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The WTO and the Environment

Development of competence beyond trade

James K.R. Watson



The WTO and the Environment

This book is a review of the development of the WTO dispute resolution procedure and the power and influence it has gained over the practices of the member countries and in relation to international treaties. The book addresses the development of environmental competency in the WTO and examines the arguments of those who oppose WTO rule making with impacts on the environment. The WTO's interactions with multilateral environmental agreements are considered and recent WTO cases including the 2011 US/Mexico tuna dispute and the US sea turtles decision are analysed in detail. In examining how an international organisation which was established with a specific purpose in mind has come to interact in fields beyond its original remit, James Watson demonstrates how the dispute resolution system at the WTO has come to work in a judicialised manner, operating with an informal system of precedent. This has led to the contracting parties placing more reliance on the decisions of the dispute panels and appeal body when considering policy options, with WTO rulings increasingly influencing the behaviour of national legislatures in regard to the environment.

The book goes on to make concrete recommendations, based on existing practice in the WTO dispute resolution procedure, which could enhance decision making in environmental cases heard by the WTO. The book argues that this could be achieved with straightforward amendments to the WTO, based on existing practices endorsed under the WTO for other policy considerations. *The WTO and the Environment* will be of particular interest to academics and students of International and Environmental law.

James K.R. Watson has been researching the international trade and environment subject for more than 15 years. Currently working in Brussels at Weber Shandwick on policy development, he previously worked for the Commonwealth Secretariat on a European Commission-funded trade policy project based in Ethiopia. He has completed an LL.M in Environmental Law and a PhD on international trade and environmental law.

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Foreword

It is a great pleasure and an honour for me to write a few words about this intellectually stimulating book written by Dr James Watson. This book emanates from the doctoral thesis that he wrote at the University of Leeds, and I had the privilege of supervising his research.

The interaction of trade with the environment has been an area of much consideration and discussion, and the relevance of this debate has never been more salient than it is now. The relationship between global trade and environmental protection is well established, although the international legal links between the two areas can still be considered to be formative. The international legal frameworks that support the trade and environment spheres are also very different, with the World Trade Organisation (WTO) leading the regulation of international trade and a plethora of treaties addressing environmental issues at the international level with no one institution covering all the relevant environmental treaties.

This book explores the dichotomy between international trade and international environmental law and the impact this has had on the development of the legal regimes addressing both fields. The more fragmented approach under international environmental law has created certain issues in relation to effective enforcement. To the extent that the concern of many commentators has been that environmental protection enacted at the international level has been in some way subordinated to the global regulation of trade through the WTO. The fact that there is no one global environmental body dealing with all the various international environmental treaties has to a certain extent supported the interpretation of the international legal system as favouring economic concerns, given the success of the dispute resolution system of the WTO to influence national policies.

The current global situation, in terms of economic struggle and lack of serious progress in important environmental protection negotiations such as the United Nations Framework Convention on Climate Change, also feeds the view that there is a subordination of environmental rules to economic ones. This book reviews the current state of the relationship between trade and the environment and the international legal system as it stands through analysing the practice of the WTO in relation to environmental protection – primarily through an assessment of the activities of the dispute settlement

system. The context of the development of the global trading system has been so different to the growth in international environmental law and the numerous treaties that cover them. This of course has implications in terms of the way states approach the two fields, but the relationship between trade and the environment is complex and requires analysis at the interface of the systems governing their administration.

The development of international trade law through the creation and operation of the WTO has led to the implementation of a robust dispute settlement system to referee the global trading regimes of 153 countries. There has been little in comparative terms in the international environmental field to match the development of the WTO covering all aspects of global environmental governance. Greater efforts in global environmental legal governance could be one way of reviewing the perceived imbalance, but there are other possibilities. In this book the practicalities of the possibilities of setting up a Global Environmental Organisation (GEO) are examined, as this has been a constant call from concerned environmentalists over the past decade and more. The questions surrounding the creation of a GEO have yet to be answered fully and indeed in the current global economic crisis, where countries are even considering reducing their contributions to the UN, the opportunity for creating a GEO seems hampered. It is thus important that practical solutions are found to enhance environmental protection in the current global legal context.

