TRADE AND ENVIRONMENTAL ISSUES IN THE WTO

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ABSTRACT

The GATT does not explicitly refer to the term 'environment'. From a trade perspective, environmentalism looms large on the horizon of new issues and it is viewed with some trepidation. Environmental protection is, in fact, just one of many social policies affecting trade; two other examples are antitrust policy and labour standards. As a subset of the competitiveness policy debate, trade experts see special dangers in protectionism masquerading as environmentalism. It is particularly difficult to challenge policies cloaked in environmental garb because of their popular appeal and the skittishness of politicians and government officials at the prospect of being cast as anti-environmental.

1. ORIGINS OF TRADE AND ENVIRONMENT CONFLICT

International concern for the environment except in particular areas such as marine pollution and aircraft noise is of relatively recent origin. Protection of the environment was not a major issue when the GATT 1947 was drawn up. Not a word was said about the environment in GATT 1947. The same is the case in the Charter of the UN and the Treaty of Rome establishing the European Economic Community. It was only in the beginning of 1950s, a number of widely read books and films, notably by Rachel Carson and Jacques-Yves Cousteau, stimulated a world wide movement dedicated to preservation of the environment.[1]

Indeed, the GATT does not explicitly refer to the term 'environment'. Until recently, trade policymakers and environmental officials pursued their work on separate tracks, rarely perceiving their realms are interconnected. Today, environmental protection has become a central issue on the public agenda and trade and environmental policies regularly intersect and increasingly collide. This reflects the fact that norms and institutions of international trade remain rooted in the pre-environmental era and that there exists no international environmental regime to protect ecological values, to reconcile competing goals and priorities, or to co-ordinate policies with institutions such as the GATT.

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[1] Rachel Carson, The Sea Around US, (1951); Silent Shores, (1962): Jacques Cousteu, The Silent Word (1963); The Sea in Danger (1974). ^ See generally, Daniel C. Esty, Greening the GATT, Trade, Environment and the Future, Institute for International Economics (Washington, DC, 1994).

From a trade perspective, environmentalism looms large on the horizon of new issues and it is viewed with some trepidation.[3] This reflects, in part, evolution in the focus of trade liberalization efforts. 148 countries subscribe to the GATT rules regulating trade and the GATT has made great progress in its original goal of reducing tariffs, as a result, attention has shifted to non-tariff barriers to the free flow of international commerce. In fact, the international trading system has become a market access regime that goes well beyond concerns about border controls, to cover international and domestic economic issues that require at least partial harmonisation of variety of national policies.

The Tokyo Round of GATT negotiations in the 1970s consolidated the assault on non-tariff barriers and produced a series of GATT Codes to combat some of the obstacles. The Uruguay Round of negotiations advanced the process further by adding new non-tariff concerns such as intellectual property, services and investmeiit to the GATT agenda, which are by way of cutting down non-tariff barriers.

Environmental protection is, in fact, just one of many social policies affecting trade; two other examples are antitrust policy and labour standards. As a subset of the competitiveness policy debate, trade experts see special dangers in protectionism masquerading as environmentalism. It is particularly difficult to challenge policies cloaked in environmental garb because of their popular appeal and the skittishness of politicians and government officials at the prospect of being cast as anti environmental. Moreover, environmentalists often add potency to their arguments by distilling complicated issues for the public into black and white choices or more precisely, 'brown' and 'green' positions. The hostility of some parts of the environmental community to economic growth as a goal and therefore to trade as a tool for achieving growth, gives added intensity to the fears of those who see misguided and narrowly focused environmental initiatives as derailing trade liberalisation.[4]

In the wake of the Tuna-Dolphin decision 1992[s], the international trade regime came under severe attacks from proponents of the environmental protection lobby around the world. GATT was proclaimed as GATT zilla, a kind of free-trade world government ... all bottom line, a global corporate Utopia in which local ciiuens are toothless, workers' union arc tame or broken, environmentalists and consumer advocates outflanked... regulations of all kinds will be lax, factories will be dangerous and their waste will be toxic.

' *Ibid. 'Ibid.* [5] GATT, DSZ1/R, Sept 3, 1991, sec also, John H. Jackson, "Dolphins and Hormones: GATT and the
Legal Environment for International Trade after the Uruguay Round", 429-454 (14) University of Arkansas at Little Rock Law Journal (1992).

The uninformed nature of attacks of this sort and the level of misinformation led some observers to conclude that origins of the trade and environment conflict could be traced to a clash of cultures between free traders and environmentalists reflecting differences in goals, assumptions, procedures and traditions. No doubt, progress toward mutually supportive trade and environmental policies has been slowed by the fact that trade and environmental communities approach similar problems in different ways. Even the language of the two communities can be a source of confusion. For example, the word 'protection' warms the hearts of environmentalists but send chills down the spines of free traders.

