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Greening the WTO's Disputes Settlement Understanding: Opportunities and Risks

Jim Rose

Abstract

It is reasonable to ask whether the WTO's rules may hamper the ability of national and sub-national governments to be genuine pacesetters in environmental law making.

Environmentalists consider that the WTO's disputes panels may encourage governments to converge to the relevant international standard for a particular risk regulation because such uniformity is likely to reduce the incidence of trade disputes.

Proposals that go beyond environmental advocacy and greater transparency in the WTO's disputes settlement process—changes such as a weakening of the sound science requirement and incorporating stronger forms of the precautionary principle into WTO agreements on biosecurity laws—reduce due process safeguards against disguised regulatory protectionism in New Zealand's agricultural export markets.

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GREENING THE WTO'S DISPUTES SETTLEMENT UNDERSTANDING: OPPORTUNITIES AND RISKS*

> In the WTO forum, global commerce takes precedence over everything—democracy, public health, equity, the environment, food safety and more.
>
> Lori Wallach and Michelle Sforza[1]

> Without a means of settling disputes, the rules-based system would be worthless because the rules could not be enforced.
>
> World Trade Organization[2]

1. Introduction

The World Trade Organization (WTO) helps members settle disputes under the rules they all agreed to follow. Over 200 disputes have been submitted to the Disputes Settlement Body of the WTO since it was set up in 1995.[3] This paper is about the tension between retaining a free hand in environmental lawmaking and the self-restraint implied by signing the WTO's Disputes Settlement Understanding.

Environmentalists consider that the rulings of WTO's disputes panels encourage governments to converge to international standards because uniformity reduces the incidence of trade disputes. If these standards serve as ceilings, not floors, the incentive for governments to experiment and become genuine pacesetters in environmental, biosecurity and food safety law is reduced.

The central concern of environmental groups is that the rulings of disputes panels may restrict domestic environmental laws in advanced countries because they burden imports unduly or are without full scientific justification. The WTO's rules may also stop industrialised countries from employing trade restrictions to pressure other governments to improve environmental quality and protect endangered species.

Environmental groups have proposed changes to the WTO to ensure that trade rules: are not be used to weaken national or international health and environmental standards; encourage environmental progress and discourage environmental harm; and are developed and implemented through open and fully democratic procedures.[4] New Zealand considers that legitimate environmental concerns do need to be

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* My thanks to Peter Martin, Wayne Stevens, Mario Di Mao, Simon Hay, Alistair Dixon, Linda Cameron, Brett Longley, David Wood, Chris Pinfield, and David Pine for their comments on drafts.

1 Wallach, L. and Sforza, M. 1999, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy*, Public Citizen, Washington, D.C. p. 7.

2 World Trade Organization 2001, *Setting disputes, The WTO's 'most individual contribution'*, World Trade Organization Home Page, no date, www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, visited 22 October 2001.

3 The WTO's disputes panels are not courts. If a dispute cannot be resolved bilaterally, the complaining country may request the establishment of a disputes panel made up of independent experts. If the country that is the target of the complaint does not accept the recommendations of the panel (or the Appellate Body if the panel's decision is appealed), and no other accommodation is found, all the WTO's Disputes Settlement Body can do is endorse a request by the complaining member to impose limited bilateral trade sanctions.

4 Sierra Club, *A Fair Trade Bill of Rights*, Sierra Club Home Page, no date, www.sierraclub.org/trade/ftaa/rights.asp, visited 5 May 2001.

integrated better with international trade agreements. However, these concerns should not be used to protect against fair competition from the developing countries.[5]

If New Zealand wishes to renegotiate or withdraw from treaty commitments, generally international law provides a mechanism for doing so. Where commitments are reciprocal, others who were the beneficiaries of our now revised commitments may be induced to withdraw some of the commitments they made to us. International law emerged from the pursuit by nations of self-interested policies on the international stage. Treaties arise largely from a coincidence of national self-interest. For example, the WTO was established in 1995 because all 130 nations who signed the Treaty of Marrakech in 1994 found enough of their national interests in the document that was on the negotiating table to make it worth their while to sign it.

The plan of the paper is as follows. Section two will discuss why trade has become an environmental issue. Section three will discuss the trade agenda of the international environmental movement. Section four will discuss the relevant rules of the WTO. Section five will discuss the precautionary principle. Section six will discuss the integration of technological and democratic values into risk regulation. Section seven will discuss the constraints the WTO's agreements imply for pace-setting in environmental legislation. Section eight will summarise the paper.

2. Why has trade become an environmental issue?

2.1. The trigger events

International agreements such as those establishing the WTO represent a growing and increasingly controversial body of international economic law. In common with a number of treaties, the WTO agreements have verification mechanisms to monitor adherence and to help members settle disputes.

Prior to the 1990s, environmentalists did not see a role for themselves in international trade negotiations. Trade officials had little interest in environmental policy:

> No mention is made of the word environment in the original General Agreement on Tariffs and Trade (GATT) — the central pillar of the international trading system— negotiated just after World War II. At that time, no one saw much connection between trade liberalization and environmental protection. For the next forty years, trade and environmental policymakers pursued their respective agendas on parallel tracks that rarely, if ever, intersected.[6]

Everything changed in the 1990s. There were four trigger events.

The first trigger event was the negotiation of the North American Free Trade Agreement (NAFTA).[7] Some U.S. environmentalists expected significant environmental harm would flow from NAFTA due to increased trade with a developing country either directly or through cross-border migration of polluting industries to

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5 *Speech From The Throne Opening Of Parliament 1999*.

6 Esty, D. 1999, "Economic Integration and the Environment", in Vig, N. and Axelrod, R. (eds), *The Global Environment: Institutions, Law, and Policy,* Washington, D.C. CQ Press, p. 190.

7 Esty, D. 1994, *Greening the GATT: Trade, Environment, and the Future*, Institute of International Economics, pp. 27ff.

Mexico. There was a separate growing interest among environmental groups in using trade restrictions to influence environmental outcomes at home and abroad.

Some politically shrewd American environmentalists saw NAFTA as an opportunity to address pre-existing environmental issues, including those along the US-Mexico border.[8] Environmental NGOs perceived trade policy as a new means of raising national environmental standards at home and abroad and of inducing countries to become signatories to and abide by the increasing number of international environmental agreements.[9]

The second or companion trigger event was the 1991 report of the GATT disputes panel on a U.S. import ban on tuna caught off the west coast of Mexico.[10] The tuna was banned because it was caught in nets that incidentally entangled dolphins.

The disputes panel found that GATT rules do not permit signatory nations to restrict imports on the basis of how they are produced outside their legal jurisdiction. The response of the GATT panel was a strong assertion of equality in national autonomy, emphasising the right of each country, large or small, to decide how products are produced within their borders free from threats of unilateral trade sanctions.

The public reaction to the tuna/dolphin decision of the GATT permanently transformed trade policy. For environmentalists, the tuna-dolphin dispute seemed to subordinate national environmental law to trade concerns. American environmental groups considered that trade rules that forbid the differentiation between production methods made it impossible for national governments to adopt an aggressive approach to environmental protection both at home and abroad. It raised the spectre of domestic environmental laws being routinely challenged and overturned by a far away international trade tribunal with no environmental sensitivity or expertise.

The third trigger event was the beef hormones dispute between the USA and the European Union (EU). In 1996, a WTO disputes panel ruled that the EU's beef hormone ban was illegal even though the ban treated domestic and foreign products alike. The ban was considered to lack scientific justification and was not the subject of a proper risk assessment. The decision affirmed prior suspicions of environmental groups that the WTO would not properly safeguard a country's right to protect human, animal and plant life or health, and to establish the level of protection from risk that it chooses.

