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The World Trade Organization vs. The Environment, Public Health and Human Rights

The WTO "is the place where governments collude in private against their domestic pressure groups."
—*The Financial Times*

EIGHT YEARS OF WORLD TRADE ORGANIZATION (WTO) decisions have demonstrated that the WTO views environmental, public health and human rights protections as obstacles to trade that should be eliminated.

The WTO's Dispute Settlement Body has the strongest enforcement procedures of any international agreement now in force. WTO panel rulings are automatically binding. Once a WTO tribunal has declared a country's law WTO-illegal, the country must change the law or face trade sanctions. Dispute panels operate in secret, documents are restricted to the countries in the dispute, due process and citizen participation are absent and no outside appeal is available. The tribunals are composed of three to five trade experts chosen by the WTO secretariat without meaningful protections against conflicts of interest. Given that the WTO uses unelected and unaccountable trade experts to decide in secret if domestic laws are acceptable under WTO trade rules, the resulting tidal wave of rulings against public interest laws is not particularly surprising.

As described in detail in examples below, the WTO record of rulings involving the U.S. against laws designed to protect the environment, endangered wildlife, consumer health and safety, fair trade and human rights, demonstrates the WTO's "trade *uber alles*" bias. The WTO's trade rules have regularly trumped domestic regulations, weakening protections for clean air, wildlife, safe food, fair trade and human rights.

Clean Air

The U.S. was forced to weaken the U.S. Clean Air Act in response to a WTO ruling which found that the law "discriminated" against foreign producers. The Environmental Protection Agency (EPA) was forced to revert to a policy identical to an industry proposal that the EPA had earlier rejected as effectively unenforceable and too costly.

Wildlife

In two rulings, the U.S. was forced to weaken the U.S. Marine Mammal Protection Act and the Endangered Species Act, relaxing protections for dolphins and endangered sea turtles. The WTO ruled that countries could not differentiate between products based on how they are produced, known as production process methods, so long as the final product is essentially the same. Examples of laws that are seriously threatened by the rulings include laws banning products made with child labor; laws that require products to be made with a certain percentage of recycled products; laws requiring that products do not use ancient forest or endangered animals; among others.

Safe Food

The European Union (EU) currently faces hundreds of millions of dollars in trade sanctions from the U.S. because it has not eliminated a ban on hormone treated beef as required by the WTO. The EU enacted the ban in response to public and scientific concern over the health risks associated with hormone treated beef. In its ruling, the WTO effectively declared that health regulations enacted in advance of scientific certainty were not allowed under WTO provisions. This is a direct challenge to the Precautionary Principle which states that potentially dangerous substances must be proven safe before they are put on the market. Many areas of U.S. law, such as systems for approving new pharmaceuticals, are based on this principle and are therefore at risk due to this WTO ruling.

Fair Trade

The EU currently faces hundreds of millions of dollars in trade sanctions from the U.S. because it has not eliminated the Lome Convention, a preferable trade arrangement with its former colonies in Africa, the Caribbean and the Pacific (ACP). This arrangement was an example of trade being used to successfully advance social and economic goals—or "fair trade." In 1997, the EU was instructed to eliminate the convention or face $190 million in trade sanctions from the U.S. per year. The EU has said that it will rescind the ACP preferences.

Human Rights

The WTO was used to successfully threaten two U.S. human rights laws modeled after successful South African anti-apartheid laws. The EU and Japan launched a WTO challenge against a Massachusetts law penalizing companies doing business with Burma's brutal military dictatorship. The WTO case was suspended and ultimately unheard because a U.S. corporate group simultaneously pursued a challenge all the way to the U.S. Supreme Court where it was struck down. The WTO challenge was used by the Clinton Administration, however, to stop a similar bill under consideration in Maryland. At the height of the WTO challenge against Massachusetts, Maryland was on the verge of passing a similar bill punishing Nigeria's brutal military dictatorship. The State Department lobbied against the bill by focusing on how it would violate WTO rules and thus draw a challenge. The law, which had been expected to pass handily, lost by one vote. This "chilling effect" on laws designed to promote human rights is one of the largely undocumented impacts of WTO rules.

Alternative Policies

1. Reduce the Power of the Dispute Settlement System.

The WTO's dispute settlement system is fundamentally undemocratic, untransparent, unjust and works to serve only commercial trade interests at the expense of any competing societal goals. The WTO should not take on any new cases while a new, significantly scaled-back and democratic system, closer to the original GATT dispute settlement system, is debated democratically in national governments and negotiated among WTO member countries.

