# Global Legal Pluralism and Multipolar Conflicts: A Review of Oren Perez's "*Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict*"

*By Elena Cirkovic*[*]

**[Oren Perez, Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict, Oxford and Portland, Oregon, Hart Publishing, 2004, 290 pp., ISBN: 1-84113-348-5. £42.00]**

## A. Introduction

What is the role of law in the ever-increasing fragmentation of spaces of norm production in the international arena? One feature of contemporary international law is the emergence of specialized and relatively autonomous legal sub-systems such as "trade law", "corporate governance", "environmental law", or "human rights law", each with their own principles and institutions. The challenge of 'transnational law' as a category outside national frontiers, points to the break with the traditional conception of inter-state relationship, pointing to multiple interests, discourses and norm creating sites.[1] The globalization process has led to an increased transformation and homogenization of the social life, while at the same time contributing to the specialization of different spheres in international law. These specialized sub-systems tend to develop and to function in certain tension with legislative and institutional activities occurring in their adjoining fields and of the general principles of international law. This results in a conflict between different rule-systems and institutional practices, which in turn poses a challenge to the overall unity of international law.[2] In this context, international law still seems

[*] Ph.D Candidate, Osgoode Hall Law School at York University, Toronto. Email: ElenaCirkovic@osgoode.yorku.ca.

[1] Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3-28 (Gunther Teubner ed., 1997).

[2] *Report of the Study Group of the International Law Commission*, Finalized by Martti Koskenniemi, General Assembly, International Law Commission, Fifty-eighth session, A/CN.4/L.682 13 April 2006 available at

ill equipped to facilitate the resolution of such multi-polar conflicts, playing out on different levels of government and involving and intricate policy mix involving public and private actors constituencies and actors. Claims used to counter effects of economic globalization as expressed through environmental or human rights discourses and treaties, remain marginal in the particular discourses and jurisprudence of institutions such as the GATT or the WTO, or private realms of international financial law. The relationship among those different systems, however, is complex. What then are the linkages if any among these different rule-complexes? And how can they influence each other given the asymmetry between different institutional settings such as the environmental protection regime vs. international trade regulation.

It is against this question of how the law can and does function outside the parameters of nation-state, that Oren Perez exposes one particular conflict that takes place between international environmental concerns and international trade regulation. Perez's book begins with the 1999 protests in Seattle during the Third Ministerial Conference of the World Trade Organization, which he describes as a "strange amalgam of trade unionists, environmental groups, human rights campaigners, and resurrected hippies"[3]. The protests demonstrated the difficulties of dialogue between the global civil society and regulatory instruments of international trade. It was an accumulation of broader struggles emerging out of contradictions of globalization, in particular in relation to the conflict emerging out of contentious issues such as trade and environment, labor rights, agriculture, anti-dumping, and extended market access to developing countries.[4] For the protestors, the WTO, as a prominent international economic organization, represented primarily the interests of the most privileged sectors of the global economy. In fact, the focus of many new global legal structures has been the promulgation of economic globalization and a creation of a system free of regulatory barriers.[5]

The influence of these economic interests, however, has been adverse on the civic concerns such as human rights and the environment. The negative effects of

---

www.un.org Last visited on 01.10.2006; Martti Koskenniemi and Paivi Leino *Fragmentation of International Law. Postmodern Anxieties?* 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553-579 (2002); ANREAS FISCHER-LESCANO AND GUNTHER TEUBNER *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,* 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999-1046(2004).

[3] OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENTAL CONFLICT, (2004).

[4] *Id*. 2

[5] Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 INDIANA JOURNAL OF GLOBAL STUDIES 25-63 (2003).

operations of Multinational Enterprises (MNEs) in developing countries have been well documented. Mining operations, for instance, have destroyed the environment, harmed the health of its inhabitants, as well as incited civil conflicts.[6] The struggle then, as it became manifested in Seattle as well as in subsequent protests that have since continued during annual IMF and World Bank Meetings, G8 summits and so on, appears to be between the anti-globalization movement on the one hand and the undemocratic rule of the WTO and the MNEs, on the other.[7] Discourses in both arenas, however, are diverse, and Perez's aim is to unravel this complexity challenging the binary and simplistic description of the conflict as that between the "greens" and "free traders". He aims to provide a pluralistic framework, which would explain the debate and also decode the different organizational and discursive contexts in which the conflict is embedded.[8]