The final straw was the April 1998 report of the WTO disputes panel on the shrimp-turtle case. The dispute was over U.S. trade sanctions against nations whose fishing industry used shrimp nets that incidentally caught and killed turtles — an internationally recognised endangered species. U.S. law requires shrimp-exporting nations that trade with the U.S. to equip their shrimp trawlers with turtle excluder devices. India, Malaysia,

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8 Ibid.

9 Anderson, K. 1997, "Social Policy Dimensions of Economic Integration: Environmental and Labor Standards" in Ito, T. and Krueger, A. (eds) *Regionalism versus multilateral trade arrangements,* Chicago and London: University of Chicago Press, pp. 57-84; and Anderson, K. and Blackhurst, R. 1992, "Trade, the Environment and Public Policy" in Anderson, K. and Blackhurst, R. (eds) *The greening of world trade issues*, Ann Arbor, University of Michigan Press, pp. 3-22.

10 Esty, op cit, pp. 27ff.

Pakistan, and Thailand argued that the U.S. ban violated the WTO rules requiring non-discrimination among countries and prohibiting quantitative restrictions on imports.

The World Wildlife Fund International considered the Shrimp-Turtle dispute to be arguably the most important environmental case ever before the WTO.[11] It raised the critical issue of the extent to which nations can unilaterally restrict the import of products whose production threatens endangered species and harms the global environment.

Most proponents of unilateral trade measures accept that multilateral environmental responses are the first choice. However, multilateral solutions are not always available. It is said that situations will arise in which serious environmental harm is about to occur, there is no more time to wait for agreed international action, and only unilateral action by individual countries can mitigate the harm. Other responses such as voluntary eco-labelling may not be a practical alternative for addressing process and production methods that cause immediate or irreversible environmental damage abroad.

The Shrimp-Turtle disputes panel said in 1998 that if a country was able to condition market access for a product to the adoption by the exporting country of certain conservation policies, the WTO's agreements could no longer serve as a multilateral trade framework. It is difficult to think of a way to effectively contain the cross-border assertion of conservation priorities. If one WTO member were allowed to adopt such measures, other members have the right to follow suit. If that happened, it would be difficult for exporting countries to comply with multiple conflicting process and production method policy requirements.

The WTO's Appellate Body overturned the Shrimp-Turtle panel's ruling, holding the U.S. measure was provisionally justified on conservation grounds, but were applied in a way that was arbitrary and unjustifiable discrimination. The Appellate Body determined that the U.S. procedures for deciding whether countries met the requirements of the law did not provide adequate due process. It also found that the United States had unfairly discriminated between the complaining countries and Western Hemisphere nations. The U.S. gave four months notice to some Asian nations. Other nations were given three years. Considerable importance was attached to the failure of the U.S. to conduct serious, across-the-board negotiations to conclude bilateral or multilateral agreements before enforcing the unilateral import prohibition.

The U.S. amended the turtle conservation law in response to the Appellant Body's report. Malaysia complained to the WTO about these amendments in October 2000. A WTO disputes panel released a report in June 2001 finding that the implementation of the U.S. sea turtle protection law was now fully consistent with the WTO's rules and it complied with earlier recommendations of the WTO Appellate Body. The WTO disputes panel recognised the efforts of the U.S. to negotiate a sea turtle conservation agreement with the Indian Ocean and South-East Asian nations affected by the law, and to provide technical assistance in the adoption of fishing methods that do not cause incidental harm to endangered sea turtles.

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11 World Wildlife Fund for Nature International 1998, *WWF Legal Briefing The Final Report of the WTO Shrimp-Turtle Panel*, Home Page of the World Wildlife Fund for Nature International, www.panda.org/resources/publications/sustainability/wto-papers.

2.2. Nations have different environmental policies

In the end, the conflict between international trade law and environmental protection arises from the simple fact that nations have different environmental policies in what is an increasingly integrated world. At one end of the spectrum, there are the "high-level" or industrialised countries, which have rigorous laws that are vigorously enforced. At the other end of the spectrum are "low-level" or developing countries. These countries have equally rigorous environmental laws that are not so rigorously enforced, or they have less rigorous laws, or they have no laws at all.[12]

The conflict about differences in environmental policies, previously low-key, has enjoyed a major public and business community profile lately because of the success of trade liberalisation. The business community has become increasingly concerned about the use of health, safety and environmental regulations as non-tariff barriers.

By the end of the 1980s, average tariff rates on industrial goods had dropped by almost a factor of three since the 1960s to about 5 per cent in Japan, the United States and the European Union. The growing competition from abroad focused attention on cost-raising social policies and on the diversity in cross-country intra-industry environmental standards that were previously thought to be small change.[13]

International public awareness of environmental issues coincided with trade liberalisation and the later rise to prominence of the WTO's disputes panels. Environmental awareness in the 1960s and 1970s manifested itself as concern about national and regional pollution problems in the advanced economies.[14]

Starting in the 1980s, there was a much more intense second wave of public interest in environmental issues and this spread across national borders. Ozone depletion and global warming emerged as major environmental themes.[15]

Public concern has since gone beyond managing the global commons and trans-border spill-overs – matters usually handled through bilateral and multilateral treaties – to conservation issues such as resource depletion, species extinction and animal welfare, all regardless of national boundaries. There is a view that we have obligations beyond borders. Individual countries are seen as custodians of particular resources for the common benefit of humanity. Individual nations are said to have the right to take unilateral action to protect that common environmental heritage wherever it may be located, both in general, and in response to failed international negotiations.[16]

Just as the environmental debate internationalised, the standing of the world trading system was enhanced considerably on 1 January 1995 when the WTO came into

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12 Bhagwati, J. and Srinivasan, T. N. 1996, "Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?", in Bhagwati, J. and Hudec, R. (eds), *Fair Trade and Harmonization: Prerequisites for free trade?* Vol. 1, Cambridge and London, MIT Press, pp. 159-223.

13 Anderson op cit. and Anderson and Blackhurst op cit.

14 Ibid.

15 Ibid.

16 Ibid.

existence. The WTO enforces trade rules negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).

The WTO's rules go well beyond the GATT in constraining non-tariff barriers and address government procurement, subsidies, and product standards, and new areas such as trade in services. The agreement on sanitary and phytosanitary (SPS) measures allows nations to set their own biosecurity and food safety standards, but requires that they be based on science and do not arbitrarily or unjustifiably discriminate between countries and products with the same or similar conditions.

2.3. Conservation is global, environmental protection is local

The position of environmental NGOs is nuanced. Their initial concerns arose out of the limits the GATT's dispute panels imposed on the unilateral cross-border assertion of conservation priorities. Trans-national priorities about endangered species and habitats, the global commons and forests were held to be more important than national (regulatory) sovereignty. Several early WTO disputes panel rulings against anti-pollution and food safety laws revealed a preference among the environmental NGOs for regulatory heterogeneity and an opposition to international convergence and regulatory harmonisation of biosecurity, pollution and food safety laws.

The views of environmentalists on decentralisation and national autonomy vary. Conservation usually calls for trans-national action to reduce resource depletion. This straightforward objective is the same at local, national and international forums.