Trade negotiators are generally outcome oriented, utilitarian and willing to compromise. Their goal is to lower trade barriers and increase economic welfare. In contrast, environmentalists, although interested in results tend to be process oriented as well. They come from a tradition of openness and put great stock in public participation in decision-making as a way of ensuring that business interests do not dominate decision-making. The trade and environment debate can also be seen as a clash of paradigms: the environmentalist's law based worldview versus the trade community's economic perspective. The trade world's economic paradigm puts great emphasis to the proposition that freer trade stimulates the opportunity and creates additional resources for environmental protection. Free Traders believe that excessive deference to environmental regulations or standards will result in creating barriers to trade, not justified by real environmental results. They also believe that indiscriminate use of trade as leverage will result not in broad conformity to high environmental standards but in international chaos and lost economic opportunities. Economists fundamentally see the trade and environmental issue as a matter of weighing the relative costs and benefits of trade and environmental policies to maximize social welfare.

Economists and free traders also believe that trade policy goals and environmental policy needs, can be made largely compatible by ensuring that environmental resources are properly priced. Many environmentalists recognise the value of cost internalisation and increasingly understand the potential of the polluter pays principle for making trade and environmental policies mutually reinforcing. In fact, as environmental regulations become more incentive-based, the scope for clashes with free trade goals is sharply reduced. Despite the incipient prospect of collaboration based on adherence to the polluter pays principle, each paradigm finds fundamental faults with the other. Free traders believe that environmentalists systematically undervalue the real world economic consequences of their inflexible command and control policies and the growth stunning impact of environmental trade issues. They also see environmentalists, as preoccupied with the use-of coercion, rather than positive incentives and as being inattentive to whether this 'negative reinforcement' approach to difficult issues actually ushers in, environmental quality improvements.

Free traders see the application of environmental trade measures as a threat to the trading system and to international harmony, generally. They argue, consistent with traditional public policy theory, that trade measures are never the best environmental policy tools.

Environmentalists believe the economic paradigm to be equally flawed. They see free traders living in a world of economic theory that distracts them from environmental realiiies. They argue that the trade community is too focused on a welfare maximizing calculus that encompasses only impacts that can be easily reduced to a monetary value. Specifically, environmentalists believe the trade and environment clash is inherently over 'values' and that such disputes are not amenable to solutions based on economic algorithms.

The nature of environmental problems exacerbates the valuation problems and thus the tension between environmentalists and free traders. In particular, ecological problems are characterised by threshold effects, time lags between emissions and detection and biological, chemical and physical interactions that are not well understood. Sometimes it is also due to substantial scientific uncertainties over the source, scope and magnitude of public health or habitat damage. These uncertainties can lead economists to dismiss environmental values and to ignore environmental variables in their analysis. There is an additional problem of determining, how much weight is to put on these environmental issues.

Environmentalists building on a strong base of political reality, fear, that society is not setting aside resources to pay for future cleanups. In other words, we are leaving unfunded environmental liabilities to our progeny. On this basis they reject the discount rate analysis. From an economic perspective, China argues that, in analysing long-term environmental problems, one should use a lower than traditional discount rate. China comes to this conclusion not only because of concerns about intergenerational equity but also the fact that being richer may not adequately compensate future citizens, for being endowed with a degraded environment, because the price line or trade off, between environmental amenities and all other goods may shift one time. In addition to the economic debates, the conflict between environmentalists and free traders is, in part, a dispute over the relative scientific seriousness of the environmental issues the world faces. In analysing how the world responds to global environmental issues, there are four elements of policy making: definition, fact-finding, bargaining and regime strengthening. Scientific investigations have an integral role in each of these areas. The combination of scientific and economic uncertainty make policy consensus hard to achieve in the environmental realm. If one accepts that the global problems like ozone layer depletion, climate change, deforestation, loss of biological diversity are large and pressing problems and potentially irreversible, then minor intrusion on the trade system by way of institutional environmental responses are not welcome.

2. THE ENVIRONMENTAL CHALLENGE

While the vituperative nature of some of the assaults on the international trade regime has been excessive, the charge that trade and trade liberalisation can be environmentally counterproductive is accepted even by the most ardent free traders. Stripped of its *ad hominem* aspects, the environmentalist's challenge to free trade boils down to four central propositions:

(a) Without environmental safeguards, trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production.

(b) Trade rules and trade liberalisation often entail market access agreements that can be used to override environmental regulations, unless appropriate environmental protections are built into the structure of the trade system.

(c) Trade restrictions should be available as leverage to promote world wide environmental protection, particularly to address global or transboundary environmental problems and to reinforce international environmental agreements.