Perez builds in his project on Niklas Luhmann's theory of autopoietic social systems as *self- referential networks of communications,* rather than as collections of actors.[9] He also draws for his argument on the work of Gunther Teubner, who inspired by Luhmann's system theory, outlines the paradigm of reflexive law, as an alternative to both formal and substantive law, which appear to be ill-equipped to deal with the pressures of societal complexity.[10] Perez applies the autopoietic process to the trade vs. environment conflict, arguing for the possibility of mitigation of negative effects of practices of international trade regulation on the environment through their own internal mechanisms and discourses. In doing so, Perez, rejects normative hierarchies as a basis for his argument, while at the same time making an appeal to environmental sensitivity within individual institutional structures. This review will follow Perez's argument as it unfolds throughout his book with focus on his discussion of the GATT/WTO jurisprudence, and simultaneously offer a commentary on how Perez's own findings point to the difficulties posed by trends within the system of transnational economic regulation, whose primary purpose is to regulate international markets, and whose inner ethos conflicts with the legislative and institutional activities in the adjoining field of environmental law.

---

[6] *Sarei v Rio Tinto* 221 F Supp 2d 116 (US Dist 2002).

[7] *See supra* note 4 at 6.

[8] *Id*.

[9] *Id*. 18.

[10] *See* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOCIETY REV. 239 (1983); see the somewhat critical appraisal by William Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 THE JOURNAL OF POLITICAL PHILOSOPHY 83 (2001).

**B. A Pluralistic Approach to the Trade and Environment Conflict**

The environmental critique of the General Agreement on Tariffs and Trade (GATT) and the WTO, as it unraveled in Seattle and afterward, consisted of two different components. First, the substantive critique focused on the rules of the new regime, in particular on their impact on the global and local environment, arguing that the WTO Agreement would generate an uncontrollable process of environmental degradation across the globe.[11] Those arguments, as Perez notes, were based on several important decisions of the GATT and WTO panels, such as the *United States-Mexico Tuna Dolphin* dispute, the *Shrimp-Turtle* case, and the *European Union-United States* dispute over *Hormones Treated Beef*.[12] On the procedural level, the environmental critique has focused on the institutional lack of democracy of the WTO and the GATT before it.[13] In order to avoid the simplistic grouping of *greens* and the *free-traders,* Perez wishes to reach beyond the antagonistic rhetoric of Seattle. His first goal is to expose the varied institutional and discursive domains in which the trade environment conflict is experienced. It is this multiplicity of discourses on both sides, which at the same time makes the conflict difficult to resolve.[14]

Perez's first critique is of the assumption that the WTO epitomize the trade vs. environment conflict. Instead, he argues, there are numerous institutional arenas which operate alongside the WTO and which have evolved in response to the needs of the global economy. There is no one locus of norm production, and new actors continue to emerge. The impact of institutions regulating international business, however, has not been limited to the economic domain. Indeed they have had substantial influence on environmental issues (and other civic concerns, such as human rights, indigenous peoples' rights etc.). To what extent the affinity of these global legal structures to economic interests has influenced their responsiveness to ecological concerns is the primary question he seeks to explore. These *regimes* are not only state-oriented systems such as the GATT or WTO, but also hybrid and private regimes, including the field of transnational arbitration, the field of international financial law, and so on. According to Perez, all of these systems have universalizing aspirations to global jurisdiction.

---

[11] *See supra* note 9 at 4.

[12] *Id.*

[13] *Id.*

[14] *Id.* 7.

https://doi.org/10.1017/S2071832200005368 Published online by Cambridge University Press

A pluralistic exploration of this conflict exposes inner discourse and "cultural differences" of different systems as well as the intricate conversations that take place among them.[15] Of particular importance in this context are the various, and not always transparent, links between the WTO or the IMF and other legal bodies that do not share the same iconic status. Perez takes this approach as an alternative to the search for a universal or singular solution to the trade-environment conflict. He studies the situation using a contextual strategy. In other words, particular contexts, discourses, and inner ethos of each institution, reflect how they view the issue of environmental protection. Hence, the empirical part of the book closely examines some of the different legal domains that are implicated by the trade and environment conflict. The modern society cannot function without its major function systems: law, science, economy, and politics. The understanding and reform of each requires modest micro modifications.[16] Perez's aim is not to construct a new normative hierarchy, but to expose the nuances of a complex situation, which requires a multi-faceted solution. The institutional diversity reflects the complex structure of the global economic system, which is governed by multiple systems of law.