Environmental protection is a local/national issue albeit with some important exceptions. The details count: local tastes, conditions, and concerns will vary from place to place. Environmental regulation is about the control of input and output mixes, is information intensive, and is sensitive to local geography and history (including previous levels of pollution), and community preferences and wealth. The cost of achieving a given level of air or water quality depends on the level of industrial activity, the composition of that activity, its spatial dispersion, and the surrounding topographical and climatic conditions — all of which vary between and within countries.

The benefits from a particular environmental standard depend on the extent and vulnerability of nearby receptors. There may be crops that are particularly sensitive to air pollution or fisheries that are particularly vulnerable to water pollutants. The capacity to absorb pollution varies between places and countries. The standards that are relevant to crowded cities have less relevance to sparsely populated rural areas. In addition, inter-jurisdictional competition promotes the discovery of new environmental protection strategies. More progressive jurisdictions can be pacesetters in improving environmental protection. The resulting improvements in environmental amenity in one place will lead voters in other jurisdictions to demand similar reforms to catch-up.

The rest of this paper will focus on international trade laws that restrict domestic environmental laws, such as bio-security and food safety laws. The sanitary and phytosanitary (SPS) agreement and beef hormones case will be the focus. Most environmental concerns that relate to domestic environmental law were touched on during this dispute. National laws aimed at foreign environmental practices — the cross-border assertion of conservation priorities — are outside the scope of this paper.

3. The trade agenda of the environmental movement

The WTO is about what is traded and limits discrimination by member-governments against imports on the basis of how they were made and what they were made from.

WTO member-nations can regulate domestic production and any associated harm or externalities (pollution and other spill-overs) as they please.

When governments regulate consumption-generated environmental and other harm or spill-overs, the WTO requires that there must be no discrimination against imports substantively or in the administration of the law. Regulators are expected to be blind to the source or national origin of a product. Regulatory and biosecurity standards should apply equally to local-made products and imports. They should have at least a provisional scientific justification; and should follow a proper risk assessment.

There is a growing approval by the WTO's disputes panels of environmental measures that restrict imports that are externally goals, such as those that are designed to protect internationally recognised endangered species abroad that are unilateral, but lack full authorisation in an international environmental or conservation agreement.[17]

Environmental NGOs are interested in how things are made as well as what is traded.[18] In addition to risking a lowering of biosecurity and food safety standards to weaker international levels, NGOs consider that the WTO's disputes rulings have eroded the ability of countries to regulate imports based on how they were made. Importing nations can no longer ensure that their consumption patterns encouraged responsible forestry abroad or the preservation of endangered species everywhere.[19]

Environmental NGOs consider that the true test of any national law under the WTO's disputes settlement rules will be whether it promotes trade. They stand in direct opposition to WTO and GATT rules that usually do not permit signatory nations to restrict imports on the basis of how they are produced outside their legal jurisdiction. Trade rules deny consumers the right to use democratic means to limit import access to those goods produced abroad in ways that minimise environmental damage.[20]

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17 A number of countries, including New Zealand, believe that it is prudent to address the possibility that measures inconsistent with WTO's rules might be applied pursuant to multilateral environmental agreements (MEAs). Direct conflict between the core concerns of the WTO and MEAs is unlikely. Under international law, a more specialised treaty such as an MEA will over-ride obligations in the WTO agreements for those nations that signed the more specialised treaty. The WTO has 144 members. Most or all major nations have ratified the three major MEAs: endangered species, the ozone layer and the trans-boundary movements of hazardous wastes. No MEA sanctioned trade measures have been challenged in the WTO, and it is unlikely that there would be such a challenge.

18 Esty 1999, op cit. p. 203.

19 Sierra Club, *Broken Promises: How the Clinton Administration is Trading Away Our Environment*, Sierra Club Home Page, no date, www.sierraclub.org/trade/articles/brokenpromises/broken.asp , visited 5 May 2001.

20 Ibid.

When the agenda of environmentalists and trade officials crossed in the early 1990s, there was a strong clash of cultures.[21] There were distinct goals, traditions, procedures and even language that defined each group:

- Environmentalists assign large weights to environmental and health damage and little weight to abatement costs;
- The business community assigns great weight to abatement costs and low weight to environmental damage;[22]
- Environmentalists emphasise process such as public participation and open decision-making: open discussion clarifies issues, separates fact from opinion and narrows the range of scientific uncertainty;[23]
- Trade negotiators emphasis outcomes such as concluding agreements and liberalising trade and the necessity of secrecy in the negotiation phase, all of which is conducted at the government-to-government level;[24]
- Trade officials use economics and pursue trade liberalisation as a means to raise living standards at home and abroad;
- Environmentalists rely on legal institutions to advance their goals and fear that growth results in more pollution and environmental degradation; and[25]
- Environmentalists are impatient for action — many international agreements have sweeping goals but offer little or no plan for achieving those goals.[26]

All in all, each group focuses on different public choice risks. Trade officials are concerned with containing the power of sectional interests to manipulate public policy. Environmental groups give priority to fostering public deliberation in democratic decision-making. Striking the right balance is an enduring democratic dilemma.

Many of the concerns of the environmental movement about international trade law arise from the possibility that trade disputes will be resolved by WTO panels in ways that subordinates environmental outcomes to trade liberalisation.

The best single articulation of the international trade law reform agenda of the environmental movement, as it has evolved since 1991, in terms of conciseness, clarity and comprehensiveness, has been by the Sierra Club USA in 1994:

1. All units of government should be able to make their environmental regulations and programs as strong as they wish, unrestricted by trade policy, provided that their regulations apply equally to domestic and foreign products (i.e., are non-discriminatory);
2. These environmental regulations should not be limited in stringency by upper limits set by international bodies or trade institutions;
3. Nor should they be subject to standards of acceptability set by international trade institutions; conflicts between trade and environmental policy should be resolved by impartial bodies;

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21 Esty 1994, opt cit.

22 Esty, D. and Mendelsohn, R. 1998, “Moving from national to international environmental policy”, *Policy Sciences*, Vo. 31, pp. 225-235.

23 Ibid.

24 Esty 1994, op cit.

25 Ibid.

26 Esty and Mandelsohn op cit.

4. Trade institutions should operate in an open and accountable manner which permits public participation; normal deliberative practices should not be suspended when trade agreements are approved by national legislative bodies;
5. Nations should be able to restrict imports into and exports from their national territory on a non-discriminatory basis in order to pursue bona fide environmental objects, such as enacting "life cycle" product responsibility laws; laws designed to keep products harmful to the environment out of circulation; to prevent resource depletion both at home and abroad; to protect endangered species and habitats anywhere; and to enforce international environmental conventions;
6. There should be no presumption that trade agreements prevail in cases of conflict with international environmental conventions, nor should the scope of such conventions be limited by trade doctrine; and
7. Governments should be able to provide subsidies to encourage good environmental practices, as in agriculture, without being precluded from doing so by trade policies. [27]

Other NGOs such as the World Wildlife Fund, the Friends of the Earth International, Public Citizen, and Greenpeace International articulate their own agendas.[28]

The policy position of the Sierra Club is a convenient single summary of the common themes of NGOs about the tensions between a free hand in environmental law-making and the self-restraint implied by signing the WTO disputes settlement understanding. The agenda of the Sierra Club focuses on the powers that national authorities should not fetter with treaties. The aim is to ensure that international standards do not act as regulatory ceilings and there is scope for governments to experiment and become pacesetters in environmental law. The implications and risks of this agenda cannot be evaluated without discussing the rules of the WTO. That is the purpose of the next section.

