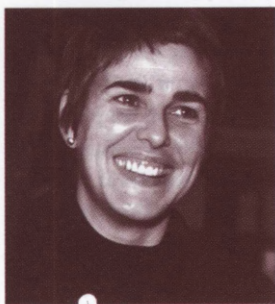


Safe trade and the WTO

by Deborah Tripley



Deborah Tripley

Deborah Tripley, solicitor for Greenpeace, discusses the concerns of the environment movement over the WTO's approach to trade issues involving multilateral environmental agreements, highlighted in the Greenpeace report to the Seattle Conference.

In recent months the WTO and its institutions have come under intense public scrutiny. According to one commentator (Larry Elliott, *The Guardian*, 7 February 2000) so intense has interest been in the WTO that it appears to have transformed a little heard of and rather grey institution into a sexy issue.

Much of the criticism of the WTO has come from the environmental movement concerned about the approach adopted by the WTO to trade issues involving multilateral environmental agreements.

By December 1999, criticism of the WTO had reached such a pitch that a number of non-governmental organisations (NGOs), including Greenpeace (an international environmental organisation), attended the WTO conference in Seattle to voice their concerns. Some of those who attended Seattle went with the clear aim of 'shutting down' the WTO. However, this was not the purpose of Greenpeace.

The Greenpeace approach to Seattle, according to Remi Parmentier, Head of Greenpeace International Political Unit, was to ensure that:

'the WTO could and should become a tool to promote sustainable development and environmental protection through trade policy.'

(Speech entitled 'Sustainability, Trade and Investment – Which Way Now for the WTO?' delivered to Chatham House Conference (Environment Series), London, 27–28 March, 2000). Greenpeace issued its Safe Trade Report at the conference. This contained key recommendations as to initial steps to be taken by the WTO in order actively to promote sustainable development.

In this article the author examines the difficulties in translating the concept of 'safe trade' into legal principles capable of enforcement in international law. The article considers whether the concept of 'safe trade' is dependent upon the creation of procedural environmental rights or whether existing principles, such as sustainability and the precautionary principle could help deliver 'safe trade'. Finally, the author

considers whether the term 'safe trade' would require international negotiations involving developing nations to include real provision for equity and fairness when decisions are taken about trade and the environment.

THE GREENPEACE REPORT

As well as taking its report on 'Safe Trade' to the Seattle Conference, Greenpeace distributed condoms to all the delegates in boxes containing the words: *'Practice Safe Trade – Safe Trade can prevent various global infectious problems such as poverty, deforestation, desertification, etc. ...'*: Most delegates got the joke! The device highlighted one of the key issues raised in the report and considered to be at the heart of the debate on the nature of 'safe trade': the issue of whether or not trade liberalisation, as pursued by the WTO, is inevitably at the expense of the environment.

There are those who argue that there is nothing inevitable about trade liberalisation leading to a degradation of the environment. For instance, the UK Government's Minister for Trade believes that 'international trade and environmental objectives can go hand in hand'. However, the environmental community, together with other leading NGOs, is unlikely to accept this statement without some guarantee that environmental issues can and will be taken fully into account in any decision-making process relating to trade.

For instance, Oxfam argues that trade liberalisation might reduce poverty and deliver sustainable development, but only if the conditions are right. In their submission to the Seattle Conference they argued that in order for the conditions to be right there would need to be fundamental reform of the WTO itself. Such reforms are needed to provide a 'level playing field' between developed and developing nations.

However, there is scant evidence to suggest that the WTO shares this view and accepts the need for reform. For instance, both the UK's Department of Trade and Industry (DTI) and WTO strike up the position that the WTO has no role to play in setting policy on the environment or labour rights. This seems a

somewhat blinkered vision. For instance, when considering the type of reforms the WTO could embrace, why not invite UNEP to participate in the WTO dispute panel whenever environmental issues addressed in a UNEP agreement are under consideration? This might go some way at least to achieving the 'level playing field'.

Most environmentalists agree that the international institutions dealing with multilateral environmental agreements, such as the Climate Change Convention or the Biodiversity Convention, are fragmented, poorly funded and badly integrated with one another. As expressed by Professor Philippe Sands, for example, this leads to a lack of any real international enforcement or progress in dealing with environmental problems (see 'Safe Trade in the 21st Century – A Greenpeace Briefing Kit' prepared by the Center for International Environmental Law and Greenpeace International / 'International Environmental Law Ten Years On,' Philippe Sands, RECIEL Volume 8, Issue 3, 1999).