In Chapter three Perez provides a detailed analysis of the trade and environment jurisprudence of the GATT/WTO. Chapter four examines the linkage between the WTO and the private sphere of standards harmonization, focusing on the key role, played by science in these domains. The purpose of this exposition is to understand the sociological origins and structural manifestation of each institution. Environmentalist critique of the GATT has been its "pro-trade bias", which Perez chooses to name as *mercantilist ethos*.[17] This ethos emerges out of an attempt to balance the equal treatment of states and facilitation of transnational trade. The overreaching purpose of the GATT, the facilitation of free trade, has resulted in what Perez calls "*cognitive discrimination*", whereby GATT's environmental jurisprudence did not allow for the panels to compare the trade and environment effects, while at the same time it developed a more open strategy in the field of anti-dumping and subsidies. In the latter the GATT developed a "much more open strategy towards empirical questions".[18] The mercantilist ethos has also expressed itself through a narrow reading of the GATT Article XX, which contains general exceptions to the agreement and a very confined understanding of the GATT's "environmental"

[15] *Id*. 9.

[16] *Id*.

[17] *Id*. 51.

[18] *Id*. 55.

responsibility.[19] Perez categorizes two types of environmental conflicts within the GATT environmental jurisprudence: first, as 'inward oriented', or government measures directed at protection domestic ecological unit or health and safety of local population, and second, 'outward oriented, or extra-territorial measures. These conflicts are triggered by trade measures whose objectives lie outside the territory of the regulating state - he uses the term outward oriented.[20]

In the example of the *Tuna –Dolphin* dispute involving the United States, and EC and the Netherlands, the application of Article XX to extra jurisdictional measures was based on a mercantilist vision of the GATT and the environment did not have an independent role.[21] To what extent, however, should environmental questions play a significant role within the GATT considering its overall objectives have focused on "market access"? The presumably static nature of particular value ranking within an institution seems to have been challenged in the situation of the WTO jurisprudence. The WTO has taken a somewhat different and more open approach in the case similar to *Tuna-Dolphin* dispute, the *Shrimp-Turtle* case.[22] The Appellate Body ruling has created a new legal standard for the trade and environment debate in several ways.[23] It has, for instance, created parity between the environmental exceptions of Article XX and the substantive obligations of the GATT (expressed in Articles II and III); two tiered analysis was introduced, whereby a measure must not only come under one of the particular exceptions listed under Article XX, but also must satisfy the requirements imposed by the opening clause of Article XX, which has as its main goal prevention of abuse of the exceptions of Article XX. [24] Furthermore it noted that the interpretation of Article XX should be guided by the idea of sustainable development, mentioned in the WTO preamble. Also in terms of procedure, amicus briefs were allowed as part of the submission, and hence were more inclusive of third party participation.

---

[19] *Id*. 51-55.

[20] *Id*. 59.

[21] *Id*. 63. GATT, *United States-Prohibition of Imports of Tuna and Tuna Products from Canada* L/5198, adopted on 22 February 1982, BISD 29S/91; GATT, *United States-Restriction of Imports of Tuna* DS21/R (unadopted), 3 September 1991, BISD 39S/155.

[22] WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WTO Doc. WT/DS58/AB/R (Appellate Body report).

[23] *Id*. 67.

[24] *Id*.

Perez describes the *Shrimp* dispute as a "bold attempt to reconstruct a broader social vision of the WTO".[25] The two reports of the Appellate Body moved away from the mercantilist vision towards a greater sensitivity to environmental issues. Nonetheless, obstacles to an integration of environmental concerns into the WTO continue at the level of both, internal institutional practice, as well as political and economic opposition. [26]

Perez attempts to combine here a proposal for how these obstacles can be overcome, through innovative institutional solutions. He outlines a series of proposals that remain within confines of institutional practices of international trade regulation sphere, rather than finding the solution within the area of environmental regulation. In the case of WTO, as well as in the analysis of other institutional domains, Perez provides a more normative argument. The WTO should be guided by the following key insight: the deep and persisting gap between the institutional capacities of the trade and environmental domains.[27] This asymmetry characterizes both the international and national levels. In the international domain, environmental protection lacks power of enforcement as well as the lack of participation of important players (some states, for instance) in international environmental agreements. In the domestic context environmental regulation remains weak, in particular in developing countries.[28] Domestic constitutional law is insufficient in regulating actors in the transnational private sphere, such as transnational corporations, which have their own private governance regimes. Thus "it makes little sense to move forward in the trade field without making similar progress in the environmental domain."[29] The institutional asymmetry between the environmental and trade regimes calls for solutions, which would place explicit environmental responsibilities on the WTO and other trade institutions.[30] This would mean that they cannot be governed any longer by purely mercantilist ethos.

