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The WTO, Ecology, and Russia: The Time to Make Decisions

A. K. Golichenkov, A. S. Ispolinov, and O. V. Kadysheva

Moscow State University, bldg. 13-14, Moscow, 119991 Russia

e-mail: office@law.msu.ru

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Abstract—The relationship between the principle of free trade and nature conservation is one of the most acute and multifaceted problems in international business. The diversity of WTO activities implies the necessity of interdisciplinary studies utilizing the expertise and experience of specialists in international law and ecologists. In this paper, provisions of the WTO set of agreements and procedures for dispute settlement within the WTO framework are considered as applied to environmental protection.

Keywords: WTO agreements, environmental protection, public health, ecology, WTO Appellate Body, general exceptions to the WTO trade rules

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The entry of the Russian Federation to the World Trade Organization (WTO) has become a kind of challenge to Russian specialists not only in international trade law but also in other branches of jurisprudence. Multifaceted activities of the WTO and obvious intricacy and complexity of procedures for dispute settlement within its framework require special studies, including those on an interdisciplinary basis. Such studies can allow a fresh look on the startup of the WTO, the stages of and reasoning behind this process, and prospects and possible alternatives for the development of the entire system for regulating international trade.

In our opinion, one of the most acute problems in this context is still that of the relationship between the principle of free trade and nature conservation and public health as factors having a direct effect on trade, their mutual antagonism or complementarity within the framework of the WTO.

Attitudes to this problem widely differ and often oppose each other. Some authors severely criticize the WTO because, in their opinion, it regards ecological and public health issues only as annoying obstacles to international trade, forbidding the member states to impose their own, more strict ecological and consumer safety standards.[1] Other specialists consider that, in many respects, the WTO has already transformed into an ecological agency and should proceed in the same direction.[2] They are opposed by a group of scientists who maintain that the WTO in recent years has been paying too much attention to ecological problems, compromising its main task of providing access to the internal markets of member states and that this organization should get back to its roots.[3]

Unfortunately, all this spectrum of discussions remained out of the view of Russian researchers, who therefore could neither express and validate their opinions nor propose relevant guidelines, which are much called for by practitioners.

This paper is an attempt to fill this gap and consider the basic WTO agreements and the practice of dispute settlement within its framework in relation to environmental protection and public health.

"Ecological" Provisions in WTO Documents

Following the futile attempt to establish an international trade organization after World War II, the General Agreement on Tariffs and Trade (GATT) was concluded in 1947 to become the basic document regulating all matters related to international trade. However, ecological issues have long been absent from the list of priorities in this field.

As if reluctantly responding to reproaches from ecologists, the states party to the GATT organized the Group on Environmental Measures and International Trade (1971), which however failed to hold even a single meeting over the next 20 years. Noteworthy in this context is the remark from the GATT Secretariat Report (1992) that "the GATT rules prevent members from making access to their own markets dependent

[1] *The World Trade Organization v. the Environment, Public Health and Human Rights: International Forum on Globalization*. http://www.ifg.org/pdf/cancun/issues-WTOvsEnv.pdf

[2] Charnovitz, S., A new WTO paradigm for trade and environment, *Singapore Yearbook of International Law*, 2007, pp. 15–40.

[3] Staiger, R.W., *Report on the International Trade Regime for the International Task Force on Global Public Goods*. http://www.gpgtaskforce.org/uploads/files/41.pdf

on the domestic environmental policies or practices of the exporting country."[4]

In the early 1990s, the scientific and political communities began to increasingly criticize the GATT for disregard of ecological problems. However, even the most ardent proponents of its "greening" could not foresee the magnitude of changes that have taken place since the mid1990s.[5]

The Agreement Establishing the World Trade Organization was concluded in 1994. It begins with the preamble announcing that "...relations in the field of trade and economic endeavour should be conducted ... allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so." Approximately 50 various agreements and other legal documents have been adopted within the WTO framework (the WTO set of agreements), and any of them is more or less applicable to ecological measures implemented by the member states.

