Globalisation, trade liberalisation and the WTO - a recipe for financial gain or environmental loss?

by Kirsten Hagon

There is increasing debate as to whether trade liberalisation and environmental protection are compatible goals.[1] The economic benefits of free trade and globalisation are often cited, but what about the impact of this "integrated global market" on the environment? Trade liberalisation is a reality,[2] so maybe the important question is no longer "Are trade and environment compatible?" but "How can we ensure they are mutually beneficial?" and perhaps more importantly, "Whose responsibility is it?"

The relationship between trade and the environment

These two apparently distinct areas are closely linked. What and how we trade can have an enormous effect on the environment: "Trade rules and agreements are a major determinant of how natural resources are used, what pressures are placed on the environment and who benefits from the huge money flows... that cross borders with the exchange of goods".[3]

The wealth of a nation (or lack of) also has a substantial impact on the environment. According to Klaus Toepfer, Executive Director of the United Nations Environment Program (UNEP), poverty in the developing world is one of two main global environment threats facing the world today.[4]

Supporters of free trade generally argue that trade liberalisation will reduce poverty, enabling developing nations to become more prosperous and technologically advanced and thus better able to protect the environment. This may be true in some circumstances, but when faced with poverty, famine and the absence of adequate democratic processes, reality dicates that protecting the environment is a low priority to a developing nation. Measures made to protect the environment can in some circumstances have the effect of destroying a nation's predominant source of income.

An example of this can be seen in the Islands of the South Pacific. Logging on a group of Melanesian islands (by mainly Malaysian companies) has escalated in the last five years to more than 3 times the estimated sustainable yield. Greenpeace estimates that "In less than ten years all the productive lowland forests will be logged. The forests are rich tropical rainforests with thousands of unique plants and animals. As well, a diversity of cultures and people who customarily own and rely on the forests are under threat."[5] If the government of the Melanesian islands were to halt the devastation of its forests, it would lose 60% of its income which currently comes from taxes on log exports.[6]

Increased trade liberalisation has had detrimental effects on the environment. Multi-national Corporations ("MNCs") are now able to forum shop to find the cheapest place to manufacture and process their goods. Environmentally sound production and manufacturing methods are expensive, hence there is an economic incentive to choose the nation with the lowest environmental standards.

The tanning industry has followed such a pattern, to the economic benefit, but environmental detriment of a number of nations. Tanning is a pollution intensive industry, and since strict environmental regulations were introduced into Europe, the "wet-processing" part of the production line (which amounts for 80-90% of pollution for the entire process) has moved to nations such as Brazil and Argentina where regulation is less strict. The increased presence and output of companies involved in this process is causing not only irreversible environmental damage, but also the build up of economic costs.[7] As such, some MNCs are acting to further destroy the environment.

Why the lack of regulation?

International law was not established with MNCs in mind, rather it focuses on nation-states. As such, the international legal regime has no control over the practices of MNCs. Environmental Regulation is generally viewed as a domestic issue and the responsibility of host states.

The host nations where the most damage is being done are the poorer developing nations. They need the funds brought by international investment to combat poverty. They also know that corporations will move elsewhere if environmental regulation is increased. It is not surprising that environmental degradation to the extent associated with projects such as the Ok Tedi mine[8] in Papua New Guinea are largely unheard of in first world countries. Hence states become involved in a "race to the bottom," competing for foreign investment at the expense of the environment.

As the new international trading system appears to be creating these problems, it has been suggested that the WTO rules are the problem and need to be changed, as they prevent environmental protection.

Do the WTO rules prevent environmental protection?

WTO trade rules do restrict the ability of nations to apply international pressure in the form of trade restrictions, import bans, etc on other states to conform to environmental standards. This, however, does not necessarily mean they prevent environmental protection.

Article I of the General Agreement on Tariffs and Trade (GATT 1947)[9] states that all contracting parties must be treated equally. Article III provides that foreign products must be treated the same as "like" domestic products. This means that refusing to import products because they are produced in a manner which is detrimental to the environment is prima facie in breach of WTO rules.

