Developing Countries, Environment and Liberal Norms

Introduction
The paper deals with the policies of developing countries and the role of liberal norms in global environmental governance. The point of departure of the paper is the changing role of major developing countries in global governance. I am referring particularly to the adoption of new roles and identities, during which certain major third world players have changed their approach toward international economic issues, particularly in the world trade regime. The paper scrutinizes how these new identities have moulded the performance of the developing countries in environmental governance and how these identities limit or give new means for them to cope with environmental issues.

The paper focuses on the interplay of the environmental norms and global trade regime. Therefore it does not deal with the very interesting discourse referring to the norms connected to political system – liberal democracy – that may be emphasised in other sectors of global environmental governance, such as in the politics of multilateral funding institutions. Hence, the examination concentrates on the language of international environmental governance and the arguments drawn from neoclassical economics together with judicial concepts of international trade law.

Norms and IR theories
The role of norms in the mainstream International Relations (IR) approaches, neorealism and neoliberal institutionalism and even in the neo-Marxian approaches is somewhat similar: the norms are always subordinate to material interests. The present paper, nevertheless, favours a different theoretical and methodological tendency. The material interests are not given as fixed but are bound to a broader international development. The interests of the states and other actors, such as NGOs and INGOs are defined in their interaction. The norms may reflect several kinds of interests and the actors define their position vis à vis the norms and give their own interpretation of norms in reciprocal interaction. The interpretation of norms and interests reflects the identity that the actors have adopted. As suggested in constructive theory, the identity is not fixed, but in a state of constant change, as are the interests and the
interpretation of the norms.\(^1\) This is not to deny the importance of the interests of the particular actors. I wish to emphasise that the interests are expressed in a certain context of norms and identities. The actors are not free to do whatever serves their interests best; rather they follow the rules of the game.\(^2\)

The paper will deal with those norms that form the rules regulating interaction between developed and developing countries. Hence the discourse of constitutive rules of international relations is of particular interest. In neo-Gramscian thinking certain norms, principles and rules that are essential to the international system have higher status related to other international norms, even though the international law lacks the hierarchical structure. As a system theory it emphasises the importance of constitutional regulation and ideological hegemony in international governance.\(^3\)

These constitutive rules are focused on liberal world order and the norms are connected to it from the perspective of both economic and political theory. Liberal norms, or part of them, are adopted by the actors in global economic, political and, as I wish to emphasise, in environmental issues.\(^4\) The basis is a liberal-democratic model that is based on monistic ideas about economy and politics, whereby the Western models of market economy together with neo-classical economic concepts and constitutional democracy are taken as globally valid.\(^5\) The role of the state in this system is to guarantee unrestrained functioning of global market forces through uniform legislation in certain sectors (protection of private property and free enterprise) and nominal equality of individual citizens, with minimal interference in other sectors such as social security.

However, this paper seeks to examine the question of how the developing countries adopt constitutive rules and how they try to apply them. It does not assume that international governance is synonymous with international hegemony and hierarchy. There are several rules that can be seen as fundamental for the system, but the actors use and adopt only part of them. Accordingly there is a certain degree of free choice bound to the interests and identity of the actor. Similarly the point of departure reflects the fact that the norms, even if they have constitutive characteristics, cannot simply be reduced to a subordinating single material interest.

Assimilation of two discourses of international trade and environmental conservation

During the Cold War the international trade regime was divided into two: GATT negotiations dominated by the US and actively attended by other developing countries and UNCTAD, led by the major developing countries. In spite of the fact that important developing countries were also participants of the GATT negotiations and agreements, they paid major attention to UNCTAD which was focused particularly on commodity trade. When the GATT negotiation rounds developed from reciprocity to general liberalisation of trade, the UNCTAD system emphasised the actual interests of developing countries whose major approach to

---


development was uncompelled and self-reliant economic policy. Thus the adopted identity of national development emphasises an opposite tendency to the GATT development: non-reciprocity, preferential treatment and concessions to the developing countries.

