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# A RECONSIDERATION OF WTO PRIORITIES: FROM OPEN TRADE CHAMPION TO ACTIVE ENVIRONMENTALIST

# ENVIRONMENTAL PROTECTION AND INTERNATIONAL TRADE

International trade is commonly cited as a reason for governmental inaction

International competitiveness concerns

Proposal: use international trade as a spur for governmental ACTION

How to do this?

# BORDER ADJUSTMENT MEASURES

Good in principle but:

- Implementation issues
- Will they be enough to nullify competitiveness concerns for the imposing country?
- Will they be enough to incentivise other countries to adopt environmental measures?

# A BALANCING APPROACH

Any domestic regulation...

- in which protectionism is a relatively minor element;
- which is part of a larger strategy of environmental protection;
- and whose public benefits clearly outweigh the economic and trade costs
- should be considered compliant with WTO obligations

# GOING FURTHER

Limitations on BAMs and Balancing approach

Need to offer more than neutralising of competitiveness concerns

# INCENTIVES TO ADOPT ENVIRONMENTAL TAXES

What form should they take?

- Some freedom to adopt protectionist measures

How to provide them?

- Renegotiation of rules
- Broader interpretation of the current rules

Who should they be offered to?

- Developing countries/LDCs only?
- All WTO members?

# WHY A ROLE FOR THE WTO?

More than an open trade body

It has espoused for itself a concern for the environment

# WTO CONSTRAINTS

WTO membership constrains governments' policy choices.

Notably Art XI

These constraints are lifted in certain circumstances (notably where Art XX applies)



# GATT Art XI: 1

- No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through **quotas**, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

# GATT ARTICLE XX – THE GENERAL EXCEPTION

- Subject to the requirement that such measures are not 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** , nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
  - (b) necessary to protect human, animal or plant life or health ;
  - (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ;

# THE SHRIMP-TURTLE CASE I - 1998

US required “TED”s on American trawlers to protect turtles during shrimp catching

US banned imports of shrimp caught without TED

Held: US measure violated Art XI; was justified under Art XX (g); but failed the Art XX chapeau test

# THE CHINA RARE EARTHS DISPUTE

## 2014

- Rare earths are critical for a myriad of products
- Green tech uses – wind turbines, energy efficient lights, hybrid car batteries, magnetic levitation trains (Maglev)
- Over 90% are sourced from China
- China imposed export restraints, raising international prices and fears of shortages
- In August 2014 WTO AB held these restraints breached WTO rules, including Art XI

# CHINA'S EXPORT RESTRAINTS

- export duties;
- export quotas;
- minimum export price requirements; and
- export licensing requirements

# WHY DID CHINA DO THIS?

- To conserve its resources, protect its environment and promote sustainable development (and ensure sufficient domestic supply).
- Or were there other purposes?
  1. Rising prices abroad provide an advantage to downstream Chinese manufacturers
  2. Lower prices in China pressure international enterprises to move operations (and technology) to China

# ENVIRONMENTAL BENEFITS OF CHINESE MEASURES

- Reduce environmental degradation from mining in China
- Encourage (re)development of RE mining and processing in other countries with possibly higher environmental standards
- Encourage demand destruction - through increased efficiency in RE usage, substitution and recycling of RE's

# REVISIT ARTICLE XX

“arbitrary or unjustifiable discrimination  
between countries”

‘disguised restriction on international trade’



# CONCLUSION

- A more active role for the WTO
- Do more than keep out of the way of environmental measures
- Environmental protection comes at a cost – including some impact on open trade?