In contrast, the WTO consists of a single institutional framework encompassing the General Agreement on Tariffs and Trade (GATT) and all other agreements and legal instruments negotiated by the Uruguay Round in 1994. Membership of the WTO automatically entails accepting all the results of the Uruguay Round. In addition, the WTO has a compulsory and rule-based Dispute Settlement Procedure with powerful compliance mechanisms, including the enforcement of compensation and trade sanctions.

There is simply no environmental institution that has comparable power. It is hardly surprising that environmental organisations become alarmed when the WTO settles trade disputes with seemingly little understanding or consideration of environmental issues.

These types of criticisms were levelled by the environmental movement at the decision taken by the WTO in the Shrimp/Turtle case, in which the US had banned the import of shrimp that had been caught in a manner adverse to seven species of sea turtle that were specifically protected under various international environmental instruments due to their threatened and endangered status. The US had banned imports of shrimp harvested without the use of turtle excluder devices (TEDS). It considered this the most environmentally-safe option for the harvesting of shrimp. Four countries (Thailand, Pakistan, Malaysia and India) charged the US with trade protectionism and won their case before the Appellate Body of the Dispute Settlement Panel.

As a result of this decision, many environmentalists charged the WTO with undermining multilateral environmental agreements agreed as a result of a democratic process. They claimed that the WTO was making decisions that were subject to little if any democratic accountability. In addition, the Appellate Body was criticised for taking decisions that had a direct impact on multilateral environmental agreements without taking into account environmental principles, such as that of sustainable development and the precautionary principle, nor did it take account of any expert scientific evidence on the environment.

In order for a level playing field to come into existence, environmentalists argue that multilateral environmental

agreements cannot be subordinate to WTO rules. Greenpeace claims this view has been supported most recently by the Cartagena Protocol on Biosafety adopted in Montreal in January 2000. This protocol points out that: 'trade and environment agreements should be mutually supportive with a view to achieving sustainable development' and that there is no intention to 'subordinate this Protocol to other international agreements'.

SAFE TRADE AND PARTICIPATORY RIGHTS

The use of the term 'safe trade' by Greenpeace clearly advocates the establishment of a number of participatory rights for NGOs and citizens. For instance, 'safe trade' would allow for rights to information, the right to be heard and participate, and access to the decision-making process. These rights would 'open up' the WTO (rather than 'shut it down') and make it a more transparent and accountable institution.

Clearly, the establishment of a 'right' to participate in the above ways would mean a greatly enhanced role for NGOs in the policy-setting/decision-making process of international agreements and possibly other fora.

Greenpeace already has observer status at international level in many multilateral environmental agreements. For instance, at the Convention for the protection of the marine environment of the North East Atlantic (OSPAR), Greenpeace has very wide access. But such rights have been established by custom and not by rule of procedure. In addition, it has no voting rights nor any access to the decision-making process.

It is widely accepted that NGO participation at international environmental negotiations has the effect of enhancing the process – for example, by helping to identify parties' interests, providing research and background information, shaming parties into action and generally making the decision-making process transparent. (See Stepan Wood, 'Renegades and Vigilantes in Multilateral Regimes: Lessons of the Canadian-EU "Turbot War"', in LE Susskind, WM Moomaw, TL Hill (eds.). *Innovations in International Environmental Negotiation*, Pon Books.) It is noted that the WTO deals with disputes that can impact on millions of lives, and in particular the economic and social wellbeing of individuals.

CONCERN

There is a great deal of concern from environmentalists that an institution that has few transparent or democratic procedures has the power to strike down multilateral environmental agreements by invoking its internal rules to ensure free trade.

However, in order for participation by NGOs to be given the status of a 'right' there would need to be some form of legal mechanism or legal fora to deliver such a right. The European Court of Human Rights has touched on some of these issues in recent cases. For instance, in the case of *Guerra and Ors v Italy* (1998) 26 EHRR 357, the court was asked to consider a right to information under art. 10 of the European Convention on Human Rights (ECHR) (as well as rights under art. 8).