In practical terms this meant that the world trade law developed on the terms of developed countries and some very important sectors for developing countries such as agriculture and textile products – commodity trade – were excluded from the negotiations. The success of the developing countries in GATT – the partial inclusion of non-recipr ocity advocated in UNCTAD – turned to an expensive victory for them. Non-recipr ocity put the developing countries on the sidelines and weakened their negotiating position for combating trade barriers in developed countries set against the Third World’s commodity exports. The ostensible defence of sovereign national line in international economic relations turned outside the GATT system into even stronger dependency: the trade relations between developed and developing countries were regulated through long bilateral trade agreements between ex-colonial powers and their ex-colonies, giving some preferential treatments that maintained the old colonial ties, but no relative advantage in global terms.

However, in the late 1980s the world trade system started to change dramatically. This meant that the number of countries participating actively in the negotiations increased and the covering of trade issues broadened. Two obvious changes took place: the developing countries that took an active part in the formulation of the GATT Uruguay Round agenda in pre-negotiation phase turned their nationalist and anti-colonialist rhetoric into judicial-economic argumentation for a more rule-based trade system. This means that those countries gave up non-reciprocity and claims for exceptions and waivers for a most-favoured-nation (MFN) clause, opted for reciprocity in negotiations and took the MFN clause as a leading principle. The adoption of new language was reflected in the changes of the identities of these countries.

Second, the united front of the developing countries, Group 77, disintegrated when the export oriented developing countries (the Southeast Asian ASEAN countries, Brazil and Argentina) started to ally with those developed countries having common trading interests with them. The most important of these groups has been the Cairns Group which has defended the interests of the agricultural exporters in the GATT/WTO. The group consists of three developed countries (Australia, Canada, and New Zealand), nine countries from South and Central America (including Brazil and Argentina), four ASEAN countries and South Africa who joined the group in the 1990s. There have been several other more or less temporary pressure groups after the beginning of the Uruguay Round emphasising the particular interests of the members and the changing identities of developing countries.

Obvious changes also took place in global environmental regimes. In this, some kind of similarities can be seen with the changes in global trade indicating the turn to an economic approach. In environmental governance the conservationist basic tendency that existed in environmental ideologies as well as treaties had to give way to neoclassical economic approaches that attained influence in environmental management. Hence, the interaction of political actors and interests defined new identities. The concept of sustainability, introduced by the Brundtland Commission, clearly indicated this. The main focus of the concept is on amalgamating the profitable exploitation of natural resources and concern for environment.

---

According to its rough interpretation, environmental concerns are not the priority, but the whole idea is that environmental assets are incorporated into the economic system in order to secure the sustainability of this system.\textsuperscript{11}

Accordingly, the word sustainability was a convenient term for both the developed and developing countries. Its usage shows clearly that neoclassical environmental economics was approved as a mainstream approach to environmental management. Neoclassical economics has tried to deal with environment (conservation) as a market commodity and to determine the costs of environmental degradation. The point of departure is to set a price for degradation. This means that property rights should be clearly defined in order to determine harm caused to the outsiders in production or in the use of resources. The discussion on the tragedy of the commons pointed to two different solutions in property question: to state property or to private property.\textsuperscript{12}

The neo-liberal trend in environmental economics suggests a straightforward answer leaning on public choice theory, the virtue of the market and self-regulating individuals. This assumes that resource sources and land, including land use rights, should be left to private bodies. The private market forces would drive environmental conservation much more efficiently than public governance. If the resources are owned by a state or a local authority the price for protecting or not protecting environment is not determined in the markets. Accordingly, the basic reason for efficiency is the transferability of the property rights that determines the costs of conservation.\textsuperscript{13}

However, in certain environmental and natural resources issues, particularly in international environmental issues, degradation often concerns the phenomena of global commons – such as the atmosphere – where the property rights could not be defined and the prices cannot be formed on the markets. The attempts to define the costs of degradation necessarily lead to the politicization of environmental issues both on national and intergovernmental level.\textsuperscript{14}

Consequently, market-based regulations have established their position in global environmental governance and to some extent multilateral environmental agreements and conventions (hereafter MEAs). This concerns both governmental (flexible mechanisms in the Kyoto Protocol) as well as non-governmental arrangements (environmental certification and labelling).\textsuperscript{15} The flexible mechanisms in the Kyoto Protocol are clearly liberalism from above, in which the governments have a crucial input before market-based regulations can work. Non-governmental environmental certification started both from private commercial initiatives as well as in a republican spirit in environmental movements and are not, however, contending only for environmental conservation but also for certification markets. Thus these initiatives represent liberalist thinking and economic activities from below. Nevertheless, both of them have to conform to the basic rules of the global trade legislation.