(d) Even if the pollution they caused does not spill over into other nations, countries with lax environmental standards have a competitive advantage in the global marketplace and put pressure on countries with high environmental standards to reduce the rigor of their environmental requirements.[6]

International trade and protection of the environment are both essential for the welfare of mankind. In a majority of the matters, these two values do not come into conflict with each other. Rather they supplement each other. Section 2.19 of Agenda 21, which was adopted at the UN Conference on Environment and Development in 1992 states that "Environment and trade policies should be mutually supportive. An open multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to the lessening of demands on the environment. It thus provides additional resources needed for economic growth and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpins the continuing expansion of trade."

It is beyond the scope of authority allotted to the WTO, to take active steps for the protection of environment. Its function is rather confined to the successful implementation of the provisions of various agreements covered under WTO. It is clear at the outset, from the provisions of the WTO, that the organisation has been established only for the promotion of international trade and not for the

[6] *Supra* n. 2.

protection of the environment. The WTO agreements apply to measures protecting the environment only where and insofar as they have an impact on international trade. Relatively, only very few environmental measures fall into this category.

Nothing in the WTO agreements requires that free trade be accorded priority over environmental protection. Rather, the Preamble to the WTO Agreement, acknowledges that expansion of production and trade must allow for the optimal use of world's resources in accordance with the objective of sustainable development. It therefore, seeks both, to protect and preserve the environment and to enhance the means for doing so in a manner consistent with each of the member country's respective needs and their concerns at different levels of economic development.

3. TRADE AND ENVIRONMENT AND OTHER GATT PROVISIONS

A. Article XX: A GATT Environmental Charter

The GATT, whose basic objective is to promote free trade on a non-discriminatory basis, allows for trade restrictions on a non-discriminatory basis by allowing for trade restrictions on environmental grounds, under Article XX. The relevant parts of Article XX of GATT 1994 provides for the following:

> 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 word 'environment' is not mentioned explicitly in either of two paragraphs. Commentators are divided whether these provisions were intended by the drafters to apply to the environment in the broadest sense, including moral and aesthetic concerns or, alternatively, to a much narrower range of policy concerns. Shrybman, for instance, argues in favour of the latter point of view.[7] It is possible to understand Article XX (b), for example, as intended to cover

' S. Shrybman, 'International Trade and the Environment: An Environmental Assessment of GATT', (20) 33 Ecologist (1990).

measures designed either to protect public health against diseases e.g. from contaminated meat or to protect animal or health life for commercial reasons.

With regard to Article XX (g) the purpose might be to allow a country to protect 'exhaustible natural resources' such as minerals or petroleum that are considered as essential to its economic well-being. In a detailed analysis of the negotiations that produced the GATT, Charnovitz has shown that drafters did have some concern for minimum economic, public health and safety in mind. He argues that the drafters were aware of existing international conventions on conservation and probably did not include a more explicit environmental exemption, precisely because they thought that Articles XX (b) and (g) would suffice for this purpose.[8]

In the US Gasoline case,[9] while discussing the preambular language of article XX, the Appellate Body stated that, "nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary for protecting environment." The exceptions listed in Article XX thus relates to all of the obligations under the GATT, the national treatment obligation and the most-favoured nation obligation and other obligations.

The Appellate Body in Gasoline case emphasised that 'there is specific acknowledgement to be found of the importance of co-coordinating policies on trade and environment. WTO members have a large measure of autonomy to determine their own policies on the environment, their environmental objectives and the environmental legislation they implement. So far as it concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.

The Panel on US-Gasoline, in a finding not reviewed by the Appellate Body, laid three-tier test, with respect to Article XX (b). As the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that United States therefore had to establish the following elements:

(a) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;

(b) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and

*** S. Chamovitz, 'Exploring the Environmental Exceptions in the GATT (25) 37 Journal of World Trade (1991).**

*** United States Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS2/R, Adopted 20 May, 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:1.**

(c) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.

In order to justify the application of Article XX (b), all the above elements had to be satisfied.
In US-Gasoline, the Panel addressed the question whether the scrutiny should^be justified as "necessary" within the meaning of paragraph (b) of Article XX. The panel held that "it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline was effectively being prevented from benefiting from favourable sales conditions as were afforded by the individual baseline tied to the producer of a product." The Appellate Body did not address the Panel's findings on paragraph (b) of Article XX, but was critical of the fact that the Panel asked itself whether the less favourable treatment of imported gasoline was primarily aimed at the conservation of clean air. The Appellate Body found that "the panel was in error in referring to its legal conclusion on Article 111.4, instead of the measure at issue."