The WTO has been playing a role in international environmental law making through its dispute resolution system, since the days of the GATT. Famously the *US-Mexico Tuna Dolphin* cases in the 1990s caused headlines and stirred anti-GATT/WTO sentiment from environmental groups. Questions were raised about the suitability of the GATT/WTO system as the right forum to assess issues with environmental aspects. This situation is still the case today, as numerous trade–environment cases have come before the WTO dispute resolution panels in the last few years. Some of these cases are now infamous – such as the *US-Mexico Tuna Dolphin* dispute, which re-emerged in 2011 with another challenge from Mexico to the labelling practices of the US. This case is now subject to appeal from both parties, as Mexico contests some of the findings in terms of the discriminatory nature of the labelling. This demonstrates that finding the right balance between economic development and environmental protection will always be a challenge in the current global context, it is important to note that this could be the case in any dispute resolution forum.

Reviewing these WTO cases and the procedure applied by the WTO dispute resolution panelists and the appellate body can support an understanding of the reasoning in the law-making process at the interface of trade and environmental concerns at the WTO. As this is the forum where these decisions are taking place at the present time it is important to understand what drives the decision making. These decisions are crucial to understanding why environmentalists feel that the interests of trade are overpowering those of environmental protection; however, it is also clear that the reasoning

shows proper legal consideration for the laws as they stand. The question then that should be considered is what can be done now to support improved environmental decision making when consideration is undertaken through the WTO dispute resolution system.

The competence of the WTO in the environmental field is open to interpretation. With the Committee on Trade and Environment (CTE) and the reference to sustainable development in the preamble of the WTO it is clear that the WTO members recognize the need to reconcile environmental protection with trade policy. The work of the CTE has been fitful to date and the drive for finding agreements on trade in environmental goods remains unfulfilled. There are opportunities for the WTO through the CTE to show real commitment to the trade–environmental protection paradigm, but action has not always followed the words of the WTO Secretariat – although we should recognize that much depends on the will of the contracting parties.

Nevertheless, the practice of the WTO in other areas can shed some light on the potential for how it could approach the environment. Practice exists in relation to dispute resolution procedures, for example when developing countries are involved, that show the WTO system does not operate a ‘one size fits all’ approach. Learning from these examples can improve the practices of the WTO in dispute resolution around environmental protection issues. This book makes recommendations that are possible and practical in the current global context.

The trade and environment debate is a crucial one for the present generation of international law and policy makers. The decisions that are made today will impact the world of the future and the environment in which future generations will live, both economically and environmentally. The work contained herein builds on the work that has gone before and now focuses on what can be achieved going forward, to best support the objectives of sustainable development through the international trade and environment legal systems.

I am pleased that Dr Watson has produced a highly commendable book on such a challenging area of international trade law and its interaction with international environmental law. He has made a major contribution to the body of knowledge on the subject and provided a great deal of food for thought for policy and decision makers. I would like to congratulate him most warmly on the publication of this book which I can happily recommend to researchers and students of international law of trade and environment as well as to those interested in issues of global governance.

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Table of Abbreviations

AB	Appellate Body
AIA	Advanced Informed Agreement
ASEAN	Association of South East Asian Nations
CBD	Convention on Biological Diversity
CCJ	COMESA Court of Justice
CITES	Convention on International Trade in Endangered Species
COMESA	Common Market for Eastern and Southern Africa
COP	Conference of the Parties
CPB	Cartagena Protocol on Biosafety
CRTA	Committee on Regional Trade Agreements
CTBT	Technical Barriers to Trade Committee
CTE	Committee on Trade and Environment
CTESS	Committee on Trade and Environment Special Sessions
DDA	Doha development agenda
DEFRA	UK Department for Environment, Food and Rural Affairs
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on rules and procedures governing the settlement of disputes (Dispute Settlement Understanding)
EC	The European Community
ECJ	The European Court of Justice
EFTA	European Free Trade Association
EGS	environmental goods and services
EKC	Environmental Kuznets Curve
EMIT	Group on Environmental Measures and International Trade
ENGO	environmental non governmental organisations
ETS	The European Union Emissions Trading System
EU	The European Union
FoE	Friends of the Earth
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEO	Global Environmental Organisation
GMO	genetically modified organisms

ICJ	The International Court of Justice
ICTSD	International Centre for Trade and Sustainable Development
IIASA	International Institute for Applied Systems Analysis
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
INECE	International Network for Environmental Compliance and Enforcement
ITC	International Trade Centre
ITO	International Trade Organisation
LDC	least developed country
LMO	living modified organisms
MEA	Multilateral Environmental Agreement
MEP	Member of the European Parliament
MFN	Most Favoured Nation
MoP	Meeting of the Parties
NAAEC	North American Agreement for Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGO	non governmental organisation
PCWTO	Preparatory Committee of the World Trade Organisation
NSA	Non State Actors
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
npr PPMs	non-product-related processes and production methods
PICT	Project on International Courts and Tribunals
PPM	process and production methods
SCM	Agreement on Subsidies and Countervailing Measures
SPS	Sanitary and Phyto-Sanitary Agreement
STO	specific trade obligations
TBT	Technical Barriers to Trade
TED	turtle excluding device
TREM	Trade Related Environmental Measures
TRIPS	Trade Related Intellectual Property Rights Agreement
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNFCCC	United Nations Framework Convention on Climate Change
USAID	United States Agency for International Development
USDA	United States Department of Agriculture
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation
WWF	Worldwide Fund for Nature