2. The WTO should in no way Impede Nations from Choosing the Means by Which they Protect Their Environment, Natural Resources and Human Rights. The WTO Should Have no Authority of Laws that Impact these Areas.

The WTO has demonstrated its inability to protect values other than unimpeded free trade for multinational corporations. It has even stood in the way of "fair trade" policies. If WTO rules exist, they should not be applied to those areas of policy-making in which the delicate balance between competing interests must be democratically debated.

3. Multilateral Environmental Agreements (MEAs) Must Trump WTO Rules.

WTO supremacy over MEAs severely retards the ability of the global community to react to such major environmental challenges as climate change, extinction and pollution. MEAs have included trade measures since the late 19th Century, and include agreements related to trade in endangered species, the movement of hazardous waste, the protection of biological diversity, and the use of substances that deplete the ozone layer. Parties to MEAs should resolve disputes about trade measures in the context of the environmental agreement, not the WTO.

Examples of Rulings of the WTO Tribunals Against the Environment, Public Health and Human Rights

1. Weakening the U.S. Clean Air Act— The Venezuelan Gas Case

Case Summary

In 1996, the U.S. was forced to weaken the Clean Air Act in response to a WTO challenge by Venezuela and Brazil. The WTO found U.S. Clean Air Act gasoline cleanliness regulations in violation of WTO trade rules. The U.S. was instructed to eliminate the offending regulations or face $150 million in trade sanctions every year it did not comply. The U.S. agreed to change the law, and in so doing weakened the Clean Air Act by replacing the regulations with a policy identical to an industry proposal that the Environmental Protection Agency (EPA) earlier had rejected as effectively unenforceable and too costly. The effect has been to allow dirtier gasoline into the U.S. and thus dirtier air across the nation.

Background

In 1994, the EPA issued rules implementing Congress' 1990 Clean Air Act (CCA) amendments requiring reduction of gasoline contaminants. The rule was designed to ensure that gasoline refiners made cleaner gas. However, it is more difficult to get reliable information on foreign refineries because most do not require the same data collection and reporting as U.S. refiners. In addition, it is more difficult for the EPA to conduct monitoring and enforcement abroad to ensure compliance. So, the EPA was forced to create two sets of rules—one set for U.S. refiners and another for foreign refiners. The rules were set to expire in 1998, giving EPA five years to determine a single cleanliness target.

WTO Ruling

Venezuela and Brazil challenged the rules at the WTO claiming that they were "discriminatory treatment" and illegal under WTO national treatment provisions. The WTO agreed, finding that while the EPA had not intended to discriminate against foreign producers, the rules had a discriminatory effect and therefore were not allowed. The WTO did not care that vital human health and environmental protections were being advanced by the rules.

The Impact

The WTO was used to skirt democratic policymaking and judicial systems. The EPA gasoline regulation struck down by the WTO had withstood all the challenges available to its opponents, including the Venezuelan government, through the U.S. legislative, regulatory and judicial systems. Failing to change the regulation, domestic oil refiners began to comply. Venezuela and Brazil, on the other hand, had another recourse—the WTO. Only there, in a closed WTO tribunal, out of the public eye and before unaccountable, unelected trade bureaucrats, did opponents of the Clean Air Act find success.

2. Weakening the U.S. Marine Mammal Protection Act—the Tuna/Dolphin Case

Case Summary

In 1991, the U.S. was ordered to weaken the Marine Mammal Protection Act (MMPA) in response to a General Agreement on Tariffs and Trade (GATT) (the predecessor to the WTO) challenge by Mexico. The GATT panel found U.S. MMPA "dolphin safe" tuna provisions in violation of GATT trade rules. In a ruling with devastating implications for environmental and public health legislation worldwide, the panel found that countries could not differentiate between products based on how they are produced. Thus, even if dolphins are killed in the harvesting of tuna, laws deemed to "distort" trade in order to protect dolphins are not allowed as long as the end product—the tuna in the can—is the same. In 1993, the European Community launched its own challenge to the U.S. law and, again, the GATT panel agreed.

Background

In parts of the Pacific Ocean, certain species of tuna travel with pods of dolphin. A common method of catching tuna involves chasing the dolphins, encircling them with large nets called "purse seines," driving them to the center of the nets (often using explosives) and closing the nets to trap the tuna. In the thirty years that this method has been in use, some seven million dolphins have been drowned, crushed or otherwise killed due to the practice.

The U.S. MMPA attempted to address the harm to dolphins caused by this practice. After placing restrictions on U.S. tuna fishers, the law prohibited the importation of tuna caught with purse seines or a "comparable" dolphin safety program. In 1990, Congress added the "dolphin safe" labeling program, which outlawed the use of the label for tuna caught using encirclement nets. In 1992, Congress banned the U.S. sale of all tuna that was not "dolphin safe."