There are however some limited exceptions to the WTO non-discrimination rules. These are contained in Article XX of the GATT. Article XX(b) provides an exception for measures considered "necessary to protect human, animal or plant life or health" and Article XX(g) permits measures which are in "relation to conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

Whilst such measures must not be "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction to trade",[10] it is therefore possible to apply international pressure on other nations through trade restrictions without violating the WTO trade rules. Nations that are in breach of any of the WTO Rules, such as Article XX, are brought before a Dispute Settlement Body which is empowered to make directions as to how a nation must modify its practices so as to comply with the WTO Rules. If an offending nation fails to abide by these directions, nations affected by the breach are permitted by the WTO to impose retaliatory restrictions. For example: refusing the importation of various products from the infringing nation.

Can the WTO be used as a means to improve the environment?

The WTO was set up to govern trade, not to promote environmental protection. It is not the WTO rules which are leading to destruction of the environment, it is the MNCs and the lack of domestic environmental regulation and enforcement. In its current form, the WTO does not have the ability to regulate the conduct of corporations. However its member states do, of course, have such power.

So what can be done in terms of Australian law and policy making?

- Leave it up to consumers: As consumers we can choose not to buy goods produced by corporations with poor environmental records. Unfortunately, this is often not enough to cause a corporation to change its practices.

- Look for technological answers and win/win situations: New technologies can provide the means for protecting the environment whilst appealing to MNCs' economic goals. For example the companies that developed and/or owned CFC alternatives were strong proponents of the Montreal Protocol on Substances that Deplete the Ozone Layer because it was in their best economic interests to do so. However, they also managed to aid the environment at the same time. The trading of Carbon Credits is another example of this.[11]

- Encourage greater environmental regulation in other nations: Political pressure and negotiations are obvious methods of achieving international environmental goals. Further, the government can join and push for the acceptance of Multilateral Environmental Agreements (MEAs) between states to address particular issues.

- Implement domestic legislation or policies to encourage good environmental standards by Australia-based MNCs: A bill was recently tabled in the Australian federal parliament,[12] aiming to "regulate the activities of Australian companies overseas in the areas of human rights, environment, labour and occupational health and safety." It proposes a system of minimum standards, compliance reports and financial penalties for breaches.

A bill has also been proposed in the United States[13] requiring all corporations with more than 20 employees working abroad to enact codes of conduct applying to the company, subsidiaries, joint venturers etc. These codes must provide for certain environmental and other standards. It is proposed that the US government will give preference in awarding contracts to corporations complying with such codes and the bill also proposes to enable non-United States citizens to sue in United States courts where such codes have not been complied with.

There is little indication that either of the bills will become legislation in the near future, however they do provide clear answers to how domestic governments may act to protect the global environment.

Conclusion

Globalisation and the liberalisation of international trade are a reality and can bring many benefits. However, trade liberalisation ought not to be at the expense of the environment. There are various means by which it should be possible to demonstrate that trade development and the environment and are not necessarily incompatible, but that they may be complementary. In this way globalisation could even become a tool for environmental protection.

NOTES

1 One example of this is the stark division of views between representatives of the WTO, World Bank and WEF and protestors at the WTO conference in Seattle in November 1999 and at the World Economic Forum demonstrations in Melbourne, September 2000.

2 There are arguments that the only way to protect the environment would be to end trade liberalisation, including suggestions of removing WTO, IMF, World Bank and related organisations. This essay does not aim to address these issues.

3 Lorraine Elliot (1998) The Global Politics of the Environment, Macmillian Press, London , p209

4 Poverty and Environment on the G8 Summit Agenda, UNEP News Release 00/88, July 2000

5 Greenpeace web site: www.greenpeace.org -

Forests, Solomon Islands

6 Greenpeace web site: www.greenpeace.org - Forests, Solomon Islands

7 Report by WWF-UK: Foreign Direct Investment and the Environment (OECD Webpage - www.oecd.org)

8 BHP is the major shareholder of the Ok Tedi mine in Papua New Guinea, which allegedly releases 80,000 tonnes of waste into the river each day. Environmental reports indicate that the Ok Tedi River, its fish and the surrounding forests have suffered increasing environmental harm in recent years. Source: Mineral Policy Institute, http://www.mpi.org.au/

9 GATT 1947 is a multilateral treaty aimed at promoting trade through the gradual reduction of tariffs and other import barriers. It is governed by the World Trade Organisation (WTO) which was created in 1995.