Similarly, these mechanisms include interesting aspects from the viewpoint of political science. Although these mechanisms may have some implications for the developed countries, main political considerations deal with the developing countries. In general, market-based mechanisms for varying reasons threaten to limit the country’s policy options


\textsuperscript{15} Bernstein 2002, 5 – 7, 10 – 12.
and transfer its decision-making power to developed countries or to Northern private (business or NGOs) circles.\textsuperscript{16}

Hence the GATT/WTO principles of \textit{non-discrimination}, \textit{transparency} and \textit{national treatment} constitute the premises of world trade legislation and economic order. The inclusion of TRIPS (trade related aspects of intellectual property rights) underlines a basic norm of the liberal order, \textit{property rights}. Before TRIPS, the definition of property rights had not been highlighted as one of the basic world trade rules, but the TRIPS brought property rights fore in its extreme definition – property rights over ideas.\textsuperscript{17}

The assumption that these principles drive other activities than economic and commercial but also environmental reverts to general idea of constitutionalism in global governance.\textsuperscript{18}

This presupposes that these constitutionalist rules form a broad context for all global peaceful global dealings and all the endeavours to build order in different sectors cannot be contrary to these principles. The role of global institutions, such as the World Bank (WB), the International Monetary Fund (IMF) and the WTO is to try to create situation where the markets are not disturbed by unexpected governmental interventions.\textsuperscript{19}

\textbf{Developing Countries’ Interests and Identities in Environmental Governance}

Although the concept of sustainability tried to amalgamate environmental conservation with economic growth and market economy, environmental conventions and agreements have continued to stand firm against the principle of sovereignty. The issue of sovereignty has been particularly central in the implementation of the agreements. In spite of the fact that recent MEAs include some supranational institutions, they do not challenge the basic principle of national governments’ role in implementation of environmental treaties.

The question was apparent during the negotiations on biodiversity convention in Rio 1992. The developing countries’ defence of sovereignty did not only deal with the scope of conservation, but also the question of who shall decide about access to natural resources. Hence the concept of sustainability advocated by developed countries and the question of sovereignty propagated by developing countries were set against each other. At the core was the Earth’s genetic resources and tropical forests containing the majority of all species, both plants and animals, to the assets of which the developed countries tried to ensure access. According to the developed countries these genetic resources are global commons and not the particular property of certain countries. This claim creates a twofold problem for the sovereignty of developing countries. By accepting this, they cause foreign parties’ activities on their own territories. Second, the conservation of genetic resources limits the use of natural resources particularly in tropical forests.\textsuperscript{20}

While the debate on environmental issues in developed countries addressed climate change and biodiversity, the developing countries were concerned about natural resources, the availability of energy together with property and user rights.\textsuperscript{21} For example, referring to


\textsuperscript{18} Stephen Gill (1995), 412 – 413. Gill refers to constitutionalist proposals containing a macro-politico-economic dimension which are rather implicit than explicit.


the historical total consumption of energy and total pollutant load of the developed countries, the developing countries declined to participate in the emission reductions and limitations in the climate change convention. The arguments for concessions in environmental restrictions, or as the Brazilian government puts it—“common but differentiated responsibilities”—follow the pattern already existed in international trade negotiations decades ago.

However, the comparison of the current environmental policies with the protectionist trade policies of developing countries a few decades ago does not do justice to the roles of developing countries in global environmental governance, although the above similarity can be found. The argument of this paper is that the trade policies as well as environmental policies are joined together when the states are seeking for their global identities. The different emphasis, such as issues of property rights in developing countries, reflects the stage of development in these countries. On global level, however, there are signs that major developing countries have adopted some of those liberal norms that have been part of environmental economics in past decades. These developments, nevertheless, have not displaced the traditional government-led approach of global environmental governance.