In response, first Mexico and then the European Community brought successful challenges to the law at the GATT. In response to the ruling, in 1997, Congress weakened the MMPA, allowing tuna caught with devices that harm dolphins to be sold in the U.S. Moreover, it allowed tuna caught with such devices to carry the "dolphin safe" label. The U.S. government has been in a pitched battle with U.S. environmental and consumer groups in its attempts to comply with the GATT ruling which continues to this day.

GATT/WTO Ruling: Production Processed Methods

The first tribunal ruled that the U.S. law violated GATT rules because it treated physically identical "goods" —tuna—differently according to the manner in which they were caught. The panel interpreted GATT's Most Favored Nation (MFN) provision, which prohibits discrimination between products on the basis of where they are produced, to also forbid distinguishing between products based on how they are produced (called production process methods). This far-reaching ruling placed a long list of U.S. and other countries' environmental, health and safety laws that focus on how goods are manufactured as illegal.

The U.S. argued that even if its ban did violate MFN, the ban was permitted by Article XX of the GATT, which permits countries to restrict trade when "necessary to protect human, animal or plant life or health," or "related to the conservation of exhaustible natural resources." In a critical ruling, the panel rejected this argument. First, the panel determined that the tuna ban was not "necessary" to the protection of dolphins because it was not the "least trade restrictive" method of achieving this goal. Then the panel determined that even if the exceptions might otherwise apply, they could not apply to animals or other resources outside of U.S. territory. This ruling is astounding, given that fish are migratory and are not confined to the territory of one country.

The Impact

The U.S. government has been in a pitched battle with U.S. environmental and consumer groups ever since in its attempts to comply with the GATT ruling. GATT rulings, however, unlike their WTO successors, were not automatically enforceable. So, in 1995, Mexico threatened to bring a challenge to the newly formed WTO over the U.S.' "continuing failure to implement the 1991 GATT dolphin ruling." In response, in 1997, Congress weakened the MMPA, allowing tuna caught with devices that harm dolphins to be sold in the U.S. Moreover, it allowed tuna caught with such devices to carry the "dolphin safe" label.

As recently as April 10, 2003, the battle over the law has continued, with a federal judge in San Francisco temporarily blocking the Bush administration from enacting rules to allow the "dolphin safe" label on tuna caught using encirclement nets that endanger dolphins provided the tuna is certified as coming from a catch where a single monitor on a football field length fishing boat did not observe any dolphin deaths.

3. Weakening the U.S Endangered Species Act—the Shrimp/Turtle Case

Case Summary

In 1998, the U.S. was forced to weaken the Endangered Species Act (ESA) in response to a WTO challenge by India, Malaysia, Pakistan and Thailand. The WTO found the U.S. ESA provisions to protect endangered sea turtles in violation of WTO trade rules. The U.S. was instructed to eliminate the offending regulation or face trade sanctions.

Background

Sea turtles are on the brink of extinction. The leading threat to sea turtle survival is shrimp trawl fishing because sea turtles become caught in the nets and drown. An estimated 150,000 sea turtles drown in shrimp

nets each year. An inexpensive device called a turtle excluder device (TED), catches the turtles in a trap that has an escape hatch, thereby directing the turtle out of the net and saving its life. TEDs reduce the number of turtles killed by shrimp fishing by 97 percent without appreciably decreasing shrimp catches. Since 1987, federal regulations have required U.S. shrimpers to use TEDs. In 1989, Congress amended the ESA to prohibit the import of shrimp from countries that do not have comparable sea turtle protections.

The governments of India, Malaysia, Pakistan and Thailand challenged the U.S. law using the same argument as the tuna dolphin ruling described above. They argued that all shrimp are "like products" and therefore must be allowed into the U.S. market, regardless of the way in which they are harvested, even if endangered sea turtles and were killed in the process.

WTO Ruling: Production Process Methods

The WTO panel ruled that the U.S. law was designed to interfere with trade and thus the GATT Article XX exceptions for environmental and animal protections were inapplicable. The panel also declared that because the regulations were unilaterally imposed on U.S. trading partners, the law deprived the WTO of its objective and purpose of establishing a multilateral trade regime, regardless of the non-trade related objective that was being pursued and the lack of discrimination between domestic and foreign fisheries. The U.S. challenged the ruling.

In October 1998, the WTO Appellate Body reaffirmed the decision that the U.S. law is WTO-illegal. However, the Appellate Body reversed the lower panel as to whether the ESA theoretically could be covered by Article XX exceptions. The panel held that the law could indeed have qualified for an environmental exception under Article XX but did not do so in this case because the law was implemented in a way that was unjustifiably and arbitrarily discriminatory.