In EC-Asbestos case[10], the Panel found that the measure at issue, a French ban on manufacture, importation and exportation and domestic sale and transfer of certain asbestos products including products containing chrysotile fibres, was inconsistent with GATT Article 111:4, but justified under Article XX (b) in light of the underlying policy of prohibiting chrysotile asbestos in order to protect human life and health. The Appellate Body rejected Canada's argument under Article XX (b) and held that the Panel erred in law by deducing that chrysotile-cement products pose a risk to human life or health.

In US-Shrimp case," the Appellate Body addressed the meaning of the term 'exhaustible' natural resources contained in Art. XX (g). The Appellate Body emphasised the need for a dynamic rather then a static interpretation of the term 'exhaustible,' noting the need to interpret this term in the light of contemporary concerns of the community of nations for the protection and conservation of the environment.

B. The Tuna/Dolphin I case.[12]

Commercial tuna fishing had been carried on through the use of purse seine nets, which are large nets that are manoeuvred around a *shoals offish* and then drawn

European Communities-Measures, Affecting Asbestos and Asbestos -Containing Products, Panel Report, WT/DS135/135/R and Add. 1, Adopted, as modified by the Appellate Body Report, WT/DS 135/AB/R. [1] United States -Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R and Corr. 1, Adopted 6 Nov. 1998. as modified by the Appellate Body Report, WT/DS58/AB/R. DSR 1998 VII. [12] US-Restrictions on Imports of Tuna. (Mexico) Panel Report, 3 Sept. 1991, Unadopted, B1SD 395/155.

tight, so that the tuna remain trapped inside the nets and can be easily harvested. The problem was that tuna fishes are frequently found together with dolphins, indeed the tuna boats often look for dolphins, which come up for air and often leap out of the water, in order to locate tuna swimming beneath the surface. Unless special protective measures are used, the dolphins become trapped in the purse seine nets along with the tuna, and many are fatally wounded or drowned.

The U.S. in 1972 passed the Marine Mammal Protection Act prohibiting 'setting on dolphins' and to permit incidental killing by tuna boats only within certain strict limits. The Act was amended in 1984 to provide that tuna caught in foreign vessels could be imported, only upon a finding by the US Secretary of Commerce that the government of any nation from which yellow fin tuna were to be imported into the US, provided it has in place a regulatory programme comparable to US and has an average marine mammal taking rate comparable to that of the US fleet. Meanwhile the US Government imposed an embargo on imports of tuna from Mexico and several other countries, on the. grounds that they had not met the comparability requirements of the US law.

Mexico at first requested consultations in the GATT and initiated dispute settlement proceedings under Article XXIII of the GATT. Mexico's contention was that the US restriction on imports violated Article XI of the GATT. The more general issue, which caught the attention of the public, was the defence of the US under Article XX of GATT.

The Tuna/Dolphin case caught the world's attention by bringing into focus the perceived tension between the concerns of the environment and the law of international trade. Indeed the case became a kind of momentum for a variety of different interest groups that were or had become hostile to the GATT and the rules of international trade generally.

The Panel in Tuna/Dolphin construed Article XX narrowly. The Panel in this case followed the so-called, Section 337 case[13] which had to pass on a challenge to differential treatment by the US of domestic and imported products alleged to infringe US patents, met with a defence under Article XX (d), addressed to measures, 'necessary to secure compliance with laws or regulations relating to protection of patents, trade marks and copyrights.' It had been held in the Section 337 case that a panel, hearing a charge of violation of the GATT met with a defence under Article XX, should first enquire whether an affirmative obligation of the General Agreement had been breached, with the burden on the complainant. If the answer was in the affirmative, the Panel should then consider whether one of the exceptions stated in Article XX was applicable, with the burden *on the responding party. Based on this approach, the Pane) found that the*

[13] *European Community v. US,* GATT DOC. L/6439, Report, Adopted 7 Nov. 1989. BISD. 36th Supp. 345(1990).

US embargo on imports of tuna from Mexico could riot pass muster, since as the Panel found, other measures, such as negotiation of international agreement, might have been undertaken in place of the unilateral measure imposed by the US.

Accordingly, the Panel concluded that the prohibition of imports by the US, of certain yellow fin tuna and products thereof pursuant to the US Marine Mammal Protection Act, was contrary to Article XI (1) of the GATT and unjustified by Article XX (b) or (g).

