Information Revelation and Structural Supremacy

Understanding the World Trade Organization’s Incorporation of Environmental Policy

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Something Curious...

The World Trade Organization has become a central venue for environmental policy.

– Recent WTO complaints include solar modules, recycling, fish, biofuel, etc.
Even More Curious...

The WTO is dedicated to trade liberalization.

But...

... it offers, encourages, and has upheld a **variety of instruments** by which states can pursue environmental policies at the expense of freer trade.
The WTO’s Incorporation of Environmental Policy

**GATT 1994** – Article XX, (b) and (g)

**Marrakesh Agreement** – emphasizes environmental protection and sustainable development as objectives of the WTO

**5 new agreements** – Agriculture, Services, SPS, TBT, TRIPs

– These additions are crucial because, if a state restricts trade in pursuit of environmental goals and a complaint ensues, the trade-restricting state must cite a particular agreement that permits such actions
One Key Feature:
Information Revelation

To gain or retain a privilege, an actor must reveal private information (i.e., information that is not common knowledge to all actors)

**WTO agreements specify private information that a trade-restricting state ought to possess and reveal** in order to implement and maintain trade restrictions in the name of environmental goals.
A Second Key Feature: Structural Supremacy

States have not granted a dispute settlement mechanism to any environmental regimes.

Meanwhile, the international trade regime has had a mechanism since 1947, and an even stronger one since 1995.

Disputes involving trade and the environment have only one place to go: in front of trade experts, who apply trade law to assess the appropriate balance of trade and environmental goals.
Why These Features?
Political Pressures of 1980s & 1990s

Disputes related to trade and the environment were on the rise

NAFTA increased environmentalists’ concerns with trade agreements

Countries from North and South clashed over “green protectionism”

– An array of WTO-permissible environmental instruments – but those instruments come with information-revealing conditions

– Those conditions play out in the dispute settlement mechanism of the international trade regime, not within any environmental regime
SPS Agreement Illustrates How These Features Are Entwined

**Information Revelation**

- Article 5 – a government can restrict trade according to its preferred standard for protecting animal and plant health, so long as that’s based on a scientific risk assessment that must be revealed if the restriction is challenged.
- The SPS Agreement specifies the existence (but not nature or level) of the assessment.

**Structural Supremacy**

- What information is demanded – and who considers it – matters.
- e.g., the EC revealed a risk assessment to justify its ban on imports containing artificial growth hormones, but the WTO Appellate Body deemed that evidence too tangential.
- A panel of experts in environmental law or public health may have decided differently, but no such panel was in a position to do so.
Policy Implications

In the WTO, experts in trade law are adjudicating more matters that involve areas outside of their expertise.

That’s hazardous – much of the WTO’s future relevance hinges on offering a well-functioning and well-regarded dispute settlement mechanism.

Potential prescription: permit environmental law experts to serve in WTO adjudicatory bodies if a dispute involves trade and the environment.
Theoretical Contributions

Literature on the international trade regime
   - Highlights an increasingly important feature: centrality for environmental policy

Literature on overlaps in international law
   - Advances recent work on the interplay between trade law and environmental law

Literature on institutional design
   - Indicates that information-revealing mechanisms are useful – but they may have hazards when combined with structural supremacy
Thanks

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Information Revelation and Structural Supremacy Are Entwined

Without GATT Article XX and the new agreements annexed to the Marrakesh Agreement:

– The dispute settlement mechanism would have little guidance on what sort of private information states must reveal

Without the dispute settlement mechanism:

– The agreements would indicate the sort of information a state should be amassing to construct a permissible trade-restricting environmental policy...

– But when a state doesn’t actually do so there wouldn’t be an institutionalized way to discover, stop, and punish the misbehavior
SPS Agreement: Roughly Representative

It’s in the middle of the 5 agreements in terms of how often it’s been cited in WTO disputes

Like other agreements:
- Permits governments to restrict trade in pursuit of environmental goals
- Phrases this as a right, not just an exception
- Requires a government to collect particular information to construct a trade restriction and to reveal information if the restriction is challenged