4. The WTO as policed decentralisation

A wide array of policy instruments can protect domestic firms against imports. As tariffs have declined, there is a concern that product standards have been increasingly used to limit imports and add unnecessarily to the costs of trade.

Both the WTO and the GATT have an underlying political logic. The GATT encouraged exporters to join to lobby for tariff cuts at home in expectation of matching cuts abroad. The WTO encourages members to make matching commitments over proper regulatory design and implementation. The aim is due process, not harmonisation.

The objective is to channel the domestic political discourse of member-countries towards regulatory measures that do not overly restrict trade.[29]

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27 Sierra Club 1994, *Sierra Club Conservation Policies International Trade Policy*, Sierra Club Home Page, www.sierraclub.org/policy/conservation/trade.asp, visited 18 October 2001; and Sierra Club 1999, *White Paper on Environmentally Responsible Trade Negotiating Authority*, 26 April, Sierra Club Home Page, www.sierraclub.org/trade/fasttrack/white.asp, visited 5 May 2001.

28 See Sek, L., Pregelj, V., and Wilson, A. 2000, *RL30521: The World Trade Organization: The Debate in the United States*, Congressional Research Service Issue Brief for Congress, 12 April, Home Page of the National Library for the Environment, *www.cnie.org/nle/inter-42.html*, visited 21 May 2001, for a summary of the debate in the USA about the WTO.

Regulatory goals can be achieved in many ways. Idiosyncratic policies open environmental law to special interest manoeuvring over details of their administration. Pesticides and additives with similar health risks are often subject to different regulatory targets. New risks are often heavily regulated compared to old risks.

Different sources of identical effluents can be subject to different rules. An example is the emission standards on new and old cars. Environmental regulations that mandate a particular production process or product design can favour one firm over another, or incumbents over new entrants or local over imported products. Environmental laws that restrict the output of each member of an industry can affect profits in a manner similar to production quotas under a cartel.

Tighter environmental controls (and the associated rise in costs) may increase the ability of domestic firms to satisfy anti-dumping injury tests, such as declining market share and excess capacity, that trigger other protection against imports via anti-dumping regulations. Since the early 1980s, industries with increasing pollution abatement costs, such as basic metals and chemicals, are prominent among those filing anti-dumping complaints in the USA, EU and Australia.

The majority of traded goods are subject to product standards.[30] Such standards raise the entry costs for exporters due to product redesign and establishing systems for compliance. Standards impose recurrent costs of maintaining quality control, testing, and certification, and there is the cost of conformity assessments (whether a product conforms to a regulatory requirement).[31] Conformity assessments are perceived as presenting the largest potential costs for exporters among technical standards.[32]

Regulatory measures that serve no purpose other than to protect against foreign competition will generally be prohibited in politically sophisticated trade agreements, even when other more transparent instruments of protection such as tariffs are fully permissible.[33] If there are no rules in trade agreements about regulatory protectionism, the tariff cuts resulting from the agreement can be undone by regulatory stealth.

Regulatory measures that serve honest, non-protectionist objectives are permissible in the WTO's agreements even if their regulatory benefits are small and their adverse trade effects large. WTO rules only require that members opt for a less trade-restrictive measure when they can, and avoid discriminating against imports in favour of domestic products, and that bio-security and food safety laws be based on scientific principles.[34]

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29 Sykes. A. 1999, "Regulatory Protectionism and the Law of International Trade", 66 *University of Chicago Law Review*, Vol. 66, Winter, p. 1.

30 Staff of the International Monetary Fund and the World Bank 2001, *Market Access for Developing Countries' Exports*, International Monetary Fund and World Bank, Washington, DC, IMF Home Page, www.imf.org/external/np/madc/eng/042701.htm, p. 30.

31 Ibid.

32 World Bank 2001, *Global Economic Prospects and the Developing Countries*, Washington, D.C.

33 Sykes op cit.

34 Ibid.

The WTO's rules could be described as policed decentralisation: national regulators can go their own way subject to certain mutually agreed process and transparency constraints. The principles of policed decentralisation include:

- Non-discrimination between local goods and imports from any WTO member;
- The sham principle and the scientific evidence requirement — the obligation to give reasons, refer to scientific evidence and use risk assessment procedures are ways of detecting improper motives;
- Transparency requirements (such as notice, consultation and publication);
- Generality requirements and least restrictive means (avoid insisting on a few particular means of achieving the regulatory objective regardless of their cost effectiveness); and
- Reference to international standards bodies (to facilitate information exchange and dispute resolution).[35]

The one thing all sides agree on is there should be no explicit discrimination against imports. Imports from any WTO member should be subject to the same environmental, biosecurity, food and other product safety laws as local production — there should be no regulatory dispensations for imports in general or imports from a particular country.

The challenge from this anti-discrimination position is the pre-1995 trade rules poorly handled regulatory measures that, on their face, applied equally to local and imported products, but had a significant trade restricting effect through protectionist design. Many countries used quarantine instruments such as bans that restricted imports that went well beyond what an impartial spectator would regard as necessary to protect bio-security and food safety. No quarantine measure, no matter how scientifically dubious or over-reaching in its geographic scope, but was non-discriminatory in its application was ever successfully challenged under the trade rules that applied prior to 1995.

The 1995 sanitary and phytosanitary (SPS) agreement broke new ground in allowing WTO disputes panels to consider the legitimacy of non-discriminatory regulatory measures. The previous rule was that regulations that did not discriminate between countries and domestic and foreign producers are perfectly acceptable irrespective of the strength of their scientific justification and quality of the risk assessment. The agreement on SPS measures allows countries to set their own standards, but requires that they be based on science. Countries are encouraged to use international standards, guidelines and recommendations where they exist. However, they may use regulatory measures that result in higher standards if there is scientific justification. Countries can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, not arbitrary. The SPS agreement also requires member countries to be consistent when they deal with risk over a range of measures and products, so as to avoid disguised protectionism about specific products.

5. The WTO and the precautionary principle

The trade issue which perhaps most troubles key international environmental groups, such as the World Wildlife Fund for Nature, is the weight and interpretation given to the precautionary principle in WTO trade disputes over bio-security and food safety laws.

35 Sykes, A. 1999, "The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets", *Journal of International Economic Law*, Vol. 2 (1), March, pp. 49-70.

In the eyes of environmentalists, the beef hormone case demonstrated how the SPS agreement undermines national health and environmental standards. The World Wildlife Fund International considered that the WTO disputes panel decision:

- Allowed the WTO to determine the legitimacy of domestic health regulations;
- Misinterpreted the provisions of the SPS text that permit countries to determine the level of appropriate risk for their citizens;
- Preferred lower international standards over higher domestic standards;
- Dismissed the precautionary principle as a legitimate basis for health and environmental policy; and
- Destabilised the international trade regime by inserting itself into a dispute in which it lacked the necessary expertise and competence to adjudicate.[36]

The WTO ruling was said to have taken aim at the level of health protection the EU chose, not trade discrimination. The World Wildlife Fund for Nature had a particular concern that the WTO panel dismissed the precautionary principle as a legitimate basis for health and environmental policy decision-making.

The Sierra Club considers that the WTO panel was suggesting that with no identifiable risk, there is no risk management decision to be made. The Sierra Club considers that through the dispute over hormone-treated beef, the WTO established itself as a major arbiter of domestic health and safety policy.[37]

The intention of the SPS agreement is to place some boundaries on the choice of the means by which countries achieve their regulatory ends. Signatories to the SPS agreement promise to administer food safety laws in a non-discriminatory way. At issue is the criteria members must meet in order to show that the law is not a disguised trade restriction. The criteria are that SPS measures should be based on sound science, a risk assessment, or relevant international standards.