A brief description of these agreements should begin from the GATT 1994 Article XX "General Exceptions," where it is stated that the member states can depart from the GATT general rules (general most-favored-nation treatment, national treatment on internal taxation and regulation, and interdiction of restrictions on international trade) in taking certain internal measures, provided they are for the public benefit. Two sections of Article XX are most relevant to this study: measures "necessary to protect human, animal, or plant life or health" (section b) and measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" (section g). The requirement specified in the chapeau of Article XX is that such measures "should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." The right to exceptions according to Article XX should be exercised scrupulously and is not to be used as a reason for nonperformance of obligations before other WTO member states.

Other agreements within the WTO framework also envisage the possibility of exceptions and specify conditions for using them. For example, the General Agreement on Trade in Services (GATS) in Article XIV(*b*) makes an exception for measures taken by the state to protect human, animal, or plant life or health. In the Agreement on Technical Barriers to Trade (TBT), environmental protection is regarded as a valid argument to allow member states to depart from obligations under this agreement. In the Agreement on Sanitary and Phytosanitary Measures (SPS), it is stipulated that any such measure should be applied only based on an assessment of the risks to human, animal or plant life or health by a number of criteria, including relevant ecological and environmental conditions.

However, the above provisions of WTO agreements do not themselves provide sufficient evidence that the "ecological component" of this organization has changes significantly since 1995. A substantial shift in the WTO's attitude to ecological problems has been conditioned primarily by the practice of settling trade disputes related in some way to ecological issues.

A pivotal role was played by changes in the system of dispute settlement, first of all the establishment of a permanent Appellate Body in 1995. This has made the above system far more cogent and consistent, thereby improving legal certainty of dispute settlement within the WTO framework.

In the majority of disputes considered below, the Appellate Body disagreed with the verdict of the arbitration panel and arrived at different conclusions, which steered the system of application of WTO regulations toward finding a balance between the interests of trade and of ecology and public health. Such a change of attitude to environmental issues has exceeded all expectation of parties that signed the Agreement Establishing the WTO in the mid-1990s.[6]

The foundation for this reform of WTO ecological policy was laid by the Appellate Body in its report on the *US–Shrimp* case, where it was announced that countries should act jointly in taking measures to protect the environment at all levels, whether within the framework of WTO or another organization.[7] As a legal basis for this statement, the Appellate Body used its interpretation of the aforementioned preamble to the Agreement Establishing the WTO, according to which the drafters of this agreement understood that the objective of "full use of the resources of the world," set forth in the preamble of the GATT 1947, was no longer appropriate to the world trading system. Therefore, they formulated it as "optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment." It should be noted that the Appellate Body has subsequently relied on this interpretation of the preamble in hearing other ecologically relevant cases, e.g., in revising arbitration settlement of disputes *US–Gasoline, US–Shrimp*, and *EC–Asbestos* (see below).

[4] *International Trade 90–91*, GATT Secretariat Report 1992, vol. 1, pp. 19–43.)

[5] The term "greening GATT" was first used in the book *The Greening of World Trade Issues*, Anderson, K. and Blackhurst, R., Eds., Hertfordshire: Harvester Wheatsheaf, 1992.)

[6] Charnovitz, S., Trade and environment in the WTO, *J. Int. Econ. Law*, 2007, vol. 10, p. 4.

[7] *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report WT/DS58/AB/R, November 6, 1998, pars. 152–153.

Ecological Aspects in the Practice of Dispute Settlement within the WTO Framework

We consider here only a few disputes related in some way to environmental protection or human health.