The environmentalist community rejected and still continues to reject the pro-trade bias reflected in the Panel's interpretation of Article XX. In part, the criticism is a textual one. It has been suggested that if the 'least degree of inconsistency' requirement, that the Tuna/Dolphin Panel took from the Section 337 case, had been intended to be part of Article XX, it would have been easy to conclude such a phrase in the appropriate exceptions in Article XX.[14]

C. Tuna/Dolphin II Case[15]

Apparently because no request was submitted for adoption of the Panel Report in the Tuna/Dolphin case, a second complaint was brought by the EC and Netherlands, challenging the same regulation as in Tuna/Dolphin I. This time the complaining party focused on the 'intermediary nation embargo,' i.e. on the provision in the United States statute, prohibiting imports of yellow fin tuna or products thereof from any nation that could not certify that it had not in the preceding six months imported such products from a state, subject to the direct embargo in the preceding six months. The secondary boycott or tuna laundering once again provoked the long-standing resentment against the US action.

The second GATT Panel was convened, and it came out with a ruling substantially like the first Panel, except that it did not suggest that the human, animal, or plant life or health to be protected by a challenged measure had to be located in the regulating state, as had been stated by the Panel in Tuna/Dolphin I. The second Panel focused more on Article XX (g), addressed to the conservation of exhaustible natural resources. The outcome, however, was much the same.

As in Tuna/Dolphin I, the majority of GATT members supported the decision, but it was not formally adopted by the GATT Council. For the environmental community, the Tuna/Dolphin II was confirmation of the motion that the first case was not an aberration, but that the trade community, and the laws that

[14] Thomas J. Shoenbaum, 'International Trade and Protection of the Environment,' The Continuing Search for Reconciliation, 91 Am. J. Im'l L. 268, 1997.
[15] US-Restrictions on Imports of Tuna, Panel Report, 16 June 1994, unadopted, DS 29/R.

governed international trade, had a persistent bias against the values of conservation and environmental controls.

D. Gasoline Case[16]

The petitioners in the Gasoline case asserted that the EPA rule of the United States, which set discriminatory standards for imported gasoline that were more stringent than the requirement of domestic refiners, was a prima facie violation of the GATT national treatment norm in Article III: 4 but the United States claimed that the EPA rule was in fact consistent with Article III: 4 and, in the alternative, raised defences based on the human health and conservation of natural resources exceptions of Article XX.

The WTO Panel decided in favour of the petitioners. The Panel found that domestic and imported gasoline were 'like' products and that the EPA rule in fact discriminated against imported gasoline in violation of Article III: 4. In evaluating the EPA's treatment of 'like' products, the Panel reasoned that imported gasoline which need chemically-identical to domestic gasoline was subjected to more demanding quality standards than domestic gasoline; therefore, imported gasoline was effectively precluded from favourable sales conditions afforded to like domestic products.

With respect to the Article XX defence, the Panel concluded that (a) the EPA rule could not be justified under Article XX (b) as 'necessary to protect human... health' because the EPA had at its disposal other means less inconsistent with GAJT, to accomplish the same health and environmental health, and (b) the EPA rule could not be justified under Article XX (g) as 'relating to' the conservation of 'exhaustible natural resources', since affording treatment to imports in accordance with article III: 4 would not necessarily prevent the attainment of the desired level of conservation of air quality under the rule.

The United States filed an appeal with the WTO Appellate Body on February 21, 1996, in order to challenge only the Panel's findings on Article XX (g). The limited context of the appeal is telling. Effectively, the US was admitting that the EPA rule's violation of the GATT's national treatment norm was uncontestable and that the provisions of the rule were not the 'least GATT inconsistent' alternative available. Given the fact that the United States had actually "considered the May 1994 proposal which was 'least GATT inconsistent' than the original RFG rule—the United States could not argue on appeal that the approach, the EPA maintained was 'necessary' and therefore it could not effectively appeal the Article XX (b) determination. Rather, the critical goal for the United States was to uphold its environmental regulatory

'* United States-Standards for Reformulated and Conventional Gasoline, Penal Report. WT/DS2/R, 29 Jan. 1996.

prerogatives under Article XX, which would effectively provide the United States with an exception from national treatment obligations for purposes of upholding legitimate measures to protect the environment. The issue was whether, the measures adopted by the EPA were in fact legitimate, in pursuant to the terms of Article XX (g).

The Appellate Body reversed the Panel and held that the EPA rules did in fact fall under the terms of Article XX (g). However, the Appellate Body decided against the US by holding that the EPA rules were "unjustifiable discrimination" and a "disguised restriction on international trade" pursuant to the *Chapeau* of Article XX. In making the "unjustifiable discrimination" determination, the Appellate Body underscored the fact that the United States had more than one alternative course of action available in promulgating regulations implementing the environmental policies that were less inconsistent with GATT. Had it chosen such alternative courses, the United States could have avoided subjecting imported gasoline to the discriminatory treatment that resulted from the imposition of more exacting statutory baselines.