Introduction

The World Trade Organisation (WTO) was formed by contracting party decision in 1995, following years of discussion under the Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations. The WTO formalised many of the practices of the GATT and ushered in a new era of international trade regulation by setting up an institutional body to oversee the GATT and its associated agreements. The WTO agreements included an Understanding on Rules and Procedures Governing the Settlement of Disputes, with the intention of formalising the practice of the GATT on resolving complaints arising from the contracting parties. This was seen as a major success at the time and the importance of this Agreement is now better understood – some 15 years after it came into existence.¹ Prior to the WTO, the GATT dispute resolution system had already gained experience of dealing with trade-related issues impacting on policies not limited to purely trade matters.² The WTO has continued this work, and with its enhanced dispute procedures the issues around the inter-relationship between trade and other policy areas has also been closely scrutinised.³

One area has been of particular interest to commentators, and that is the relationship between the rules of the WTO and the environment, particularly

1 See R. Read, 'Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT', Lancaster University Management School Working Paper, 2005/012, 2005.

2 See D.C. Esty, *Greening the GATT: Trade, Environment and the Future*, Institute for International Economics, Washington, DC, 1994.

3 See, inter alia, E. Neumayer, 'The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak', *Global Environmental Politics*, Vol. 4, No. 3, August 2004; C. Tisdell & R.K. Sen, *Economic Globalisation: Social Conflicts, Labour and Environmental Issues*, Edward Elgar Publishing, Cheltenham, 2004; and S.P. Subedi, 'The Road from Doha: The Issues for the Development Round of the WTO and the Future of International Trade', *ICLQ*, Vol. 52, No. 2, April 2003.

through the workings of the dispute resolution system (DSU) of the WTO.⁴ Much of the attention of these commentators has been polarised between two groups of thought: one claiming that the WTO has been harmful to international and national environmental laws, and the other stating that no harm has been done to the environment through the workings of the WTO, while on the other hand going on to suggest that the global trading system is beneficial for the environment.⁵ The former group seeks solutions to the problems they perceive and often call for international institutions to be established to protect the environment, whilst the latter tends to believe that such action is unwarranted.

The purpose of this study is to not only add to the well of knowledge in the debate on the role played by the WTO in the environmental field, but to suggest ways forward for the debate in the current global situation of the early 21st century. In this respect this study will look to offer achievable solutions for the international community to consider while addressing the conundrum that is the interaction between international trade and environmental law. Practical solutions are of great value at the present time when there has been so much stagnation in international trade talks and the economic crisis has had an impact on the finances of states and their ability to commit to international institutions. This study aims to suggest pragmatic solutions with regard to the interaction between the WTO and the environment.

This area has been reviewed by leading scholars, but there is a need for further research and analysis on this topic, especially when all avenues appear not to have been explored in terms of offering suggestions for enhancing the trade–environment relationship at an international level. The exploration or identification of new approaches to the debate will support the development of the discussion at an international level and could lead to new ways of addressing existing problems. The relevance of the issue is felt not just at the level of academic debate, but also throughout society on a global basis.

A recent survey of countries across the world has demonstrated that the public in developed and developing countries see it as important that environmental and labour standards are protected within the global

4 See F. MacMillan, *WTO and the Environment*, Sweet & Maxwell, London, 2001; J. Wiers, *Trade and Environment in the EC and WTO: a Legal Analysis*, Europa Law Publishing, Amsterdam, 2002; and G.P. Sampson & J. Whalley, *The WTO, Trade and the Environment*, Edward Elgar Publishing Ltd., Cheltenham, 2005.