In the *US–Gasoline* case, The United States appealed against certain conclusions of the Panel established to consider a dispute between the United States, on the one hand, and Venezuela, and Brazil, on the other, related to the implementation by the United States of its domestic legislation known as the Clean Air Act and, more specifically, to the regulation enacted to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. In particular, Venezuela and Brazil claimed that, in implementing these measures, the US authorities applied different standards to domestic and foreign oil refiners. Considering the Panel proceedings, the Appellate Body concluded that the purpose of these measures was itself completely legitimate, but they were not justified under the chapeau of GATT Article XX, since they constituted "unjustifiable discrimination" and a "disguised restriction on international trade," which must have been foreseen and was not unavoidable.[8]

The aforementioned *US–Shrimp* case concerned the US legislation prohibiting imports of shrimp and shrimp products from any country that did not have a turtle-conservation program comparable to that of the United States. The Appellate Body concluded that this legislation fit the Article XX(g) exception for conservation of exhaustible natural resources, but corresponding measures had been applied in a way that violated the chapeau of this Article. In particular, different countries were not given equal time to bring their shrimp-harvesting technologies in line with the US legislation, which was regarded as unjustified and arbitrary discrimination.

Thus, the Appellate Body formulated the two-tier test that has since been used to decide whether certain domestic measures taken by member states fit the Article XX exceptions. The first step requires an analysis of the measure in question under a subparagraph of the Article. If the measure is justified and necessary, the second step requires an analysis of the manner of implementation of the measure under the chapeau of Article XX.[9]

In the *EC–Asbestos* case, the complete ban imposed by the European Communities on the manufacture and marketing of all varieties of asbestos fibers or product containing them (because of health hazard they pose) was analyzed for compliance with provisions of WTO agreements. The Appellate Body concluded that the state has the right to prohibit the production and sales of a certain product, provided this measure is justified, unbiased, and does not involve discrimination of foreign manufacturers, in accordance with the WTO regulations.[10]

The same approach was demonstrated by the Appellate Body in settling the *Brazilian Tires* case, where the EU appealed against restrictions imposed by Brazil on the import of retreaded tires.[11] Brazil claimed that such restrictions were necessary for effective control of Dengue fever, since its mosquito vectors reportedly breed in waste tires scattered all over the place, and therefore fell within the meaning of Article XX(b). The Appellate Body used the aforementioned test to evaluate this measure for compliance with provisions of WTO agreements. It was concluded that the purpose of these restrictions was itself justified, but the exemption afforded to the imports of retreaded tires from Brazil's partner countries in MERCOSUR (Southern Common Market) constituted a disguised restriction on international trade and was, therefore, contrary to the chapeau of Article XX.

It should be noted that the WTO does not approve measures that are declared to be ecologically oriented but actually may lead to discrimination of trade partners. Thus, the WTO Appellate Body in its report of May 6, 2013,[12] supported the conclusion of the panel that the program for the development of energy generation from renewable sources implemented by the Government of the Province of Ontario was contrary to the WTO legislation, because this program granted greater preferences to Canadian than to foreign power generating companies.[13]

This approach of the WTO to ecological aspects of industrial production processes has recently passed one more test for reliability in hearing of the dispute concerning the ban on the marketing of seal products, which was imposed by the EU in 2009 because of public concern about the extreme cruelty of seal hunting. Norway and Canada filed complaints against this ban, but the panel upheld it, although found that some exemptions envisaged by the EU Seal Regime were inconsistent with GATT Article XX and provisions of some other agreements. In particular, this concerned the exemption for products of seal hunting by indige-

[8] *United States–Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report WT/DS2/AB/R, May 20, 1996.

[9] *United States–Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report WT/DS2/AB/R, April 29, 1996, pars. 118–119.

[10] *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Appellate Body Report WT/DS135/AB/R, April 5, 2001.

[11] *Brazil–Measures Affecting Imports of Retreaded Tyres*, Panel Report WT/DS332/R, June 2, 2007; WHO Appellate Body Report WT/DS332/AB/R, December 17, 2007.

[12] *Canada–Certain Measures Affecting the Renewable Energy Generation Sector; Canada–Measures Relating to the Feed-in Tariff Program*, WTO Appellate Body Report WT/DS412/AB/R WT/DS426/AB/R, May 6, 2013.