The Impact

The WTO used inherently subjective tests in its ruling, putting itself in the position of deciding whether the U.S. struck the right balance between sea turtle protection and trade. Sea turtles are disappearing off of the face of the planet due to human activity. The U.S. came up with a low-cost method to protect sea turtles that did not decrease shrimp catches. The law is an example of a successful application of economic incentives to achieve a valuable social end. The ruling demonstrates that the WTO can not be trusted to use the Article XX exception to uphold laws protecting the environment and the WTO's blind application of trade laws to areas of vital democratic social policy making. The ruling sends a chilling effect to any state or nation that seeks to regulate economic activity in the public interest.

4. Threatening Consumer Health and Safety—EU Beef Hormone Case

Case Summary

In 1998, the European Union (EU) was told to eliminate a ban on hormone-treated beef implemented to protect human health in response to a WTO challenge by the U.S. and Canada. The WTO found the European ban in violation of WTO trade rules. The EU was instructed to eliminate the ban or face $116.8 million in trade sanctions every year that it remained in non-compliance. The EU refused to eliminate the ban and continues to undergo sanctions.

Background

In 1995, 63 percent of all cattle in the United States and 90 percent of cattle raised in U.S. feedlots were treated with growth hormones. The International Agency for Research on Cancer has recognized extensive scientific evidence demonstrating that exposure to hormones, including those used to promote growth in livestock, causes cancer in laboratory animals and, in some cases, in humans. In addition, the same agency has noted that exposure to hormones may magnify the effects of other carcinogens.

In 1980, as a result of consumer concern over reports of harm, particularly in infants, caused by eating hormone-treated meat, the EU instituted a series of bans on the use of growth hormones in meat production. Subsequently,

the EU banned the import of meat from animals treated with such hormones. The EU adopted a “zero risk” standard: rather than trying to assess a tolerable amount of an indeterminable risk or waiting for negative human health affects to accrue over time, the EU chose to eliminate public exposure to the risk altogether.

WTO Ruling: Precautionary Principle

In 1996, the United States and Canada challenged the European ban as a violation of the WTO rules. The challenge was the first test of the WTO’s rules on food safety. In 1998, the WTO panel ruled that the beef hormone ban was an illegal measure under WTO rules in part because it was not based on a WTO-approved risk assessment. The WTO Appellate Body affirmed the original panel’s decision, and the EU was ordered to begin imports of U.S. artificial hormone-treated beef by May 13, 1999. After the EU refused to comply with the WTO panel ruling by May 1999 deadline the WTO on July 12, 1999, approved a U.S. request to impose retaliatory sanctions of $116.8 million.

The EU argued that its ban should be permitted as an application of the Precautionary Principle. This principle embodies the admonition “better safe than sorry” by giving countries the right to implement protective regulations where there is some scientific evidence of harm, even if that evidence is in some way inconclusive. On this basis, the evidence presented by the EU should have more than sufficed to justify its ban. The WTO did not agree. Furthermore, the WTO determined that a country cannot use evidence that a substance causes cancer in animals—a scientific as well as common sense basis for suspecting a risk in humans—as a basis for banning it as a food additive in humans. The U.S. National Cancer Institute has stated that “materials that cause cancer in one type of animal usually are found to cause cancer in others… For these and other reasons, we should expect animal carcinogens to be capable of causing cancer in humans.” The U.S. Delaney Clause prohibits food additives that cause cancer in animals.

Impact

In its ruling, the WTO effectively declared that health regulations enacted in advance of scientific certainty were not allowed under WTO provisions. This is a direct challenge to the Precautionary Principle. Many areas of U.S. law, such as a system for approving new pharmaceuticals, are based on this Principle. The WTO stood the Precautionary Principle on its head, shifting the burden of proof from the manufacturer of the product to the government seeking to regulate the product.

5. Challenging Fair Trade—the Caribbean Banana Case

Case Summary

In 1997, the EU was forced to cancel a preferential trade relationship, the Lome Convention, with its former colonies in Africa, the Caribbean and the Pacific (ACP countries) in response to a WTO challenge by the U.S. The WTO found the convention in violation of WTO rules on the trade in services. The EU was instructed to eliminate the offending convention or face $190 million in trade sanctions from the U.S. per year. The EU has said that it will rescind the ACP preferences.