E. The Shrimp/Turtle Case[11]

Similar to the Tuna/Dolphin, another complaint was brought against the US only after three years. Once again, an imported product—this time shrimp—was the issue. In 1987, the US acting pursuant to the US Endangered Species Act, 1973 issued a regulation requiring all US flag shrimp trawlers in the Gulf of Mexico and in the Atlantic Ocean off the south-eastern coast of the United States to use turtle excluder devices approved in accordance with standards set by US government agencies.

In 1989, the US Congress adopted an amendment calling on the Secretary of State to negotiate agreements with other nations for the protection and conservation of sea turtles. The amendment provides for the prohibition of shrimp harvested with technology that did not meet US standards. Nine states adopted regulatory measures meeting US standards and were granted certificates permitting them rights for export. Imports of shrimp from vessels registered in other states were subject to embargo.

Four states—India, Pakistan, Malaysia and Thailand—which did not comply with US regulations, brought a complaint under the WTO Understanding on Dispute settlement, alleging violation by the US of Article XI of the GATT, the same provision that had been invoked in the Tuna/Dolphin case. The US defended its restrictions on the basis that it was carrying out the intent of CITES, that its legislation and regulations were consistent with both the MFN and

[17] United States-lninort Prohibition of Certain Shi imp and Shrimp Products, Panel Report, WT/DS58/R and corr. 1, Adopted 6 November 1998, as modified by the Appellate Body Report. WT/DS 58/AB/R, DSR 1998:V1I

national treatment requirements of GATT, and they were in any event within the exceptions of article XX (b) and (g). The complaining parties replied that CITES prohibited trade in sea turtles but did not authorise, let alone require, restrains on import of shrimps, which were not an endangered species but were significant sources of revenue for the complaining states.

The Panel concluded that the US import ban on shrimp and shrimp products was not consistent with Article XI of the GATT, and not justified by any of the provisions of Article XX. The US made an appeal on the ground of Article XX (g) relating to the conservation of exhaustible natural resources. Though the US programme discriminated between states, that had and that had not met the US standards, it argued that it was not unjustifiable discrimination within the meaning of the *Chapeau* of Article XX. Moreover, the US also argued that "it is legal error to jump from the observation that GATT 1994 is a trade agreement, to the conclusion that trade concerns must prevail over all other concerns in all structures arising under GATT rules."

The response of the Appellate Body was that the US had abused Article XX by unilaterally developing a trade policy instead of proceeding down the multilateral path. The Appellate Body concluded that "if every member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns", the multilateral trading system would cease to exist.

The Appellate Body upheld the finding that the United States import ban was incompatible with GATT, but significantly altered the rationale. The Panel held that the *Chapeau* of Article XX only allows members to deviate from GATT provisions so long as, in doing so, they do not undermine the GATT/WTO trading system. The Appellate Body held that the *Chapeau* of Article XX addressed not the challenged measure itself, but rather the manner in which it was applied. The proper way to look at environmental or comparable measures, the Appellate Body held, is to look first at the specific provisions of Article XX (a) to (j), if a challenged measure is found to fit under one of the exceptions, for instance because it relates to the conservation of exhaustible natural resources, it must then be tested under the Chapeau i.e. whether the measure is applied in a manner that would constitute unjustifiable discrimination or a disguised restriction on international trade. The Appellate Body concluded that it was 'our duty and our responsibility to complete the legal analysis, and make a finding under Article XX (g) on the basis of thorough presentations of the parties to the Panel.'

The complaining parties argued that exhaustible national resources referred to finite resources such as minerals, and not to living creatures. The Appellate Body rejected the view, holding that modern biological science had shown that living species, though in principle capable of reproduction are in certain circumstances susceptible to depletion, exhaustion and even extinction,

frequently because of human activities. Living resources are just as finite as petroleum, iron ore and other non-living resources. The wordings of Article XX, which was drafted some 50 years ago and had not been altered even by the Uruguay Round, must be read in the light of contemporary concern of the nations. The US measure was related to the objective of preserving the endangered species; this was in principle enforced in an even-handed way as between domestic and foreign shrimp. For the Appellate Body 'comparable' in practice means 'essentially the same'. The US should have been prepared to consider, other measures to protect the sea-turtles and should have been more forthcoming in undertaking negotiation with other countries, including the complaining parties.

In contrast to the Tuna/Dolphin Panel, the Appellate Body in the Shrimp/Turtle case was careful to quote from the Rio Declaration on Environment and Development, from Agenda 21, from the Convention on Biological Diversity, as well as from the report of the Committee on Trade and Environment of the WTO. The Appellate Body, in short, was anxious to dispel, to the extent possible, the perception that the GATT/WTO system was indifferent to the concerns of the environment. But all of the perusals quoted looked towards multilateral solutions, international consensus and similar expressions as opposed to the exercise of unilateral restrains. Here the US had negotiated with some, but not with other member states, including the complaining parties. The effect was plainly discriminatory and in view of the Appellate Body, unjustifiable within the meaning of the Chapeau of Article XX. The United States lost the case.