Here, a chemical factory was classified as 'high risk' and in 1976 an explosion at the factory led to 150 people being

admitted to hospital with acute arsenic poisoning. The applicants argued that the failure to take any action against the factory had interfered with their right to privacy and quiet enjoyment under art. 8, ECHR. They were successful in this claim. However, they had also argued that they had a right to be provided with information concerning the safety record, inter alia, of the factory.

The ECJ ruled against the provision of the safety record. The applicants had argued that art. 10 imposed a positive obligation:

'to collect, process and disseminate information not directly accessible or known to the public'.

However, the ECJ found that there was no such positive obligation, whereas the Commission had found that there was a positive duty on member states to provide the public with information as well as a 'right' to receive such information. It considered such rights particularly important in the environmental field, given the need to act pre-emptively to deal with many environmental problems.

In the case of *Balmer-Shafroth and Ors v Switzerland* (judgment 26 August 1997, Case Note, RECEIL, Vol. 7, Issue 1, 1998; (1998) 25 HRR 598) the court considered access to the decision-making process under rights to access to justice created by art. 6(1) of the EC Treaty. This case concerned the licensing of a nuclear waste dump.

The applicants claimed that there was no fair procedure for hearing objections to the renewal of the licence, nor any fair mechanism for dealing with complaints about the granting of new licences to the power station. The ECJ found that whilst the applicants had rights under art. 6(1), they were inapplicable in this case because the power station did not expose the applicants personally to a danger that was serious, specific and imminent. In addition, it found that the outcome of any proceedings would not be 'directly decisive' of the right in question and therefore the applicants could not avail themselves of art. 6(1).

A dissenting judgment argued that in the course of interpreting art. 6(1) the court should have taken into account other substantive environmental principles, such as the precautionary principle. In addition, the minority view was that the ECJ's decision effectively required the local population to be contaminated with radiation before they could seek a remedy for breach of their fundamental human rights.

From the above decisions there appears an unwillingness by the ECJ to expand procedural rights in a manner that could include a positive duty upon a member state to provide environmental information or access for its citizens to the decision-making process on environmental issues. Without the expansion of rights in this direction it is difficult to see what assistance human rights can bring to environmentalists aiming to prevent environmental harm, even though remedies may be available to individuals once a sufficient threshold of harm has occurred.

SUSTAINABLE DEVELOPMENT AND THE PRECAUTIONARY PRINCIPLE

From the above discussion it is apparent that there is little if any legal redress for individuals, under the existing human rights

regime, where they seek the court's assistance to stop potential future environmental harm. However, most environmental problems are best resolved where it is possible to take some form of pre-emptive remedial action prior to any adverse impact on the environment.

In the 'safe trade' report Greenpeace does not argue for 'environmental rights' as human rights. Instead, it advocates the incorporation of the precautionary principle and sustainable development into all decision-making processes.

This approach applies equally to the decision-making process of the WTO. There is some precedent within the WTO for invoking the principle of sustainable development. In the Preamble to the Uruguay Round Agreement it calls for the:

'optimal use of the world's resources in accordance with the objective of sustainable development, seeking to both protect and preserve the environment'.

The principle of sustainable development and the precautionary principle found their expression in the Rio Earth Summit Agreement in 1992. Both principles often have fairly elastic interpretations applied to them. One of the most comprehensive definitions of sustainable development is that supplied by Kiss. He says that:

on the internet

<http://www.psrast.org>

PSRAST (Physicians and Scientists for Responsible Application of Science and Technology) is an independent scientific organisation which assesses the safety of new technologies. Their website has regularly updated information, articles and open letters to governments on such topics as GE foods.

'... so far as the actual content of the right is concerned, it is submitted that it includes the realisation of economic, social and cultural rights and the conservation of the conditions, including conservation of biological diversity, which are necessary to ensure that attainment'.

(Alexandre Kiss, 'The Rights and Interests of Future Generations and the Precautionary Principle', in *The precautionary principle and international law – the challenge of implementation*, David Freestone and Ellen Hey (eds.), Kluwer Law, pp. 19–28). His interpretation supports the view that the concept of sustainable development need not be wholly centred on the individual human condition, i.e. not wholly anthropocentric, nor based in the present tense. This contrasts with many individual rights created under the ECHR.

