

CLI BACKGROUND PAPER NO. 10

International Trade Law

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The law of international trade originates entirely from express agreements, including those that apply to the 153 members of the World Trade Organization (WTO)¹ and parties to regional trade agreements, such as the North American Free Trade Agreement (NAFTA).² The WTO suite of agreements and regional trade agreements do not contain any affirmative obligations to protect the environment or public health, or to protect the interests of future generations, for that matter. Indeed, international trade agreements may potentially operate as an impediment to the efforts of individual states or groups of states to address the problem of global climate change. A new law of “sustainable trade” is required to identify mutually reinforcing opportunities to encourage both international trade and climate protection.

International obligations or “disciplines” on trade are almost exclusively “negative,” in the sense that they place constraints on governmental action. Trade agreements encourage liberalized or free trade through requirements that limit governmental intrusion into what otherwise would be a free market. From an environmental point of view, this phenomenon is the equivalent of deregulation—in the sense of reducing the level of governmental intervention in the market in the form of tariffs or other prescriptive requirements—and trade agreements by virtue of their negative obligations are inherently deregulatory. This momentum largely explains the phenomenon of globalization, at least as it has been defined for the past decade or so: getting governments out of the business of impeding private interactions and transactions, thereby facilitating their global reach.

Environmental protection anticipates affirmative governmental interventions in the marketplace to offset market failures. That explains the clash between the two approaches: one operates to disable governmental action, while the other depends on invigorating government. Obligations in trade agreements *proscribe* certain governmental behavior that impedes trade, while environmental laws *prescribe* affirmative governmental actions to protect public health and ecosystems. International environmental agreements operate in a similar way. International agreements to protect the climate, for example, require state parties to intervene in their domestic jurisdictions to accomplish certain concrete results in the form of prohibitions on private actions, such as requiring private parties to reduce emissions of carbon dioxide and other greenhouse gases that might adversely affect the global climate.

International trade agreements generally contain no rule making authority that might be employed to protect the integrity of the climate for future generations, and they consequently do not require states to achieve any minimum level of environmental protection. By contrast, in domestic legal systems, such as that established by the U.S. Constitution, there is normally some affirmative governmental regulatory power to offset the externalities created by market liberalization. International trade agreements instead operate asymmetrically only in the direction of relaxing the

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¹ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, reprinted in 33 I.L.M. 1143 (1994) and 4 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS IV.C.2 (Burns H. Weston & Jonathan C. Carlson eds., 1994—) (hereinafter “Weston & Carlson”); Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154; 33 I.L.M. 1144 (1994), reprinted in 4 Weston & Carlson IV.C.2a.

² E.g., North American Free Trade Agreement, Dec. 8-17, 1992, reprinted in 32 I.L.M. 289, 605 (1993) and 4 Weston & Carlson IV.C.7.

rigor of environmental measures, with no offsetting requirements to meet minimum standards of social welfare in such areas as protection of the global climate for the benefit of future generations.

At a more technical level, the 1947 General Agreement on Tariffs and Trade (GATT), incorporated into the WTO suite of agreements, articulates three basic disciplines:

- National treatment, contained in Article III of GATT and requiring non-discrimination between foreign and domestic products;
- The most-favored-nation (MFN) principle, contained in Article I of GATT and specifying non-discrimination among imported products on the basis of their national origin; and
- A prohibition on quantitative restrictions for imports or exports contained in Article XI of GATT.

Article XX of GATT establishes exceptions for measures "necessary to protect human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources." Analytically, these provisions operate to justify a national measure that would otherwise violate a trade agreement's negative disciplines. Despite frequent misconceptions to the contrary, they are *not* affirmative obligations to regulate in these areas.

Some apprehension has arisen about the consistency between international trade rules and the emissions-trading provisions of the Kyoto Protocol³ mechanisms, as implemented through the Marrakesh Accords.⁴ The WTO suite of agreements and regional trade agreements address only trade in goods, and not intangibles. There is considerable scholarly opinion support for the proposition that tradeable credits of the sort created by the Protocol are neither goods nor services. There is, however, also commentary asserting that the governmentally-established structure and operation of the system for trading credits could have indirect effects on trade in services.⁵ An example of an indirect effect would be more rigorous auditing or accounting procedures imposed on foreign suppliers than domestic providers. But consistent with the basic GATT disciplines, international trade law would not generally be expected to establish constraints on the recognition of intergenerational rights and duties in international law, so long as those actions are non-discriminatory.

There has also been some concern about the potential for multilateral agreements, such as the Kyoto Protocol, to run afoul of international trade disciplines. The agreements that have attracted attention in this context include the Montreal Protocol,⁶ the Convention on International Trade in Endangered Species (CITES),⁷ and the Basel Convention.⁸ These instruments all have provisions that regulate trade in goods covered by international trade agreements. By contrast, given the strong likelihood that international trade rules do not cover operation of the Kyoto mechanisms (at least as currently structured for the first commitment period covering 2008-2012), that risk appears minimal.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (1998), *reprinted in* 5 Weston & Carlson V.E.20d.

⁴ Marrakesh Ministerial Declaration and Marrakesh Accords, in Report of the Conference of the Parties on its Seventh Session, Oct. 29-Nov. 10, 2001, U.N. Docs. FCCC/CP/2001/13/Add.1, Add. 2 & Add. 3 (Jan. 21, 2002), *available at* <http://unfccc.int/resource/docs/cop7/13a01.pdf>, <http://unfccc.int/resource/docs/cop7/13a02.pdf>, and <http://unfccc.int/resource/docs/cop7/13a03.pdf>.

⁵ *E.g.*, Steve Charnovitz, Trade and Climate: Potential conflicts and Synergies, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, at 141, 152-53, *available at* <http://www.pewclimate.org/docUploads/Trade%20and%20Climate.pdf>.

⁶ Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 29, *reprinted in* 26 I.L.M. 1550 (1987) and 5 Weston & Carlson V.E.9.

⁷ Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, *reprinted in* 5 Weston & Carlson V.H.10.

⁸ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125, *reprinted in* 28 I.L.M. 657 (1989) and 5 Weston & Carlson V.H.10.

Far more troubling is the structural architecture of international trade agreements, whose provisions do not further protection of the global climate and may impede domestic or multilateral efforts to do so. Although the preamble to the Marrakesh Agreement Establishing the WTO makes a passing reference to "the objective of sustainable development," WTO rules themselves contain no test of sustainability. To the contrary, the law of international trade views measures to protect global climate as potential non-tariff barriers to trade, which are constrained by trade-based disciplines. Consequently, existing international trade rules as instruments for addressing the problem of climate change are, at best, neutral or potentially obstructive. Instead, international trade law should be recast to identify opportunities for trade and the environment to operate in a mutually reinforcing manner, for both are intended to promote human welfare.