The tension between government’s sovereignty and market’s decisive role in environmental management prevails in the recent development. The question of different incentive mechanisms for environmental conservation and management in global environmental conventions during the 1990s clearly indicated this. At the Rio Conference and during the negotiations of the Convention on Biological Diversity (CBD) in 1992 the developing countries kept to a government-led approach in incentive mechanisms. A new institution, Global Environmental Facility (GEF), for the implementation of the CBD environmental and developmental targets was established after a two-year pilot phase. Later it absorbed the implementation tasks of the Kyoto Protocol. It is based, as requested by the developing countries in Rio, on transfer payment mechanisms. These mechanisms mean financial resources without any market transfer from the customers (developed countries) to the producers (developing countries). The funding is aimed at the areas of biodiversity, climate change, international waters and ozone layer depletion together with related development projects. Since its establishment GEF has tried to absorb private sector and market-based practices on the demand of developed countries, while developing countries have emphasised democracy between the participants (governments) and accountability. However, as a result of the political struggle between developed and developing countries, its organisation is dominated by intergovernmental structure and is complex and highly bureaucratic.

However, during the climate change negotiations the developing countries changed the emphasis from this approach when Brazil suggested a market-based system in order to facilitate the developed countries’ CO2 emission targets. The system was later named Clean Development Mechanisms (CDM). It was based on the idea that those developed countries which fail to meet their emission targets are obligated to the fund the projects in developing countries that reduce CO2 emissions. The context of Brazil’s suggestion was a broader demand for combining environmental management with economic profitability. The Clinton administration insisted on ‘flexible mechanisms’, particularly emission trading, which would allow industrialised countries to buy and sell emission credits. Countries keeping emissions

---


below their agreed targets would be able to sell the excess emissions to countries unable to meet their own targets. The similar market-based mechanism in CDM and emission trading was intended to persuade the national bodies to support the limitations of emissions of the developed countries. Besides this, the CDM was the only link that joined the developing countries with climate convention and their contribution to prevent the climate change.24

Trade Law and Environmental Management in Developing Countries Policies’
Although the major developing countries have accepted liberal norms of international trade and although they obviously adopted some of them in environmental management, environmental issues – particularly when issues of natural resources are involved – turned developing countries to a more state-centric approach. From this perspective WTO rules are a double-edged sword. There are two particular concerns. On the one hand, like MEAs, the WTO is a strictly intergovernmental organisation that acknowledges national sovereignty as a basic principle. All the trade laws are made by consensus and are ratified by the national bodies of the member countries. Therefore there should be no conflict between national environmental management and the WTO legislation. Similarly, by emphasising MFN and transparency, developing countries have managed to reject the conservationist measures in trade related environmental issues. On the other hand, however, there are concerns, that the WTO rules can be an obstacle in implementing environmental management. The emphasis of property rights that TRIPS took on board, together with the principle of national treatment, contains neo-liberal ideology that presupposes a “limited role” of government. Accordingly the role of the state is to offer equal opportunities to market forces, national as well as global, when they take advantage of economic, intellectual and natural resources of the WTO member countries. In this, a contradiction has been pointed out in the issue of genetic resources between legal authority conferred by TRIPS and the emphasis of governments’ sovereignty to decide about access to genetic resources as defined in the CBD.25

The point of departure of this paper is how the trading identity moulds the developing countries’ approach to global environmental governance and not to deal with the collision between two regimes. Therefore these issues are not scrutinized in detail. However, a short summary to this question should is appropriate.

The question arises very much from the question of the primary nature of international law. First, what is the scope of different laws? Some important WTO members are not members in important MEAs and some MEA members are not WTO members. Second, if a MEA and a trade law contradict one another which one is principal? This question reverts to the issue of constitutionalism in global governance. The final part of this summary deals with the MEAs and how the WTO rules limit their implementation in the member countries.