The precautionary principle bites when there is scientific uncertainty about unknown risks that are likely to be both serious and irreversible. It is likely to require a shift in the burden of proof for its proper application. For instance, the burden of proving that a trade is safe would be on the objector to any trade restriction/limitation. The objector would need to show that the trade, process or product was 'safe' in terms of environmental quality, consumer protection, worker safety, and public health.

Greenpeace take the view that, if it were possible to invoke these principles in a formal way within the procedures of the WTO, it would become necessary to give priority to the environment in any decision-making process. In other words,

like fundamental human rights claims, environmentalists hope to imbue such terms with similar priority when it comes to decision-making processes. (For a fuller discussion, see Paula M. Pevato, 'A right to Environment in International law: Current Status and Future Outlook', RECIEL, Vol. 8, Issue 3, 1999.)

Certain academics argue that just as a 'right to a clean and healthy environment' is fraught with difficulties of definition, so too are these concepts. It is said they will never amount to a customary international norm, but will remain part of soft law forever (David Freestone/Ellen Hey, op.cit).

It is true that despite numerous international agreements referring to these environmental principles they do not appear to have made their way into law as legal norms. They cannot be evoked as having the same type of priority of claim as fundamental human rights claims.

However, it is argued that if these principles were given greater legal status, affording them a priority of claim, the balance in favour of the environment in decision-making processes would become more even. For example, in the case of genetically modified organisms (GMOs) environmentalists argue the precautionary principle has not been properly evoked. They hold that had a precautionary approach been formally incorporated into the decision-making process for the grant of consents to release and market GMOs there would have been few, if any, authorisations granted for their introduction into the human diet and the environment.

In this context decision makers have preferred to rely on a principle called 'substantial equivalence'. This implies that two foods are equivalent in all characteristics that are of importance to the consumer – safety, nutrition, flavour, and texture. But it is argued that:

'... in actual practice the investigator compares only selected characteristics of the genetically engineered food to those of its non-genetically engineered counterpart. If that relatively restricted set of characteristics is not found to be significantly different in these two, the genetically engineered food is classified as substantially equivalent to the corresponding non-genetically engineered food and is required to be neither tested further nor labelled as genetically engineered.' (John Fagan, PhD, *The Failings of the Principle of Substantial Equivalence in Regulating Transgenic Foods*, an article reproduced at www.psrast.org)

There have been some recent advances in ensuring greater standing for these principles. For instance, in the recently agreed Cartagena Protocol on Biosafety the precautionary principle is included both in the Preamble to the Protocol and also in the decision-making procedures regulating trade in GMOs. The Protocol states:

'Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use

as food or feed, or for processing in order to avoid or minimise such potential adverse effects'. (Article 11.8, Cartagena Protocol)

Also, a recent Communication from the EC (COM (2000) 2 Feb. 2000) setting down guidelines for the use of the precautionary principle states, inter alia, that:

'The Commission considers that the Community, like other WTO members, has the right to establish the level of protection – particularly of the environment, human, animal and plant health – that it deems appropriate. Applying the precautionary principle is a key tenet of its policy, and the choices it makes to this end will continue to affect the views it defends internationally, on how this principle should be applied.'

THE CONCEPTS OF 'SAFE TRADE' AND EQUITY

The concept of 'safe trade' also raises the issue of fairness or equity for developing nations. As far as developing nations are concerned, the concept of fairness is likely to include, at the least, their equitable involvement in international negotiations and a fair approach adopted by developed nations when requiring the application of environmental protection measures to trade.

Many developing countries have long argued that high standards of environmental protection are just another form of protectionism. They point out that at the Rio Earth Summit in 1992 they struck a bargain with the developed nations. This bargain was to allow developing countries to be compensated for the implementation of higher cost environmental protection measures by the transfer of technology and mitigation costs. However, this has largely not materialised.

Current negotiations aimed at implementing the Kyoto Protocol to the Climate Change Convention – arguably one of the most significant environmental conventions ratified in recent years – seem to underscore this point. As UNEP states (see the UNEP website at www.unfccc.de/resource/beginner.html):

'If current predictions prove correct, the climatic changes over the coming century will be larger than any since the dawn of human civilisation. Upon current scientific estimates it is almost certain that atmospheric levels of carbon dioxide will double from pre-industrial



levels during the 21st century and triple by 2100 if no steps are taken to curb greenhouse gases.'