What, however, are the obstacles to linking trade and environment in WTO negotiations? Particularly important are the legal barriers within the WTO. The negotiation culture of the WTO would have to be transformed enabling various

[25] *Id*. 65.

[26] *Id*.

[27] *Id*. 81.

[28] *Id*.

[29] *Id*.

[30] *Id*.

forms of "issue linkage" admitting environmental issues to the negotiation table.[31] There are also inner institutional difficulties, as new responsibilities would have to be imposed on the WTO, which could endanger its legitimacy.[32] Incorporating ecological consideration could expose the law to new types of cultural distortion or blindness.[33] And further, it is the very adversarial nature of the WTO legal process that is at odds with the need for co-operation.

Perez's subsequent chapters address in detail domestic environmental protection measures under the *Sanitary and Phytosanitary Measures Agreement*, where he criticizes the focus and over-reliance on science in determining which are legitimate and which protectionist measures. In the final chapters, he explores realms of international construction law, and international financial law, as well as the more recent transnational litigation against transnational corporations in developing countries under the *Alien Torts Claims Act* (ATCA) in the United States.[34] The environment – trade conflict thus takes place in a highly pluralized context, where new actors, with specific interests and purpose, engage in transnational activities.

What is then the role of law in the radically pluralized environment, where each regime develops its own inner ethos, practice, and law which is limited in the degree to which it can apply to other objectives (such as the environment)? Choice of preferences to which a law would adhere (eg. mercantilist ethos) over another (environmental protection) is pre-determined by external political and economic conditions, a determination of what the overall purpose of a particular system is supposed to be. Hence while law produces rules that identify the binary distinction of legal/illegal, which is preserved over time, and renewed for purpose of assessment of conflicts at a later point in time[35], the initial distinction remains in the arena of some extralegal predetermination. The importance of Perez's argument lies in that it uncovers each of the different institutions he studies, as being able to change over time, however slowly. The plurality of discourses requires equally complex solutions outside the confines of the nation state or a centralized

---

[31] *Id*.

[32] *Id*. 91.

[33] *Id*. 92.

[34] *See hereto, e.g.*, Peer Zumbansen, *Beyond Territoriality: The Case of Transnational Human Rights Litigation*, ConWEB Paper 4/2005, available at http://www.qub.ac.uk/schools/SchoolofPoliticsInternational Studiesand Philosophy/ FileStore/ConWEBFiles/Filetoupload,38370,en.pdf (last visited 25 November 2006).

[35] Peer Zumbansen, *Review of* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (LAW AS A SOCIAL SYSTEM 466 (Klaus Ziegert trans; Fatima Kastner *et. al*. eds. 2004), 15 SOC. & LEG. STUD. 453, 456 (2006)

international body. Still, while he negates the establishment of moral concerns in dealing with the conflict and institutional reforms, Perez's proposals do call for some more normative process through which an institution would evolve. It is not clear why this transformation would be progressive and inclusive of environmental and perhaps other concerns.

Perez's analytical framework is based on system theory as well as new writings in the fields of economy and biology. Its aim is to provide an important tool in the effort to achieve a better understanding of complex discourses in the interaction between society and nature. Different institutions play a different role in the trade-environment conflict, and hence do not form a unified hierarchical system, or follow a singe ideology. The solution to environmental insensitivity hence has to be multifaceted. Still, any proposal for a solution, or a normative claim, is problematic due to the lack of predictability in the global system. If also we understand law as a procedural device within an institution, this law is then limited in what it can do by the mandate of that institution. While it may change over time, reacting to developments taking place in other arenas, such as politics, or science, any drastic change also threatens to undermine its very purpose or internal culture, which Perez recognizes. For instance after examining the GATT/WTO Trade-Environment Jurisprudence, Perez concludes that the negotiation game continues to be dominated by mercantilist rules.

Still, there are plural sites and possibilities for environmental action, and one of them is visible in the demand side of the financial market, or the change in consumers' preferences, for instance. In his chapter on international financial law, Perez analyzes different aspects of ethical investment and its capacity to generate significant change in corporate politics.[36] This capacity would be manifested in hindering conditions in which environmentally unfriendly businesses operate by, for instance, increasing their cost of raising capital. [37] However, the power of ethical investment is still limited due to a variety of reasons. The assets of ethical investment, for instance, are still very small within the global equity market. Significantly, the "ideological considerations, which led to the evolution of ethical investment", remains in tension "with the traditional "capitalist" ethos."[38] Thus, as Perez concludes, "ethically" managed funds, such as ecologically oriented mutual funds continue to be judged according to their financial performance and not by ecological or social criteria."[39] Even within this conflict, however, Perez avoids the

[36] *Id*. 239.