In the Shrimp/Turtle case, the Appellate Body had sought to tone down the conflict between trade and environment. The Appellate Body concluded that it has not decided that protection and preservation of the environment has no significance to the members of WTO. Members are free to adopt measures for the protection of endangered species. However, the Appellate Body does not provide any guidelines as to how protection of species should be tackled by member countries of WTO. It simply declined to decide what are the measures, which should be taken individually or bilaterally or multilaterally.

4. ENVIRONMENT AND WTO PREAMBLE

Prior to the founding of the WTO in 1995, dispute settlement panels were disinclined to give much weight to environmental and other social policy considerations in determining how trade and domestic policies should be crafted for members to comply with GATT non-discrimination obligations. However, reflecting the trend in international agreements, the preamble makes specific reference to the need to balance the trade and economic objectives of the GATT, GATS, TRIPS and other WTO agreements on the one hand and environmental

policy considerations on the other. The opening paragraphs of the Preamble to the Agreement Establishing the World Trade Organisation States;

The Parties to this Agreement,

Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while 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 in a manner consistent with their respective needs and concerns at different levels of economic development.

By virtue of the reference to sustainable development and environmental goals in the Preamble, the Appellate Body in the 1998 Shrimp/Turtle decision determined that the negotiators of WTO agreement were fully aware of the importance and legitimacy of environmental protection as a goal for national and international policy. They concluded that GATT and all other WTO agreements must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.

The Appellate Body in US-Gasoline case emphasised the importance of the Preamble in the context of environmental issues. The Appellate body affirmed "indeed in the preamble to the WTO agreement and in the Decision on Trade and Environment, there is a specific acknowledgement to be found about the importance of co-coordinating policies on trade and the environment. WTO members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. In so far as it concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and other covered agreements."

A. SPS Agreement and Environmental Protection

SPS Agreement has four sets of consequences for environmental protection.[18] First, it imposes substantial requirements that member governments base sanitary and phyto-sanitary measures on scientific principles and evidence, undertake risk assessment, apply consistent levels of risk protection across

" Peter Morici, Reconciling Trade and Environment in the World Trade Organisation, 52-53 (Rockefeller Foundation, 2002).

comparable regulatory situations, adhere to norms of transparency, accept the equivalency of equally effective foreign measures and adopt measures that are not more trade-restrictive than necessary to accomplish their objectives. Together, these place the WTO in the position of determining whether sanitary and phyto-sanitary measures, when not those prescribed by international standards-setting bodies, impose unnecessary burdens on trade.

Secondly, by presuming that the standards, guidelines and recommendations established by the Codex Alimentary Commission, the Office International des Epizooties and the framework of the International Protection Convention meet the abovementioned requirements, the SPS assigns considerable status to the norms established by these organisations and imposes costs on governments that seek to exceed or differ from these norms. This may not be as alarming as it sounds. Most WTO members participate in these organisations and the standards that are developed come from leading scientists and government experts in the appropriate fields, and not the WTO or trade experts.

Thirdly, the agreement appears to restrict the use of precautionary measures by requiring members, when faced with insufficient scientific evidence, to rely on provisional measures and to seek additional information for a more objective assessment of risk within a reasonable period.

Lastly, the coverage of the agreement may not extend to certain issues. As defined in Annex A, the agreement applies to pests, diseases, disease-carrying organisms and disease causing organisms, contaminant, toxins or disease causing organisms in human and animal food.

B. Agreement on Technical Barriers To Trade (TBT) and Environmental Protection

The TBT Agreement has three sets of consequences for environmental protection.[19] Firstly, the Agreement requires member governments to base regulations on risk assessment and available scientific evidence, adhere to certain rules of transparency, give positive considerations to accept the equivalency of foreign regulations and adopt regulations that are not more trade-restrictive than required. Together, these place the WTO in the position of determining whether measures, when not those prescribed by international standard-setting bodies, impose unnecessary burdens on trade.

Secondly, by presuming that the standards, guidelines and recommendations of international bodies meet the abovementioned requirement, the Agreement assigns considerable status to the norms established by these organisations and

Peter Morici, Reconciling Trade and the Environment in the World Trade Organisation, 55 (Rockefeller Foundation, 2002).

creates new reporting costs for governments seeking to exceed or differ from them.

Thirdly, TBT Agreement may open the door to the challenging of labeling regimes (both mandatory and voluntary) that address how products are made rather than their specific performance and physical characteristics.