The precautionary principle is where the clash between the two public choice risk management agendas of trade negotiators and environmentalists is most ripe. Environmental groups gave priority to fostering the greatest possible democratic public deliberation about risk regulation. Trade officials are concerned about containing the use of risk regulation as a ruse by sectional interests. The precautionary principle is the issue where the due process requirements in the SPS and other trade agreements clash with a key environmental concern. The precautionary principle is mostly about the process of public policy decision-making such as the management of scientific uncertainty and weighing of non-scientific factors including public opinion.

The meaning of the precautionary principle varies and along with that, the depth of its clash with the SPS agreement. Some argue that a country should have the right to ban a product whose long-term health effects are unknown, based on a precautionary principle. There is no agreed definition of the precautionary principle. Some suggest

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36 World Wildlife Fund International, Centre for International Environmental Law (US), Oxfam-GB and Community Nutrition Institute (US), *Dispute Settlement in the WTO A Crisis for Sustainable Development A WWF International, Centre for International Environmental Law (US), Oxfam-GB and Community Nutrition Institute (US) Discussion Paper,* no date, World Wildlife Fund International Home Page, www.panda.org/resources/publications/sustainability/wto-papers.

37 Sierra Club, *Broken Promises: How the Clinton Administration is Trading Away Our Environment*, Sierra Club Home Page, http://www.sierraclub.org/trade/reports/broken.asp, visited 22 August 2000.

using caution in adopting new products where the effects are not clear. Others suggest that, until conclusive evidence is presented that the long-term effects are acceptable, a product should be banned. The precautionary principle allows countries to err on the side of environmental protection when faced with scientific uncertainty.

Box 1: The beef hormones dispute

The most well-known WTO case on food safety is the U.S. challenge of the EU's ban on imports of meat from animals to which any of six hormones have been administered.

The dispute was about whether the EU's ban was enacted in response to legitimate health concerns or to eliminate competition for European beef producers.

The SPS agreement recognises the right of each member to adopt measures it considers appropriate to protect human, animal or plant life or health within its territory, but it also requires that these measures be founded on scientific evidence and applied only to the extent necessary to achieve the public health goals.

In 1996, a WTO disputes panel ruled that the EU's beef hormone ban was illegal. The ban was considered to lack scientific justification and was not the subject of a proper risk assessment. The panel also found that the EU's applied different levels of protection for comparable situations. The EU failed to provide a plausible justification for these differences in levels of protection. The substantial tariff on beef imports into the EU was unaffected by the dispute.

In 1998, the Appellate Body of the WTO found that while a country has broad discretion in electing what level of protection it wishes to implement, in doing so it must meet the requirements of the SPS agreement. However, in this case, the ban imposed is not rationally related to the conclusions of the risk assessments the EU had performed.

The beef hormone decision was finalised in 1999. The EU did not comply with the ruling so after a period of negotiation and arbitration, the dispute panel has authorised the USA to suspend concessions with respect to certain products from the EU. The value of these sanctions is equivalent to an estimate of the annual harm to U.S. exports resulting from the EU's failure to lift its ban on imports of U.S. meat. United States has imposed 100 per cent *ad valorem* duties on a list of EU products with an annual trade value of US$ 116.8 million.

The Sierra Club regards the precautionary principle as allowing countries to enforce protective standards for health and the environment in the absence of complete scientific information. The Club considers that EU's zero-risk standard for beef hormone use was based on the precautionary principle, recognised in international environmental law.[38] The Sierra Club admits that absolute scientific certainty of a substance's effect on human health is a difficult standard to meet.[39] The Friends of the Earth cast a similar broad net arguing for what could be called the strong form of the precautionary principle. If the risks are not yet known, and thus little or no scientific evidence exists, the precautionary principle justifies a ban.

The SPS agreement, as its stands, could be considered to be incorporating a weak version of the precautionary principle. The WTO's rules allow a member country, in cases where relevant scientific evidence is insufficient, to provisionally adopt sanitary

38 Ibid.

39 Sierra Club 1997, *WTO Panel Decision on EU-US Beef Hormone Dispute --- Preliminary Analysis*, 30 May, Sierra Club Home Page, www.sierraclub.org/trade/environment/hormone.asp, visited 22 October 2001.

or phytosanitary measures on the basis of the available pertinent information. In such circumstances, WTO members must seek the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time. The SPS agreement does not define scientific evidence. It is not clear how many scientific studies, or what degree of scientific certitude, is necessary to determine that a measure is scientifically sound.

The strong form of the precautionary principle provides for a zero tolerance of new risks that are not well understood. The strong form requires regulators to not allow exposure to a substance until it has been proved safe, rather than allowing unregulated exposure until there is conclusive scientific evidence that the substance is harmful.

The strong form of the precautionary principle is based on the premise that science does not always provide the information or insights necessary to take protective action effectively or in a timely manner and that undesirable and potentially irreversible effects may result if action is not taken until science provides such insights.

The weak form of the precautionary principle provides for interim bans when there is scientific uncertainty and an on-going obligation to keep searching for new information. However, under the weak form, the uncertainty itself must be cast in terms of scientific reasoning, not hypothesis and hazard identification.

To invoke the precautionary principle on a basis consistent with the SPS agreement, there must be some scientific information indicating a risk exists. The alternative proposed by the environmental movement turns the strong form of the precautionary principle into an unbounded commitment to avoid new risks.

Precaution should be part of a science-based approach to regulation, not a substitute for such an approach. This is the central difference between the weak and strong forms of the precautionary principle. Incorporation of the strong form of the precautionary principle into the SPS agreement would undermine its fundamental objective of encouraging science-based regulation.

WTO dispute panels require only that there be a rational relationship between the policy choices made by governments and objective scientific assessments that go beyond hypothesis or hazard identification.

The requirement to refer to scientific evidence eliminates recourse to a stonewalling strategy of declarations rather than explanations, used to great effect in the defence of protectionist SPS measures prior to the Uruguay Round.

The stronger the form of the precautionary principle that signatories to the SPS agreement are allowed to use, the less predictable are trade rules, and the greater are the opportunities for countries to use regulatory precaution to disguise protectionism.

6. Integrating technological and democratic values into risk regulation

The role of the precautionary principle leads into the larger issue of the sound science requirement in the SPS agreement. The requirement for sound science gives technological values a greater weight than the environmental movement consider they should have in how risk regulation is conceived.

By requiring bio-security and food safety standards to be based on a risk assessment, environmentalists consider that the SPS agreement eliminates the possibility that a society's values influence regulation. This is the dilemma. The sound science requirement also makes it more difficult for special interests to influence the design of regulation to the disadvantage of import competition.