The Kyoto Protocol sets quantified emission targets for the developed countries to meet. Market mechanisms are to be injected into the process. These are intended to allow the parties to trade in various flexible trading mechanisms dealing with emissions. It has been suggested that future agreements should allow those states that are party to the protocol to bank assigned amounts surplus to their compliance with emissions targets. In view of the trading advantages such mechanisms might provide it is clear that these matters raise fundamental equity issues as to what future emission levels each country should face.

There are 165 states party to the Climate Change Convention – although only 100 have ratified (excluding the US). The great fear for developing countries is that as they expand and their economies grow there may not be enough natural resources to go round. This is likely to include climate emissions. According to one commentator (Farhana Yamin, 'Equity, Entitlements and Property Rights under the Kyoto Protocol: the Shape of Things to Come', RECIEL, Vol. 8, Issue 3, 1999) developing countries fear that:

PARTICIPATORY RIGHTS

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'... when the time comes for them to assume commitments, the global pie of emissions will either have been 'eaten' by the Annex 1 Parties (i.e. developed countries) to the Kyoto Protocol or else be hoarded and only available to developing countries at extortionate prices'.

This paints a rather bleak outlook for developing nations under the grand scheme of trade liberalisation. Without recourse to any real principles of law to curb the behaviour of the developed world towards trade in dwindling natural resources, and without any legal mechanisms to ensure a level playing field, there seems little chance that trade liberalisation will produce the pot of gold held out by the developed nations as the prize for free trade.

CONCLUSIONS

The future challenge for the WTO is whether it can reform its procedures sufficiently to diffuse the criticisms it faces from the environmental community.

In order to deliver 'safe trade' as demanded by organisations like Greenpeace it will be necessary for the WTO to strike the right balance between trade liberalisation and the need to protect the environment. To date, its record is considered poor.

There is a great deal of concern from environmentalists that an institution that has few transparent or democratic procedures has the power to strike down multilateral environmental agreements by invoking its internal rules to ensure free trade. At a most basic level it is believed the WTO could reform itself by inviting UNEP to become involved in those trade issues considered potentially protectionist in nature due to existing

environmental instruments or environmental concerns generally.


However, in order for the WTO to 'open up' so that the environmental community can fully participate in its institutions there is a need for the development of procedural rights. It is argued in this article that such rights are unlikely to be delivered by reliance on existing human rights instruments. Instead, consideration needs to be given to the formal incorporation of the precautionary principle and sustainable development into the decision-making procedures of the WTO. This would ensure that decisions taken that are likely to have an adverse impact on the environment must first have regard, as a matter of priority, to these principles.

This would require, at the very least:

- the consideration of environmental information and opinions gathered from relevant stakeholders;
- a scientific evaluation of the adverse impacts and scientific uncertainties involved if the trade measure is allowed; and
- a change in the burden of proof as to whether or not a trade or product is safe for human health and the environment.

Finally, where the scientific uncertainties are great, and there is likely to be serious and irreversible harm, these principles require decision makers to take the step of refusing trade in certain goods and products.

In addition to the development of procedural rights there needs to be a consideration by developed nations of the need to invoke principles of equity or fairness when negotiating with developing countries. Such principles could be of critical importance to these countries during negotiations of both multilateral environmental agreements and trade agreements and enable a fair balance to be struck between developing and developed nations. On this basis, it is considered that it may be possible to achieve, or come close to, a level playing field which could ensure that the developing world can afford to implement environmental protection measures whilst participating in the grand trade liberalisation scheme.

Without such fundamental principles incorporated procedurally into existing WTO processes the prospect of the WTO being able to meet its critics adequately remains slight. 

Deborah Tripley

Solicitor, Greenpeace Ltd

This article is based on a talk given at Essex University as part of its Longman 2000 Series. The ideas in it are wholly those of the author and should not be considered to reflect necessarily the views of the organisation Greenpeace.

FURTHER READING

An article by John H Jackson on the WTO Dispute Settlement Procedure appeared in *Amicus Curiae*, Issue 24, February 2000.