Background

The EU joined the WTO only after negotiating a waiver specifically protecting the Lome Convention. This convention was designed to aid its former colonies by establishing a preferential trade relationship with them for a set list of goods. These preferences are considered indispensable for the economic and political stability of the ACP countries. The Lome Convention is a perfect example of trade rules being used to advance economic and social development ends—or “fair trade”—trade rules that make the global market more “fair” rather than just more “free.”

According to the prime minister of St. Lucia, “the trading arrangements of the Lome Convention are not about diverting trade but providing opportunities [for countries] that otherwise would have little or no possibility of participating in the global trading system.”

The most significant product protected by the convention is bananas. Bananas are central to the economic and political stability of several small Caribbean island nations where mountainous terrain and limited arable land make cultivation and other legal cash crops literally impossible. The ACP countries most dependent upon the Lome Convention banana regimes include the Windward Islands nations of St. Lucia, Dominica, St. Vincent and the Grenadines, where banana production accounts for between 63 percent and 91 percent of export earnings. Also, 33 percent of Dominica's workforce and 70 percent of St. Vincent's population are involved in the production and marketing of bananas. In 1990, banana exports to the EU represented 94 percent of all banana exports form the ACP countries.

WTO Ruling

In 1996, the U.S. government, on behalf of the U.S. corporation Chiquita Brands International, challenged the EU, claiming that the Lome banana regime violated its WTO obligations. The Clinton Administration filed the complaint on bananas—a crop the U.S. does not grow for export—days after the U.S.-based multinational Chiquita gave $500,000 to the Democratic Party. The U.S. itself does not produce a single banana for trade. Chiquita employs more than 85 percent of its 37,000-person workforce in Latin America. Chiquita has 50 percent of the EU banana market. All of the Caribbean island producers combined have 8 percent of the EU market and 3 percent of the world market.

While the EU had protected the Lome Convention under MFN provisions upon joining the WTO, the U.S. argued, and the WTO agreed, that the EU had failed to protect the "service" of the trade in bananas under the General Agreement on Trade in Services (GATS). In other words, the EU had protected bananas as a "good" but not as a "service." The EU appealed. In 1997, the WTO Appellate Body affirmed and clarified the original panel's ruling. In 1999, the U.S. said it would impose $520 million in sanctions for the EU's failure to comply with the WTO. The WTO reduced the amount to $190 million and the tariffs took effect in March 1999. The EU has said that it will rescind the ACP preferences.

The Impact

The WTO ruling has two critical impacts. First, governments often tell their citizens not to worry about the WTO or other international trade or investment institutions because the things they care about will be "protected." For example, currently, the U.S. government has a long list of services that it argues are "protected" from GATS negotiations. However, the ruling on the Lome Convention should give all citizens reasons to worry about the validity of these so-called protections. The EU had a waiver for the Lome Convention. The U.S.—or rather Chiquita Banana—successfully challenged this waiver using essentially a legal technicality: the EU had protected the trade in bananas as a "good" rather than a "service," leaving them open to challenge under the GATS agreement. The same could theoretically happen to any seemingly "protected" law.

Second, the Lome Convention was an agreement that used trade to successfully advance economic and social goals. The WTO ruling challenges the ability of nations to use trade as a tool for advancing goals other than "free trade" as an end in itself.

4. Challenging Human Rights—the Massachusetts Burma and Maryland Nigeria Procurement Laws. Two Cautionary Tales...

Massachusetts Procurement Policy on Burma:

The EU and Japan launched a WTO challenge against Massachusetts' preferential purchasing law, which penalizes companies doing business with Burma's brutal military dictatorship. This policy of economically starving the ruling junta, based on the South Africa anti-apartheid strategy model, has been called for by Burmese democracy leaders. In fact, the Massachusetts Burma law was word-for-word the same law the state had in place in the 1980's for South Africa with "Burma" replacing "South Africa" whenever the country was named. However, WTO procurement rules forbid the consideration of non-commercial factors, such as human rights, in government purchasing decisions. They also require that all countries be treated the same regardless of their conduct (MFN treatment). The WTO case was suspended and ultimately unheard because a domestic

court challenge was pursued by a U.S. corporate group called "USA ENGAGE" that successfully pursued the case to the Supreme Court where the law was eventually struck down.

Maryland Nigeria Procurement Bill:

At the height of the WTO challenge against the Massachusetts law, the state of Maryland was on the verge of passing preferential procurement rules penalizing Nigeria's brutal military dictatorship. The Clinton administration dispatched State Department staff to the state capitol of Maryland to lobby against the measures. State Department testimony focused on how the measure would violate WTO rules and thus draw a challenge. The law, which had been expected to pass handily, lost by one vote. This "chilling effect" on laws designed to promote human rights around the world is one of the largely undocumented impacts of WTO rules. ▲