5 The school of thought related to the protection of the environment from abuses under the WTO includes scholars such as D.C. Esty and F. MacMillan, but also non-governmental organisations (NGOs) such as Friends of the Earth and Greenpeace. The pro-WTO trade school includes scholars such as J. Bhagwati and J.H. Jackson.

trade arena.⁶ A specific study on whether international trade is good or bad for the environment found that 45 per cent of Americans, 57 per cent of the Chinese and 29 per cent of the French considered that international trade was good for the environment. Conversely 49 per cent of Americans, 29 per cent of the Chinese and 66 per cent of the French considered international trade to be bad for the environment.⁷ This shows that perceptions of trade and the environment vary globally, but that many populations in developed countries perceive international trade as a danger for environmental protection. This is not reflected in developing countries' responses. Therefore it is clear that the issues around trade and environment remain – and will be for the future – of great global significance.

The fact remains that the debate on trade and environment around the WTO is not black and white, as most commentators would agree. There are many shades of grey that can be analysed to offer solutions to the question of where the competence of the WTO ends and how environmental protection can be achieved at the same time as pursuing the global trade agenda. It is these shades of grey that require attention and where in fact genuine solutions may lie. An exploration of some of these 'grey' alternatives will form the intellectual guidance for this study, as well as an analysis of the reality of realising any potential suggestions for means to improve the interaction between the global trade agenda and the need for environmental protection.

To elaborate on the perceived problem it is important to note that the global trade agenda and environmental protection principles have long histories in the social and cultural activities of intellectuals and philosophers dating back hundreds of years.⁸ The study here outlined considers the issues in their contemporary state at the beginning of the 21st century. The past few decades have seen an enormous growth in the interest of humanity's impact on the environment, whilst at the same time the rules of international trade have been growing more complex as more is understood of the inter-relationships

6 See 'International Publics Strongly Favor Labor and Environmental Standards in Trade Agreements', 21 March 2007, World Public Opinion.Org website, <http://www.worldpublicopinion.org/pipa/articles/btglobalizationtradera/334.php?nid=&id=&pnt=334&lb=btgl> (accessed 24 January 2010). The survey shows that a high number of respondents from, inter alia, the USA (91%), China (85%), India (60%), Thailand (69%), Argentina (90%) and Poland (90%) believe that the members of international trade agreements should maintain minimum levels of environmental protection standards.

7 See 'World Public Favors Globalization and Trade but Wants to Protect Environment and Jobs', 25 April 2007, World Public Opinion.Org website, <http://www.worldpublicopinion.org/pipa/articles/btglobalizationtradera/349.php?lb=btgl&pnt=349&nid=&id> (accessed 24 January 2010).

8 See H. Ritvo, 'Fighting for Thirlmere – The Root of Environmentalism', *Science Magazine*, Vol. 300, No. 5625, 6 June 2003; J.B. Flippin, 'A Fresh Perspective on the Roots of Environmentalism', *Reviews in American History*, Vol. 35, No. 1, Johns Hopkins Press, 1 March 2007; G.F. LaFreniere, 'Rousseau and the European Roots of Environmentalism', *Environmental History Review*, Vol. 14, No. 4, 1990.

between trade and other policy areas.⁹ The coming together of these two phenomena has generated an issue of our time: can we have economic growth whilst protecting the environment and ecosystems of the world? The WTO is essentially dedicated to the preservation and furtherance of free trade principles, but pays respect to the principles of sustainable development.¹⁰

The concept of sustainable development is now well established in the international legal and policy order and it is important to be clear on what is meant by this term. Although the WTO does not offer a definition of sustainable development, the term needs explanation and for the purposes of this work the approach used is that as defined in *Our Common Future* – the Brundtland Report:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.¹¹

Essentially the concept sees the inter-relation of decisions made today with impacts beyond the immediate time frame and also across geographic boundaries. This is a systems approach to global development, where a decision taken in one place and time has consequences, foreseen and unforeseen, in other areas. Hence trade policy decisions can have an impact on environmental protection policies now and in the future, and vice versa.

Protection of the global environment is seen as necessary for the preservation of humanity in the future, and for future generations' well-being. Reconciling these two interests can seem challenging when certain countries value economic development more than others who have perhaps advanced along the economic development continuum and have now put more of a value on the protection of the natural environment.¹²

Given this global situation it is, with reflection, no surprise that the debate on the interaction of the WTO with environmental policy through its

9 See R. Carson, *Silent Spring*, 40th Anniversary Edition, Mariner Books, New York, 2002, as the first recognised book relating to the new environmentalism of the late 20th century.

10 The preamble to the Marrakesh Agreement Establishing the World Trade Organization contains a reference to using the world's resources in accordance with the principles of sustainable development. See http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm (accessed 24 January 2010).

11 World Commission on Environment and Development (WCED), *Our Common Future*, Oxford University Press, Oxford, 1987, p. 43.

12 See the findings in the two polls mentioned in op. cit. 6 and 7.