For the environmental movement, the beef hormone case demonstrated that the SPS agreement attempts to eliminate non-science factors from standard setting.[40] While science plays a valuable role in informing such decisions, a number of environmental groups argue that it is ultimately the legislature that must make a political decision about how much risk society will face. The environmental movement considers that political judgments always play a central role in policy-making.[41]

The environmental movement considers that, by requiring standards to be based on risk assessments, the SPS agreement eliminates the possibility that a society's values, such as the prevention of exposure to a highly toxic substance in the presence of uncertainty about the chemical's effects at low doses, should outweigh the uncertain outcome of a risk assessment.[42]

Many studies have shown that there are systematic differences between expert and citizen judgments about risk.[43] Experts focus principally on aggregate lives at stake and the stewardship of limited resources. Citizens in a democratic society base their decisions on reflective judgments. They care not simply about the aggregate amount of lives lost and injuries sustained, but also about a range of factors involving the nature and context of the particular risk.[44] For many people, salient contextual features of risk include:

1. The catastrophic nature of the risk;
2. Whether the risk is subject to personal control or is uncontrollable;
3. Whether the risk involves irretrievable or permanent losses;
4. Whether the risk is voluntarily incurred;
5. How equitably distributed the danger is or how concentrated on identifiable, innocent, minorities or traditionally disadvantaged victims;
6. Children are at special risk;
7. Future generations are at risk;
8. How well understood the risk in question is;
9. How familiar the risk is - new or old or subject to heavy media coverage;
10. Whether the source of the risk is human in origin or created by nature;

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40 Public Citizen et al 1997, *Comments to the Appellate Body of the World Trade Organisation concerning European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Public Citizen Home Page, www.citizen.org/pctrade/publications/gtwpubs.htm#WTO; and Public Citizen 1999, *Comments of Public Citizen Inc. Regarding U.S. Preparations for the World Trade Organization's Ministerial Meeting Fourth Quarter 1999*, Public Citizen Home Page, www.citizen.org/pctrade/publications/gtwpubs.htm#WTO.

41 Ibid and Transatlantic Consumer Dialogue 2000, *Principles of International Harmonization*, Public Citizen Home Page, www.harmonizationalert.org/tacd_principles.htm.

42 Ibid.

43 Sunstein, C. 1998, "Cognition and Cost-Benefit Analysis", *Journal of Legal Studies*, Vol. 29 (2), Part 2, June, pp. 1059-1103.

44 Ibid.

11. Whether trust in relevant institutions is low or high;
12. Whether the timing of adverse effects is delayed or immediate;
13. Whether the mechanisms causing the risk are poorly or well understood;
14. Whether there is a history of past accidents; and
15. Whether the accompanying benefits of incurring the risk are clear or invisible.[45]

Some of these differences between expert and lay opinion and risk regulation can be attributed to a lack of knowledge and cognitive short cuts. People are often willing to pay a premium to avoid bad deaths: deaths that are especially dreaded, uncontrollable, involuntarily incurred, and inequitably distributed. Public judgments of this kind help explain the demand for risk regulation.[46] But some of these judgments do not justify current policies, because they stem from selective attention. Some risks appear as background noise, whereas other quantitatively identical risks cause enormous concern. Some people tend to think that an event is more likely when its occurrence can come readily to mind. It may be for this reason that people think that deaths from accidents occur much more often than deaths from disease, when the numbers may be the same. Public attention will be a partial artefact of the media, which tends to emphasis unusual and provocative events rather than chronic risks.

Many of the differences between citizens and experts have nothing to do with misunderstanding of the facts or causal mechanisms. They involve values.

Ordinary citizens make reflective judgements that care about a range of other variables: whether risks are equitably distributed, faced by future generations, especially dreaded, well understood, and voluntarily incurred. Citizen judgments on these points are entirely reasonable and deserve respect in a democracy.

The environmental movement is correct in identifying a social dilemma over the incorporation of technological and democratic values in risk regulation.

The challenge is to distinguish between judgments that are products of factual mistakes and selective attention and judgments that result from differences in values. The sound science and risk assessment requirements promote better priority-setting by ensuring that regulation is targeted at non-trivial risks. Regulatory agencies should not focus their attention on relatively small problems at the expense of larger ones.

Sound science and risk assessment informs public judgment, fosters least-cost compliance, and focuses on results rather than methods and processes. The requirement for a scientific justification and a risk assessment are ways of diminishing sectional lobbying and ensuring that the consequences of regulation are available for public inspection and review. The requirements in the SPS agreement may facilitate rather than frustrate the incorporation of democratic values into risk regulation.

Values-based concerns such as whether risks are equitably distributed, or are faced by children or future generations, or results in especially dreaded deaths, or are voluntarily incurred, or the risk is human or nature in origin, usually pre-supposes that there is valid scientific basis for the feared risk. The SPS agreement sets a relatively low (internationally agreed) threshold test for the basic processes to ensure that this is so.

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45 Ibid.

46 Sunstein, C. 1997, “Bad Deaths”, *Journal of Risk and Uncertainty*, Vol. 14 (3), May-June, pp. 259-82.

Steps that reduce the role of factual mistakes and the biases resulting from selective attention foster public deliberation, which is a goal of the environmental movement, and curbs the influence of special interests, which is a goal of multilateral trade negotiators. The SPS agreement facilitates both agendas by promoting discussion and deliberation.

Public deliberation has long been considered an essential component of democracy. Every society contains innumerable groups, opinions and political conflicts. These differences are handled by citizens trying to persuade each other and voting. However, democracies usually aspire to have a degree of reflection, deliberation, and exposure to other viewpoints, and not merely the expression of fixed preferences at elections.[47] Democracies require public debate or deliberation prior to decision-making.[48]

Government based on the consent of the governed must find ways to mobilise that consent and to refine and enlarge the public view.[49] This requires discussion among citizens aimed at setting the agenda for public issues, proposing alternative solutions to the problems on the agenda, supporting those solutions with reasons, and concluding by settling on some alternative. This is, at bottom, a public process which requires the participation and reasoned judgment of the people, with a broad public orientation toward reaching right answers rather than serving narrow interests.[50]

The SPS agreement is founded on the principles of dialogue and public deliberation. A policy issue can depend on information, about which a variety of reasonable viewpoints can discuss and agree about, or on values, for which agreement is difficult. Discussion and debate among people of genuinely different perspectives and positions first requires each to explain their position in a way others understand. Discussion is likely to lead to better outcomes, if only because competing views are stated and exchanged:

> In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from the standpoint of others and the limits of our vision are brought home to us .... The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.[51]

The SPS agreement allows countries to set their own risk standards, but requires that they give reasons for the standards in a language others can understand and discuss.

A public deliberative process is necessary in order to define the right questions and the range of alternatives for managing a given risk. Many people modify or adjust their views after subjecting them to public scrutiny. Deliberation brings out new information and perspectives which may be essential to the formation of sound public policy about risk regulation. Deliberation is a useful way for handling differences of opinion about risk regulation since the strength of the argument takes precedence over the status of

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47 Sunstein, C. 2001, *Designing Democracy: What Constitutions Do*, Oxford University Press.

48 Sunstein, C. 2001, *Republic.com*, Princeton University Press.

49 Madison, J., Hamilton, A. and Jay, J. *The Federalist Papers*, Rossiter, C. (ed), New York, New American Library, 1961, No. 10, p. 82.

50 Rawls, J. 1971, *A Theory of Justice*, Cambridge, University of Harvard Press.

51 Ibid.

the arguers. Deliberation is most necessary when there may be reasons for deciding on one course of action, but equally compelling reasons for deciding on another.

By encouraging science-based justifications for risk regulations, other justifications, such as values, are brought more into the open by the SPS agreement. This obligation, arising from the SPS agreement, to offer explicit reasons for regulation helps ensure that where differences between technocratic and popular opinion about regulating a particular risk is indeed the product of differences in values, rather than factual mistakes or selective attention, reasonable steps are taken to make that transparent.

7. Technological progress in public policy—pace-setting governments

The environmental movement considers that the SPS agreement creates incentives to not exceed international standards in order to reduce instances of trade disputes.

