was made on eco-labeling issues. The WTO Ministerial Declaration acknowledged the positive impact of free trade on global environmental quality. It concluded, "Full implementation of the WTO agreements will make an important contribution to achieving the objectives of sustainable development."⁴¹

The declaration also made it clear that environmentalists will have a seat at the trade table:

The work of the committee has been enriched by the participation of environmental as well as trade experts from member governments and the further participation of such experts in the committee's deliberations would be welcomed.⁴²

The WTO, like its predecessor the GATT, lacks enforcement powers. It survives solely by consensus. For developing states and the industrialized world to reach consensus on the trade and the environment debate, certain steps must be agreed to:

1. Any imposition of trade sanctions in the name of environmental guidelines must be done on the basis of sound scientific principles;
2. Long standing and basic WTO principles such as transparency, national treatment, effectiveness and least-restrictive measures must be respected;
3. Developing states must be allowed a longer phase-in period before being bound to the high environmental standards of the industrialized world;
4. Unilateral trade sanctions must not be allowed for extra-territorial behavior which causes no negative external environmental effects;
5. The flawed theory of eco-dumping must be rejected;
6. Rather than imposition of market-distorting trade barriers, taxes or subsidies, export of environmental friendly practices and technology should be transferred voluntarily by multinational firms. Increased protection of this technology and patents will ensure that market forces play a larger role in this debate than governments. Compulsory cross licensing or shortening of patent protection in the name of environmentalism must not be permitted – a pocket picked by a green hand is still an empty pocket;
7. WTO recognition of trade measures taken pursuant to multilateral economic agreements should be restricted to the signatories. Nonsignatories remain free to challenge trade

measures adopted under these agreements;

8. Eco-labeling should be objective and subject to WTO challenges; and
9. The Committee on Trade and the Environment should be abolished. The existence of the CTE is a tempting target for those who would subvert free markets in the pursuit of a green agenda.

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