[13] *Canada–Certain Measures Affecting the Renewable Energy Generation Sector; Canada–Measures Relating to the Feed-in Tariff Program*, Reports of the Panels, December 19, 2012.

nous nations, because an advantage granted to products originating in Greenland was not accorded to the like products originating in Canada.[14]

A major challenge to the WTO and its system of dispute settlement was posed by the dispute on the EU ban on the import of beef grown with the use of natural and synthetic hormones.[15] The EU's concern was based on laboratory data that these hormones may have a carcinogenic effect, given that more than 60% of all cattle in the United States in the mid-1990s was reared using growth hormones.[16]

The concern of European citizens about a wide spread of food products obtained using genetically modified organisms (GMO) and the obscure consequences of their consumption for human health was the cause of one more dispute within the WTO framework, known as the *EC–Biotech* case.[17] To meet public demand, the EU imposed strict measures against GMO products, which included a temporary ban on their import and the requirement for obligatory testing and marking of such products before releasing them to the EU market. These measures were strongly opposed by other countries, first of all the United States, where the greater part of agricultural produce contains GMO (in 2012, 88% of the country's total grain crop and 98% of the total soybean crop).[18]

In both cases, the decision of the EU to impose restrictions on growth hormones and GMP products was motivated by the absence of reliable evidence that they cause no harm to human health. In other words, this decision was based on the precautionary principle, which allows the adoption of protective measures in situations of scientific uncertainty. By that time, it had already been shaped by the European Court of Justice and the Court of First Instance into a general principle of Community law.[19] and expressed in international legislation on environmental protection, including the widely known Rio Declaration from the United Nations Conference on Environment and Development (Rio de Janeiro, June 3–14, 1992).[20] At the same time, the WTO agreements (primarily the SPS Agreement) and the practice of dispute settlement have been (and are) based on the premise of necessity for a scientifically valid assessment of risks that are to be mitigated or eliminated by means of restrictions imposed by the state.

In our opinion, both these disputes are interesting in that they highlight the relevance of the problem concerning the relationship between the WTO agreements and multilateral treaties on environmental protection. To justify the above restrictions, the EU referred to its obligations under another international document, namely, the Cartagena Protocol on Biosafety.[21] Unfortunately, neither the panel nor the Appellate Body have addressed the above problem in hearing the *EC–Biotech* dispute. However, the panel concluded that the Cartagena Protocol was inapplicable in this case, because the United States was not party to it.

Second, both these disputes have shown that when the state is indeed concerned with ecological issues and confident in taking certain measures to this end, it will be difficult to compel it to abolish these measures, even if they are deemed contrary to the WTO agreements. The point is that the WTO has no powers to impose any economic or other sanctions on its member states. Only the state that has won the dispute can impose sanctions, and only when the decision of the WTO's Dispute Settlement Body (DSB) is not fulfilled within the prescribed term. Thus, the EU has not lifted the ban on the import of beef grown with the use of hormones even after the United States and Canada (appellants to the WTO) were allowed to increase duties on products originating in EU member states. A similar situation is observed with GMO products. Although the ban on them was lifted at the EU level, it has been replaced by a very strict system of control and certification of such products and also by their partial or complete prohibition at the national and regional levels.

Third, these disputes have provided an impetus to the development of a new interdisciplinary research field, namely, the assessment of various risks to the environment and human health that may arise after implementation of certain state measures and management of these risks at the national and international

[14] *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products,* Reports of the Panel WT/DC/400/R, WT/DC/401/R, November 23, 2013.

[15] *EC Measures Concerning Meat and Meat Products (Hormones),* WTO Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, February 13, 1998, pars. 123–124.

[16] *The World Trade Organization vs. the Environment, Public Health and Human Rights: International Forum on Globalization*. http://www.ifg.org/pdf/cancun/issues-WTOvsEnv.pdf

[17] *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report WT/DS291,292,293/R, September 2006.