The environmental movement considers that the SPS agreement and the WTO's disputes settlement understanding act to encourage governments to use international standards in bio-security, food safety and risk regulation because such uniformity is likely to reduce the incidence of trade disputes.

Environmental NGOs fear WTO disputes decisions could lead to international standards serving as ceilings, not floors, curtailing innovative solutions to public health problems that are ahead of the international status quo.[52]

In countries with regulations higher than the international standard, the fear of environmental NGOs is WTO related pressure to harmonise the regulations down to the international standard. For example, a failure to prove a scientific basis for a higher-level regulation could result in an adverse WTO disputes panel ruling. The end result might be a weakening of regulations that environmentalists have fought so hard to achieve. Public Citizen explains the risks as follows:

> International harmonization can occur at the lowest or highest level of public health, worker safety, or environmental protection. However, the TACD strongly believes that in the instances when international harmonization of standards is appropriate, it must result in the adoption of best available technology and embody the highest levels of consumer protection. Unfortunately, the actual provisions of the WTO requiring harmonization or providing incentives for harmonization generally promote the lowering of the best existing domestic public health, food safety, economic justice, natural resource conservation and product safety standards. For instance, under the WTO, international standards do not serve as a floor that all countries must meet. Rather, they serve as a ceiling. The agreements provide for the challenge of any

52 Public Citizen 1999 op cit; Friends of the Earth International 1999, *Friends of the Earth International Position Paper: The Emperor Has No Clothes: Why It's Time to Change the Way We Trade*, Friends of the Earth International Home Page, www.foei.org/campaigns/WTO/WTO_emperor.htm; and Friends of the Earth International 2001, *The Citizens' Guide to Trade, Environment and Sustainability*, Friends of the Earth International Home Page, www.foei.org/activist_guide/tradeweb/index.htm.

> domestic standards that go beyond international standards in providing greater citizen safeguards, but contain no provisions for challenging lax standards.[53]

Environmental groups often cite WTO complaints brought by the United States against high-level regulations of other governments as examples of this downward pressure. The beef hormones complaint against the EU involved a claim that the hormone ban serves no valid regulatory purpose, because there was no scientific evidence that the hormone-produced meat contains harmful substances. Environmental critics who object to this ruling argue that its implicit minimum risk standard for harmful effects is too high and contend that WTO rules may override many existing risk regulations.[54]

The environmental movement does have a point about pace-setting governments falling foul of the WTO process. An important criticism of harmonisation is that it prevents innovation and suppresses diversity consistent with local conditions. The beef hormone case may imply that the WTO could, at times, penalise diversity and experimentation in environmental and product safety legislation such as that championed by the environmental movement.

The willingness to tolerate risks is higher in some countries than in others. The costs and benefits of regulation often vary geographically. Citizens of wealthier jurisdictions, for example, may be willing to pay more to protect health, safety, the environment, and the like than citizens of poorer jurisdictions. The tastes of citizens may also vary across jurisdictions in ways that affect the costs and benefits of regulation. A common defence of low environmental standards in developing countries is that those countries are too poor to afford anything better.

The same risk tolerance rationale can be used to defend differences between rich countries in risk regulation. Many risk regulations will increase the price paid by consumers. The willingness of consumers to pay to reduce risk will tend to rise with per capita income. Individuals on higher incomes prefer to spend more on safety and quality. They are members of societies that are less tolerant of these risks.

There is a respectable argument that international regulatory harmonisation is the exception to the best case, and that it is nationally and internationally socially productive to respect regulatory heterogeneity.[55] The benefits that a local citizenry derives from a particular regulation, and its willingness to bear the costs, will commonly differ across jurisdictions. The optimal regulatory policy will differ across jurisdictions. Local government officials will often be drawn from the local population and will have closer connections to local constituencies, resulting in better knowledge of local preferences about regulatory issues. Local representatives to central governments will often represent a small minority of the central governing bodies and have insufficient influence on policy outcomes to ensure the proper degree of regulatory heterogeneity.

A valid concern about the WTO is its rules and the perceived conservative or convergence bias of its disputes settlement panels will discourage policy innovation by

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53 Public Citizen 2001a, *Principles for International Harmonization Adopted by the Transatlantic Consumer Dialogue February 12, 2000*, Public Citizen Global Trade Watch Home Page, www.citizen.org/trade/harmonization/Principles/, visited 12 November 2001.

54 Ibid and World Wildlife Fund International, Centre for International Environmental Law (US), Oxfam-GB and Community Nutrition Institute (US), op cit.

55 Sykes op cit. and Sykes, A. 2000, "Regulatory Competition or Regulatory Harmonization? Silly Question?", *Journal of International Economic Law*, Vol. 3 (2), June, pp. 257-64.

pace-setting governments at national and sub-national levels and slow the migration of those policies to other jurisdictions. Public Citizen expressed its concerns thus:

> Harmonization is the name given to the effort by industry to replace the variety of product standards and other regulatory policies adopted by nations in favour of uniform global standards. The harmonization effort gained a significant boost with the approval of several new international agreements, particularly the North American Free Trade Agreement (NAFTA), and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which established the World Trade Organization (WTO). These pacts require or encourage national governments to harmonize standards or accept different, foreign standards as "equivalent" on issues as diverse as auto, food and worker safety, pharmaceutical testing standards and informational labelling of products. These trade agreements have also established an ever-increasing number of committees and working groups to implement the harmonization mandate. The WTO alone established over 50. Unfortunately, most of these working groups are industry dominated, do not provide an opportunity for input by interested individuals or potentially-affected communities, and generally conduct their operations behind closed doors. Yet, under current trade rules, these standard-setting processes can directly affect our national, state and local policies.[56]

The decentralisation concepts implicit in the environmentalist critique of the WTO are:

- Laboratory federalism; and
- Environmental federalism.

In a setting of imperfect information with learning-by-doing, laboratory federalism focuses on the potential gains from experimentation with policies for addressing social and economic problems. A federal system offers opportunities to encourage such experimentation and thus promote technical progress in public policy. A single jurisdiction may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country. Multiple jurisdictions allow simultaneous experimentation with competing policies. Localised policy experimentation has the advantages of risking harm in a more circumscribed area, of being able to correct mistakes quickly because governments are closer to and thus more easily removable by the people. Many important social and economic policies were tried first at state or local levels before becoming commonplace as other governments, includes those abroad, built on the success of pace-setting jurisdictions.

A valid environmental concern about the WTO disputes process is that it may frustrate a trans-national version of environmental federalism. One purpose of federalism and indeed nation states is diversity in law. There is more to federalism than a calculated inefficiency: a divided government is a weak government.[57]

The main argument for federalism, and political decentralisation in general, is that there are a range of government activities for which there is no particular need for a national

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56 Public Citizen 2001b, *What is Harmonization?*, Public Citizen Global Trade Watch Home Page, www.citizen.org/trade/harmonization/articles.cfm?ID=4390, visited 12 November 2001.

57 See Easterbrook, F. 1994, "The State of Madison's Vision of the State: A Public Choice Perspective", *Harvard Law Review*, Vol. 107, 1328-47; and Buchanan, J. 1994, "Notes on the Liberal Constitution", *Cato Journal*, Vol. 14 (1), Spring-Summer, pp. 1-9.

policy.[58] Responsibility for a particular activity of government should lie with the smallest political jurisdiction that is familiar with local circumstances and needs.