[37] *Id*.

[38] *Id*.

[39] *Id*. 240.

https://doi.org/10.1017/S2071832200005368 Published online by Cambridge University Press

'logic of opposites'. He provides a metaphor of "multiple self", to avoid a binary distinction of '*homo economicus*' vs. '*homo ethicus*'."[40] The multidimensional concept of the self, does not dismiss the self-interest, but recognizes the possibility that other types of motives, such as concern for others, or moral commitments, which could co-exist together. Behavior of individuals (and perhaps by different institutions?) is not always predictable or consistent. There are some openings for change then, but it is not certain in which direction.

### C. Environmental Conflicts and Possibilities for Change

The concept of society, which underlies Perez's argument emerge from Luhmann's postulation of social systems as products of communications among interconnected individuals. Each process of communication "has a history distinguished by the fact that, on the basis of single set of interrelated choices, only a few out of the wide array of possibilities are actualized."[41] The development of law takes place via the development of more complex procedural systems.[42] Hence the evolution of law, its consequences and results, have led to the differentiation of a legal system which can realize its own societal function in relative autonomy. [43] Its inner communication flows are ordered by a binary code, which in the case of law is the distinction of 'legal/illegal'. In the global society internal linkages and communications are manifested at the level of organizations and professions. However, due to a lack of "fully institutionalized procedures and centralized decision making bodies…the validity criteria for law are extremely diffuse."[44] As Teubner puts it, in the global private regimes "where the typical combination of organized social norm-making and spontaneous processes of lawmaking occurs, the norm production is decentralized to a multiplicity of political and private actors without it being possible to make out any clear decision –taking center."[45] Social systems are

[40] *Id*. 240-241.

[41] Niklas Luhmann, *Interaction, Organization and Society* in THE DIFFERENTIATION OF SOCIETY 79 (Luhmann N. ed, 1982) quoted in OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENTAL CONFLICT, (2004).

[42] NIKLAS LUHMANN. A SOCIOLOGICAL THEORY OF LAW 133 (Elizabeth King and Martin Albrow (trans), 1985).

[43] *Id*. 281.

[44] Gunther Teubner, *Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?,* in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 71 (Karl-Heinz Ladeur ed., 2004).

[45] *Id*. 7.

https://doi.org/10.1017/S2071832200005368 Published online by Cambridge University Press

conceived of as autopoietic systems, which "*recursively produce their own elements (communications) from the network of their elements.*"[46] They are autonomous and determined by their inner structure. Autopoiesis, however, does not guarantee the survival or progress of a system. Luhmann himself postulated that "The concept belongs to the wider context of chaos theory or the theory of catastrophe…the theoretical concept does not exclude severe forms of destruction, catastrophic regressions, and losses of complexity."[47] Norms are "valid until further notice"[48] and "the future appears in the present as a risk."[49] But each domain is determined by its internal structure while it engages in process of co-evolution and co-determination with other domains.[50] Nothing in this process is deterministic or teleological; neither does it include an assurance for preservation. As Perez concludes "One can never be sure that all will go well."[51]

The main contribution of Perez's book might be seen in his avoidance of an absolutist delineation of particular situations. Grounding his observations in systems theory methodology, he clearly exposes the complex nature of the trade-environment conflict, while providing a powerful rejection of any essentialist, one-sided reform project aimed at "democratizing" or "greening" the WTO. This book is a 'map of ecological insensitivities', and the examination of each transnational domain exposes obstacles to the development of better environmental protection in a variety of transnational institutions. It is this plurality that offers some hope, as there is no single uniform hierarchical system, the possibilities are numerous. Any yet, as I tried to show here, his argument, ultimately, is a normative one, the basis of which remain to be explored more fully. In his search for a viable solution to the trade and environment conflict, one of his starting points is that of taking into greater consideration the negative impacts of international economic interests on the environment. But, in the end, we still need to resolve the ambiguity that lies in the amalgamation of a sociological perspective on the increasing proliferation and hybridization of legal regimes on the one hand and the hopes for a democratic, more responsive regime on the other.

---

[46] Perez, *see supra* note 17 at 19

[47] NIKLAS LUHMANN. LAW AS A SOCIAL SYSTEM 466 (Klaus Ziegert trans; Fatima Kastner et al eds. 2004).

[48] *Id*. 469.

[49] *Id*. 467.

[50] Perez, *see supra* note 43 at 22.

[51] *Id*. 23.