The number of WTO members in March 2006 was 149, the numbers of the WTO members of four major MEAs – CITES, Montreal Protocol, CBD and Kyoto Protocol – are respectively 136, 145, 143 and 108. All the major developing countries in the WTO, Argentina, Brazil, China, India and ASEAN countries have ratified these MEAs. In that sense the question of the scope is relevant. However, the importance of this examination is not so great as a major player in world economic and politics, the USA, has not ratified CBD and the Kyoto Protocol.26

When the WTO was established in 1995, the concern with possible conflict between the WTO/GATT rules and MEAs created the WTO Committee on Trade and Environment (CTE). The general notion of the Committee has been that there are no insuperable

---

25 Mushita and Thompson (2002), 75 – 76.
contradictions between the WTO rules and the MEAs. In fact, there is a provision in the TRIPS agreement that touches the right of the member countries to their own genetic resources: Article 27.3 (b) of the TRIPS agreement allows the members to exclude from patentability “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”. However, one of the major reasons why the USA has not ratified the CBD is Article 16, which seeks to provide the access of developing countries to the technology for “sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment”. The US policy has emphasised that the issues concerning the transfer of property rights should be voluntary and in the present form, not acceptable to the United States. Thus there is, at least a latent conflict with the CBD emphasis of sovereignty and the WTO rules on TRIPS.

When the WTO trade disputes are examined, particularly those that deal with the interpretation of the property rights and the complaints that invoke the WTO TRIPS, the picture is not much clearer. There have been no directly environmental related TRIPS issues during the history of the WTO. Out of 23 disputes where the complainant has invoked TRIPS, 13 of them were between developed countries and only seven of them were between developed (six cases with US) and a developing country. Most of the complaints were made by the US (fifteen).

The interests of the US in the TRIPS disputes are obvious, as it is the role of pharmaceutical industry. The conclusion of this is that the contradiction between TRIPS and CBD is potential and not so far, actual. Even in one of the most important cases from the point of view of a developing country is the US complaint against India on patent protection for pharmaceutical and agricultural chemical products (DS50) was not directly connected to genetic resources. The dispute touches the implementation of the agreement and India’s ability to grant patent holder’s or applicant’s rights. No reference to the CBD was made.

There are only few environment related trade issues that have been handled in the Dispute Settlement Mechanisms in GATT/WTO history. The resolutions of the GATT/WTO DSM have, however, guided the discourse of environmental management and trade. Therefore the issues have been important matters of principle. In their resolutions of these disputes the Dispute Settlement Body (DSB) sided with the complainants that the environment related trade restrictions are against WTO/GATT rules, emphasising MFN clause and transparency. A very important aspect here is that a group of developing countries prosecuted perhaps the most important WTO environment related trade dispute against the US and assured the DSB that the US trade restrictions to prohibit the imports of certain shrimp and shrimp products (DS58 and DS61) were against the WTO rules. In this “Turtle-Shrimp case”, the US authorities claimed that certain harvest methods of the shrimps used by these exporting countries threatened sea turtles with extinction. Interestingly enough, the US

---

authorities and the experts used in the Appellate Body of the WTO invoked CITES, pointing out the danger of extinction of seven turtle species owing to the harvesting methods of Southeast Asian countries. The Appellate Body of the WTO did not rule out these arguments, but found the US actions to be unilateral and against the principles of MFN and its negative stance against product and process based methods (PPM).  The WTO panel rejected the plea that this claim tried to cover the fact that the US legislation in this respect was barrier to trade and therefore illegal.

In these cases the complaining developing countries (India, Malaysia, Pakistan, Thailand and the Philippines) used the same arguments on liberal trade that developed countries had taught them when pursuing a broader rule-based trade system. The lesson from these cases was clear: the trade law acquired a strong constitutive character that regulates environmental management. Its importance is not in retrospective regulation but it forces not only governments but also other organisations to comply with the trade rules and to adjust their policies to it.

Environment related trade issues demonstrated the usefulness of liberal norms in defending developing countries’ sovereignty and independence against the inclination of developing countries to condition world trade. Before the Turtle-Shrimp case the ASEAN countries had managed to prevent Austria from officially certifying the timber trade and timber exports concerning the sustainability of timber plants by threatening recourse to the GATT DSM. These cases strengthened the developing countries’ trust in the GATT/WTO rules.

However, the WTO rules were valid only in the sphere of governmental authority. The Malaysians’ failure to prevent the use non-governmental market-based forest certification schemes at a lower national level by threatening recourse to the WTO DSM shows the character of liberal norms and the limits the government in using them. The idea of market-based forest certification is that the consumers (mostly in Western developed countries) decide whether they want to buy certified timber products including ecological and even social and political criteria. As far as the consumption is private it is not under WTO authority.