10 Chapeaux of Article XX

11 Under the Kyoto Protocol carbon credits act as a tax on companies having high greenhouse related emissions. They also serve as a subsidy for companies seeking to redevelop environmentally sustainable businesses.

12 Corporate Code of Conduct Bill, 2000

13 Introduced as the Corporate Code of Conduct Act by Congresswoman Cynthia McKinney, 106th Congress

the vienna convention

– towards global regulation of commerce

by Ross Becroft, Louis Gross & Associates

The United Nations Convention on Contracts for the International Sale of Goods ("The Convention") was adopted in Vienna on 10 April 1980. It is an ambitious attempt to create one set of rules to govern international contracts for the sale of goods. Presently, 57 countries have become signatories to the Convention. Major signatories include the United States, China, Canada and many European Union States. Australia became a signatory in 1987 and the Convention was adopted into domestic law through the passing of mirror State Sale of Goods legislation. In Victoria, the relevant Act is the *Sale of Goods (Vienna Convention) Act* 1987. Notable nations that are not signatories include India, Japan and the United Kingdom.

Despite the grand ambitions of the drafters, the Convention has not as yet operated as a ubiquitous global regime. This is primarily because only 57 nations have become signatories. The main reason for the slow uptake is that many countries are not prepared to give up the sovereign right of the nation state to govern commerce conducted by their constituents. The United Kingdom is a case in point: the Convention contained far too many European civil law concepts for it to be acceptable to the English. With many developing countries, it has more to do with an inherent suspicion that the Convention would benefit developed nations at their expense.

In Australia, many business people (and even some lawyers) have never heard of the Convention. Many others believe that it is an opt-in regime that requires consent by the parties to a sale transaction in order for it to apply. This is not the case. If private parties are resident within contracting states, then the Convention will govern the sale of goods contract unless it is specifically excluded in the contract.[1] Further, even if only one of the parties is resident within a contracting state, the contract may be governed by the Convention if the rules of private international law point to the application of the law of a contracting state.[2] This means that if an Australian company entered into a sale contract with an Indian company and the sale contract was governed by the laws of Australia, then the Convention would govern the contract.

The major difference between the Convention and the common law is that the focus of the Convention is on forcing the parties to carry out their contractual obligations and make the best of a situation, even where there has been a breach by one of the parties. Under the Convention, a party may only avoid a contract where there has been a fundamental breach, in that the party claiming harm has been substantially deprived of what that party has been entitled to expect under the contract.[3] Even in this situation a buyer cannot simply send the goods back to the seller and claim damages. The buyer must take steps to safeguard and preserve the goods and, where the goods are subject to rapid deterioration, (eg. fresh produce) the buyer must try to sell the goods. The primary reason for this type of regulation is that in many cases the buyer and seller will be thousands of kilometres apart and it is simply not practicable to send the goods back due to minor defects. In keeping with this philosophy, the major remedy available to both buyers and sellers under the Convention is specific performance. This contrasts starkly with the common law, which traditionally allows parties to rescind a contract upon an unremedied breach and mount a claim for damages.

There has only been one reported case in Australia dealing with the Convention. However, that decision of *Roder Zelt-Und Hallenkonstruktionen GmbH v Rosedown Park* (1995) 57 FCR 216 predominantly concerned rights under a retention of title clause. Article 4 of the Convention regulates the rights and obligations of parties to an international contract for the sale of goods. However, the article specifically excludes from its ambit issues relating to the validity of a contract or ownership of property in the goods. Therefore, while the *Roder* case made extensive reference to the Convention, being the applicable law, *Roder* was decided upon domestic property law principles rather than upon a judicial interpretation of the Convention.

German Courts have generated by far the most case law concerning the