

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

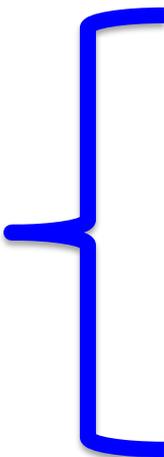
States have not granted a dispute settlement mechanism to any environmental regimes

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?

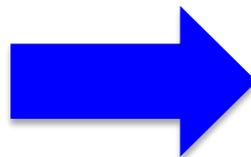
Political Pressures of 1980s & 1990s



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