However, the question is different if consumption is public. The decision of Californian authorities to use only timber products that were certified by an organisation with a strong environmental background, made the Malaysian authorities to start a diplomatic campaign towards Western governments against public support for the private certification bodies. However, when it became obvious that the decisions made on municipal and state level (in USA) are much more difficult to handle in the GATT, the Malaysians gave up pressing for central governmental authorities in developed countries and started to certify their own forests based on voluntary market-based mechanisms.

The prompt change in Malaysian policy toward private forest certification indicated the Malaysian fear of negative publicity in Western countries for their environmental management. It shows, however, the Malaysian governments adoption of liberal norms concerning the role of markets in environmental management although their accord with the WTO rules is questionable. This did not however, indicate the penetration of foreign private certification into Malaysian forest management, but addressed the liberal traders’ identity. In

---

35 See the discussion on this in Sampson 2000, 76.
lieu of gaining Malaysian forest certification markets, the private certification body managed certify only 71,664 hectares of natural and semi-natural forest,\(^{37}\) when Malaysian authorities together with Malaysian forest industry started to develop their own forest certification scheme.

The fear of developing countries of private certification lies in the fact that private certification schemes led by environmental organisations include foreign auditing of social and political criteria, the role of which traditionally has belonged to central government. Their environmental, social and political standards are adopted from Western models and therefore they are much more widespread in the developed countries than in the developing countries for which they were originally intended.

In the WTO, the policy of developing countries is to maintain different non-trade criteria such as environmental criteria and clauses from international trade law. Hence they have invoked the WTO principle of transparency and particularly on trade law a negative stance towards standardisation on PPM, which is considered a technical barrier to trade. The European Union together Norway and Switzerland was inclined to link environmental treaties to WTO legislation, but the majority of the developing countries, together with the USA and Australia have rejected this and emphasised restricted trade law. Hence, again, developing countries are eager to emphasise liberal trade norms over environmental conservation. Nevertheless, it is arguable to say, that the interest is not directly to promote free trade, but to link the interest of promoting sovereignty to liberal norms. In fact, the USA policy during the Doha Development Round has facilitated the policies of developing countries in this as the USA seems to become a major challenge to the EU in environmental related trade issues.\(^{38}\)

It is too simplistic to argue, however, that the developing countries are allied with the USA in environment related trade issues. The particular trade interests in the WTO are not in favour of long term alliances except in certain cases. The WTO negotiations constitute options for linkage politics and this increases the opportunities for developing countries to defend their interests. Owing to its subsidies of agriculture and protected agricultural markets the EU has much potential offer for developing countries if it is eager to increase the weight of environment in the WTO.\(^{39}\)

**Conclusions**

The basic assumption of this paper was that the developing countries’ identities as global players are moulded in mutual interaction. In environmental questions this interaction has taken place during the negotiations of different MEAs and their follow-up conventions and in the questions of their relations to global trade regulations as well as in environmental sustainability and trade issues in the WTO. The identity as global trader which is based on liberal economic norms and economic theory has been a point of departure in the adoption of their role in global environmental governance.

The emphasis of trading identity does not mean that the particular interests of different countries do not matter in environmental governance. The identities adopted mean that the particular interests are expressed in the context of liberal norms. These norms emphasise economic liberalism and the role of economic forces in environmental management. The emphasis on liberal norms does not standardise the policies of developing and developed

---


39 Ibid., 43 – 44.
countries. The content of the Brazilian initiative for market-based mechanisms under the Kyoto protocol, CDM, differs clearly from those suggested by developed countries. Similarly, although Malaysia accepted the role of private forest certification as part of national forest management, the implementation of certification mechanisms in Malaysia suggests the ability of national government to interpret global norms.

There is room for the governments to interpret both norms and particularly their political and economic content. Similarly, the norms and identities are not fixed but in constant change owing to intensive interaction among the states in environmental and economic governance. This means that environmental governance, including the discourse and interpretations of trade law and environment, is open to new developments.