

# **Improving the Procedures in the WTO to Take Account of Sustainable Development: Lessons from MEAs**

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There has been a strong tendency to view the World Trade Organization (WTO) as the very model of an effective international regime and to seek lessons from the trade regime for other international agreements, notably those dealing with the environment. This approach overlooks the fundamental problem that “effectiveness” is not an abstract concept but can only be constructed in relation to clearly articulated goals. Indeed, one of the most important lessons from the last decade of analysis of environmental regimes to determine their effectiveness—one of the hardest puzzles of international relations—has been the realization that the fit between a regime’s institutions and its problem structure—that is the nature of its goals—is a key determinant of effectiveness. This leads directly to three corollaries:

- a regime that is effective for one task may prove ineffective for others;
- regimes that address different problems are liable to require different institutions;
- it is difficult, and maybe even hazardous, to attempt to transfer lessons from one regime too directly to another.

It makes sense to ask what the problem is for which the trade regime is effective, and more specifically what is the nature of the institutions that it employs to achieve this result. It is striking to note that there has been limited institutional innovation in the GATT/WTO regime. Even the new Dispute Settlement Understanding represents no more than fixing the manifest inadequacies of the institution of dispute settlement that has always been an integral

Part of the trade regime. Not only has there been limited institutional innovation, the trade regime is institutionally sparse—it is effective despite using a limited number of institutions, but the institutions that it does utilize exhibit a remarkable fit with the problem, namely the implementation of the principle of comparative advantage through a process of continuous negotiation revolving around “concession” that have the curious characteristic of benefiting those who make them at least as much as those

who receive them. In practice the GATT was constructed as a mutual assistance society to help countries take decisions that were economically advantageous but politically hard. The most important characteristic of the trade regime is that it assumes that distributional issues need not be considered at the international level. This assumption—the principle of comparative advantage—is deeply embedded in its institutional structure.

As the trade regime has expanded to address a widening agenda of issues that exhibit quite different problem structure—“nontariff barriers,” that is behind-the-border measures, intellectual property rights (an issue that raises serious distributional issues), investment, competition, environment and ultimately sustainable development—it has found itself in increasing difficulties. If the lesson from the environmental regimes is taken seriously, one must assume that the trade regime is heading straight towards ineffectiveness, unless it adapts its institutional instrumentarium to adequately fit the new tasks.

It is, at the very least, reasonable to assume that multilateral environmental agreements (MEAs) will be more adapted to the problem structure of sustainable development than the trade regime. After all, they deal directly with one of the major dimensions of sustainable development and have dealt indirectly with all three. Thus any expectation that the trade regime will actually take up the challenge of sustainable development—the only substantive goal articulated by the Marrakesh Agreement that established the WTO—it will do well to consider carefully the institutions that are utilized by MEAs to achieve their goals. Moreover the impact of the environmental regimes—in the widest sense—on the trade regime over the past decade has been quite striking, to the point that the Declaration of the Doha Ministerial Conference is shot through with environmental issues—by my count in twelve different paragraphs, including the most important—agriculture—and the most contentious—investment. This also suggests that the international environmental regimes are doing something that is effective, even though we often have a hard time putting a finger on it.

The first observation when assessing the institutional instrumentarium of the MEAs is its richness—as opposed to the sparseness of the trade regime. Over the past twenty years, the development of international environmental management has been the

major source of institutional experimentation and development in the intergovernmental process. The second observation is the diversity of institutional solutions that have been developed. A comparison of CITES with LRTAP, or of the CBD with the Basel Convention, or even—most strikingly—the ozone regime with the climate regime reveals an extraordinary diversity of institutions. This is not the place to discuss whether and how they may adequately fit the respective problems but it is worth noting that within this diversity there are a number of core institutions that recur over and over again. Presumably these are among the institutions that will prove critical in any regime that seeks to take sustainable development seriously. I have listed a number of them in two papers on international environmental governance: science (and precaution), efficiency, transparency, participation, subsidiarity, environmental assessment, reporting, implementation review, and technology transfer.

Notably absent from this list is dispute settlement. The absence of this, the most potent institution of the trade regime, has given rise to several misunderstandings. The initial response of the trade regime to environmental criticism was to assume that the environmentalists were trying to get hold of the dispute settlement system, much as the IPR regime had done. It is by now manifest that this was never the case. The issue is primarily how to stay away from the dispute settlement system. The second assumption was that, lacking effective dispute settlement, MEAs must somehow be ineffective (although the previous observation already disproves this assumption). This debate is still in full swing. My own assumption is that transparency and participation are the “functional equivalents” of dispute settlement in the MEAs, because it enables them to develop constituencies that reach deep into individual states and are not beyond forcing their own governments to confront some of their inadequacies in light of the environmental regimes. Thus the dynamics of the MEAs are dramatically different than those of the trade regime with its predilection for “multi-unilateral” implementation procedures.

These observations suggest several important conclusions:

- MEAs are unlikely to make good use of dispute settlement such as is practiced in the trade regime;

- The trade regime must change significantly if it is ever to confront the challenge of sustainable development;
- It must confront the core institutions of MEAs and find some way to accept them or adapt them;
- If it fails to do so, it will be the trade regime that is at risk much sooner than the MEAs.