

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Years Twenties, years of Article XX? The risen cause of Sustainability in the WTO – Part I

Jean-Marie Paugam (Permanent Representative of France to the WTO) · Thursday, February 4th, 2021

At the end of 2020, the long overdue conclusion of the fisheries subsidies negotiation was once again postponed in the WTO. Any reasonable observer would have long ago concluded that the environment was the “the lost cause” in this organisation. Reasons to think so are many. Yet there are also strong grounds to believe the opposite and 2020 may well have been the year or the risen cause of Sustainability in the world trading system. Back to the future: following the thread of three Bob Dylan songs, this note reviews some lessons from the past and suggests renewed optimism on the rightful place of the Environment in global trade governance.

License to kill (Or: the anti-environment mind-set inherited from the times of the GATT)

Since inception with the GATT, after World War II, the Multilateral Trading system (MTS) has clearly asserted the superior value of environment and health public policies objectives over trade. As such, the word “Environment” was not yet a concept of public policy at this time, but the environmental issues (as we understand today) were clearly covered by article XX of the GATT 1947[1] through the notions of “natural resource conservation” or “animal and vegetal health”. Yet, at the same time, the MTS would more or less consider that the environment was “none of its business”. That was roughly the consequence of the famous article XX of the GATT: a regime of exception to regular trade rules (*i.e.* non-discrimination for the most fundamental one) justified by environmental objectives. In the words of economists: the only objective of the MTS was trade, and the externalities from trade had to be managed through other policies (technical regulations tax and transfer... etc.) either at national level or in other International Organizations.

All along the life of the GATT, this quasi ignorance of the environment stakes in trade has been aggravated and even turned to some form of hostility, due to several factors.

- For historical reasons (the failure of the Havana Charter[2]), the GATT was instituted as a provisional arrangement, with its own rules and governance, isolated from the broader multilateral system of the UN where the environment cause emerged (in particular with the 1972 Summit in Stockholm[3]). Trade was thus an island in the ocean of international policies.
- Under the GATT, the notion of “like products”[4], central to assessing the fair implementation of the non-discrimination principle, would not allow taking into consideration the non-product related “processes and production methods[5]” (PPMs). Hence, impossible to treat differently a “clean” (or “green”) and a “dirty” product if their characteristics and use for the consumer were the same.

- During the 1970s, the revival of anti-Keynesian/free-market economics disputed the ideas of public interventions needed for the correction of market failures. Talking about the private sector, Milton Friedman asserted: “there is one and only one social responsibility of business—to increase its profits so long as it stays within the rules of the game”[6]. The same idea somehow prevailed at government level about trade policy: its sole mission was to grow trade only, not deal with its externalities. Even more, a country wanting to achieve environmental objectives was deemed legitimate to do so only if these affected its own environmental interests (that is local but not extra-territorial), without spilling-over on other countries’ preferences through trade policy measures.
- The environment has long been portrayed as both a rich countries concern and sole responsibility of developed countries: not without some reason since the developed countries were primarily responsible for the damages caused to the planet since the industrial revolution in the West. The environment thus was not seen as a priority for developing nations, which were already focusing on how to respond to the primary needs of their populations through the pursuit of growth.

The combination of the ideological and geopolitical factors led most trade negotiators to developing a Pavlovian reflex in the WTO: if and when some country would mention the stakes of the environment, it had to be automatically criticized as “green protectionism”. Even more so as the GATT /WTO discussions would progressively move from the exclusively tariff-centred discussions to the unexplored territories of non-tariff barriers.

Nevertheless, the world around the GATT evolved and recognised progressively the centrality of the notion of “Environment” (Stockholm UN Summit, 1972), before elaborating the more holistic paradigm of “Sustainable Development” introduced in the Brundtland Report[7] of 1987 and, consecrated by the Earth Summit of Rio de Janeiro in 1992[8]. Since then, the Sustainable Development paradigm – which proposes to coherently combine the economic, social and environmental pillars of development – has become the cornerstone of all international public (and private) policies and multilateral cooperation. The world trading system did not stay immune to this emergence of Sustainable Development, raising hopes that the new international paradigm would finally colour the trade policy in green.

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[1] [WTO | Trade and environment](#)

[2] [havana.PDF \(wto.org\)](#) The Havana Charter was a comprehensive treaty negotiated in the frame of the United Nations Conference on Trade and Employment after World War II, with a view, inter-alia, to create an International Trade Organisation that would have become the “third Bretton Woods Institution”. The negotiation was finalised in 1948 but the treaty was never ratified by the USA. Hence, some parties decided to adopt some of the treaty trade provisions on a provisional basis: this gave birth to the GATT, which lasted until the creation of the WTO at the conclusion of the Uruguay Round.

[3] United Nations Conference on the Environment, Stockholm 1972 | United Nations

[4] WTO | Trade and environment

[5] *Ibid.*, 4

[6] New-York Times September 13, 1970

[7] Our Common Future: Report of the World Commission on Environment and Development (un.org)

[8] United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992 | United Nations

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