[18] *GMOs and a potential US-Europe pact, Christian Science Monitor*, July 25, 2013. http://www.csmonitor.com/World/Global-Issues/2013/0725/GMOs-and-a-potential-US-Europe-pact

[19] Case C-157/96: *The Queen* v. *Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers Union*, David Burnett and Sons Ltd., R.S., 1998, E.C.R. 1-2211, par. 63.

[20] http://www.un.org/ru/documents/decl_conv/declarations/riodecl.shtm

[21] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, adopted September 11, 2003. The Protocol has 166 parties, including Belarus and Kazakhstan, but the Russian Federation and the United States are not parties to the Convention and Protocol. http://www.jiwlp.com/contents/Cartagena-Protocol.htm

levels.[22] Unfortunately, these aspects have so far remained out of the view of Russian researchers.

CONCLUSIONS

In the first place, it is necessary to emphasize the magnitude of change in the attitude to ecological issues that has occurred both in the system of WTO agreements and in the procedure of settling trade disputes between member states. The inclusion of "ecological" provisions in WTO documents indicates that, to say the least, the member states understand the urgency of these issues and their importance for international trade.

Nevertheless, we consider that the ecological aspects of WTO activities, including the practice of settling trade disputes, should be evaluated on the premise that the WTO is not a nature conservation agency and the DSB is not an international ecological court-martial. The WTO seeks to strike a balance between environmental issues and the development of international trade. Within a short time, its attitude to the problems of ecology and public health has progressed from denial to acceptance of their extreme importance and the necessity to maintain balance between competing interests, which in itself is remarkable and deserves respect.

The above examples of dispute settlements provide evidence that the WTO member states increasingly rely on "ecological" regulations in their activities and that this attitude is understood and accepted by the DSB. However, both the panels and the Appellate Body have developed and introduced in practice their own criteria for evaluating the actions of member states under "ecological" provisions of WTO agreements in order to distinguish between measures driven by actual concern about environmental issues and attempts to use it as a disguise for discriminatory restrictions on trade.

On the other hand, it follows from the current practice of dispute settlement within the WTO framework that the increasing concerns of member states about ecological and public health problems are not always understood and supported by the panels. This is best illustrated by their antipodal positions in the dispute on the EU restrictions on the imports of beef and GMO products. While the WTO maintains that parties to the dispute should themselves present substantial scientific proof that a given product may be hazardous, the EU adheres to the precautionary principle, according to which the absence of such a proof should not be a reason for delay in imposing restrictions on this product, provided there are reasonable doubts about its safety. In our opinion, the position taken by the EU is more valid under present-day conditions. The implementation of the EU slogan "Better be safe today than sorry tomorrow" will shift the burden of proving the environmental or health hazard of certain products from the member states applying measures against them (as is the case today) to companies manufacturing these products.

It should be noted that the correct evaluation of ecological aspects in WTO activities will help Russia to develop an effective strategy with respect to specific problems such as treats from the United States to use the WTO mechanisms in order to revoke the ban imposed by the Russian Agricultural Inspection (Rosselkhoznadzor) on the import of American meat produced using growth hormones.

One more conclusion concerns the participation of Russia in the Customs Union. As follows from recent experience, regional integration associations may prove more effective in dealing with environmental and human health problems (among others) than the WTO, which is not specifically intended for this purpose. The dynamism and efficiency of regional free trade zones are largely accounted for by similarity between member states in the economic and sociocultural background, including public views on ecological risks to society, hazards to human health, and consumer behavior and expectations. It appears that the WTO in its current form is at the peak of development, and this circumstance should be utilized to a maximum by regional integration associations in order to establish their own ecological standards.

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[22] For example, see Wagner, M., Law talk vs. science talk: The languages of law and science in WTO proceedings, *Fordham Int. Law J.*, 2012, vol. 35, pp.154–155.