A key idea emerging from the literature in public economics is that the responsibility for providing a particular public service should be assigned to the smallest jurisdiction whose geographical scope encompasses the relevant benefits and costs associated with the provision of the service. The rationale is that decentralisation allows public services to be tailored to the particular circumstances – the tastes of residents, the costs of production, and any other peculiar local features – of each jurisdiction. Decentralisation offer ways to reduce these costs by providing experiments with different policies, by making it easier for citizens to monitor their political agents, and by giving citizens alternative jurisdictions from which to choose the policies they desire.[59]

The first clause of the trade and environment agenda of the Sierra Club is an affirmation of political diversity. Specifically, the right of all units of government to make their environmental regulations as strong as they wish, unrestricted by trade policy, provided that their regulations apply equally to domestic and foreign products.

The environmental movement sees no need for a national or an international policy that sets a maximum standard for environmental protection and risk regulation. There are significant differences in income levels within federal states, just as there are between countries. These differences in income affect the demand and supply of legislation in many ways, including environmental protection and risk regulation.

A decentralisation of environmental regulation allows each country, each tier of government, and each geographic unit of government within each tier, to make trade-offs between environmental protection, risk regulation, and other values that are consistent with the values of the people within its jurisdiction.

In the case of environmental law and the WTO, multiple democratic access is a priority for environmental NGOs. National sovereignty, several tiers of government, and geographically contiguous units of government within one country, allow the public to vote frequently and articulate their preferences in more detail. Each voter can choose the parties and political platforms that are tailored to their national, state and local concerns. Decentralisation enables a mobile public to move to those areas where environmental protection and other policies are most in line with their own preferences.

There are, of course, concerns that inter-jurisdictional competition may lead to a dilution of environmental standards for both production- and consumption-generated environmental harm. Jurisdictions may become more timid about environmental policy because of fears of foreign competition, capital flight and industry mobility. Environmental protection efforts may be impeded if firms are able to make credible exit threats in response to increased environmental regulation. However, the evidence on inter-jurisdictional competition, although diverse in approach and findings, does not provide a compelling basis for fears of a major effect on industrial location of either weaker or stricter environmental regulations.[60]

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58 Tullock, G. 2000, *Government: Whose Obedient Servant?* Institute of Economic Affairs, London.

59 Oates, W. 1999, "An Essay on Fiscal Federalism", *Journal of Economic Literature*, Vol. 37 (3), September, pp. 1120-49.

60 Bhagwati and Hudec 1996 op cit.

Business and environmentalists are concerned about different public choice risks. The business community wants institutions that make it more difficult for politically articulate and shrewd minorities to lobby for (often-covert) regulatory protection from imports. Environmentalists are concerned that international trade agreements will slow-down the implementation of the will of the majority. Both concerns are reasonable.

The idea of democracy is that large numbers of people participate in decisions and those decisions should reflect the views of the majority. However, if only because everyone spends time on the losing side of issues and elections, minority views should not be ignored but neither should they trump the will of the majority. Writings on democracy strive to balance the tyranny of the majority and the tyranny of the minority.

Constitutions and political institutions are compromises that ensure the will of the majority prevails, but not immediately, and not without overcoming bothersome obstacles intentionally placed in its path. The aim is to protect minorities from the occasionally intemperate or impassioned majority, with obstacles such as bills of rights, federalism and bicameral parliaments.[61] Political institutions are also designed with the aim in mind of protecting the majority from well-organised, self-serving minorities, the privileged, and the wealthy. The regulation of campaign financing is an example. Parliamentary committee systems and freedom of information laws are other examples.

The crux of the present issue is the design of regulatory and review institutions that resolve issues of scientific uncertainty in risk regulation in respect to goods that are traded. The environmental movement is distrustful of the new WTO institutions. Their concern is that disputes will be resolved in favour of trade over health, safety, the environment and conservation. Environmentalists prefer to retain the option to work for pace-setting decentralised solutions to environment and public health risks at the national, state and local levels. They also lobby for minimum standards at the multilateral level. The business community is more distrustful of national regulatory review institutions. They support the WTO's disputes settlement understanding as a way to police protectionist capture of regulation at the national, state and local levels.

Federal states have similar institutional compromises to the WTO to mitigate the risk of regulatory protectionism. Federal constitutions have modest formal legal checks on regulatory discrimination against out-of-state business.[62] They also rely on democracy within states and competition between states (the threat of exit by investors and workers) to check regulatory protectionism at the sub-national level.[63]

The WTO's institutional compromise between the competing public choice risks is to ask members to sign a mutually binding agreement about the transparency of the processes by which national, state and local legislation are created and enforced. Under the WTO's system of policed decentralisation, the member-countries agree to follow processes based on principles such as non-discrimination, the use of scientific reasoning and evidence in the design of risk regulation, and promising that the breath of regulatory responses should be narrowly tailored to the scope of the risk at hand.

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61 Easterbrook op cit. and Buchanan op cit.

62 Farber, D. and Hudec, R 1993, "Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause", *Vanderbilt Law Review*, Vol 47. pp. 1401ff.

63 Easterbrook, F. 1988, "The Constitution of Business", *George Mason Law Review*, Vol. 11, pp. 53ff.

8. Summing-up the opportunities and risks

Integrating environmental concerns into trade agreements touches on a number of issues. Exporters are concerned about the use of health, safety and environmental regulations as non-tariff barriers. Environmentalists perceive trade policy as a means of raising national environmental standards at home and abroad and of inducing countries to become signatories to and abide by international environmental agreements.

The environmental NGOs do have valid concerns about some aspects of the WTO. At times, the WTO agreements are complex and are not models of clarity in drafting. The WTO is a finely balanced compromise. The agreements are based on subtle judgements and a delicate balancing of competing considerations, which invites honest disagreement over priorities, interpretation, and implementation.

The central WTO concern of environmental groups is that disputes panels may restrict pace-setting domestic environmental laws in high-level countries because they burden imports unduly or are without full scientific justification. The WTO might limit the ability of governments to raise food safety standards or to adopt precautionary measures to protect the environment from new hazards whose the risks were not well understood. Another concern of environmentalists is whether the trade benefits of the WTO's disputes settlement process outweigh its costs in terms of regulatory flexibility, policy innovation and experimentation and national responsiveness to shifting public opinion.

The integration of technological and democratic values into risk regulation requires the resolution of predictable problems in individual and social cognition of risk and its regulation. The SPS agreement sets a relatively low internationally agreed threshold test to facilitate this. The agreement ensures that differences between technocratic and popular judgments about regulating a particular risk is indeed the product of differences in values, rather than factual mistakes, selective attention and protectionist subterfuge.

It is reasonable to ask whether the WTO's processes may hamper the ability of national and sub-national governments to be genuine pacesetters in environmental law making and possibly eliminate non-science factors from standard setting. Environmentalists consider that the WTO disputes process encourages governments to converge to the relevant international standard for a particular regulation because such uniformity is likely to reduce the incidence of trade disputes. In countries with regulations that are more demanding than the international standard, the fear of environmentalists is that WTO compliance costs will lead to a harmonisation down to the international standard even in those cases where there is some scientific basis for stricter regulation.

The environmental NGOs have proposed a number of changes to the WTO agreements. Some of their proposals, such as better interface between the WTO agreements and multilateral environmental agreements; greater transparency in the WTO's decision processes, and surer facilitation of green labelling, have few domestic policy or export market access risks.

Proposals that go beyond environmental advocacy, such as incorporating a stronger form of the precautionary principle into WTO disputes processes, and a weakening of the sound science requirement, have export market access risks. Important international safeguards against disguised protectionism in bio-security, food safety and other risk regulation in New Zealand's export markets could be weakened.

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