5. ENVIRONMENT AND OTHER WTO AGREEMENTS

Besides the above-mentioned provisions in the GATT/WTO and various agreements, the concern of the protection of the environment has also found mention in the following agreements—

(a) Agreement on Agriculture

The Preamble of the Agreement provides for the commitment from the developed countries to the reform programme carried out in the developing countries. These reform programmes include a greater improvement of opportunities and access to agricultural products. The implementation of these reforms programmes should be made in a purely equitable manner having regard to non-trade concerns including food security and the need *to* protect the environment.

The Agreement on Agriculture exempts direct payments under environmental programmes from members' commitment to reduce agriculture support programmes. To be eligible, payments must be part of "a clearly defined environmental or conservation programme and be dependent on the fulfillment of specific condition under the government programme, including conditions related to production methods or inputs," and payments shall be limited to the extra cost or loss of income involved in complying with the government plan.[20]

(b) Agreement on subsidies and Countervailing Measures (SCM)

Three categories of subsidies were non-actionable during the first five years of WTO-CO research and development subsidies; (ii) subsidies to disadvantageous regions; and (iii) environmental subsidies.[21]

[20] Agreement on Agriculture, Annex 2.12.
[21] Art 8.2, SCM.

The provisions relating to these non-actionable subsidies expired at the end of 1999. Nevertheless, the environmental subsidies are described below for a proper understanding—

Non-actionability of environmental subsidies reflects the awareness at the international plane that environmental harm cannot be avoided through private behaviour only. WTO members can provide subsidies to firms wishing to protect the environment by upgrading their facilities provided that:

(i) The scheme is directed to existing facilities, that is, facilities that have been operational for at least two years;

(ii) It is one-time measure; WTO members are disallowed from re-subsidising the same firm;

(iii) The assistance is limited to 20 percent of the cost of adaptation of existing facilities;

(iv) Costs related to replacing and operating the assisted investment must be fully borne by the subsidised firm;

(v) It doesn't cover manufacturing cost savings; and

(vi) It is available to any firm that can adopt the new equipment or production process.

All the above conditions must be respected. A comparison of **the** criteria laid down for the three categories of non-actionable subsidies leads to the conclusion that the drafters of the SCM Agreement exhausted their rigour in the context of environmental subsidies.

(c) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Article 27.2 of TRIPS Agreement allows WTO members to exclude from patentability inventions that endanger human, animal or plant life or health or the environment, but the exclusion must be 'necessary,' not merely because the law prohibits the exploitation. Article 27.3(b) of the TRIPS further provides that plants, animals and essential biological processes may also be excluded from patentability, but microorganisms, microbiological processes and non-biological processes are patentable. It stipulates that new plant varieties need not to be protected by patent but members who choose to exclude them from the patent protection are required to provide for an effective *sue generis* system i.e. an effective special form of protection. The system gives members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure.

(d) General Agreement on Trade in Services (GATS)

Article XIV of GATS contains general exceptions comparable to Article XX of GATT. The two articles' chapeaus are identical. Article XIV (b) of GATS permits members to take measures necessary to protect human, animal, plant life and health.

On March 1, 1995, the Council for Trade in Services, pursuant to the Ministerial Decision on Trade in Services and the Environment, adopted the Decision on Trade in Services and the Environment. The decision has requested the Committee on trade and environment to examine and report, with recommendations if any, the relationship between services, trade and environment including the issues of sustainable development. The Committee has also been empowered to examine the relevant intergovernmental agreements on the environment and their relationship to the agreement.

(e) Committee on Trade and Environment

The WTO has established a Committee on Trade and Environment (CTE) in 1995. Although the committee was established at Marrakesh in April 1994, it came into operation at the beginning of January 1995. It took over from a GATT Sub-Committee on Trade and Environment. The CTE has been charged with making appropriate recommendations on the need for rules to enhance the positive interaction between trade and environment measures for the promotion of sustainable development.

The CTE has been empowered to study the link between trade and the environment and to investigate and report on such issues as:

> the relationship between the provisions of multilateral environmental agreements and those of the WTO;
>
> environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
>
> provisions of the multilateral trading system and,
>
> (i) charges and taxes for environmental purposes,
>
> (ii) requirements for environmental purposes relating to products, including standards and technology regulations, packaging, labelling and recycling;
>
> transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;

dispute settlement mechanisms in the multilateral trading system and those found in the multilateral environmental agreements;

the effect of environmental measures on market access, especially in relation to developing countries, particularly the least developed ones and environmental benefits of remaining trade restrictions and distortions;

the issue of exports of domestically prohibited goods; and

the relevant provisions of TRIPS Agreement.

However, no significant decision has been taken by the CTE, which is open to participation by all members. Consequently, the Final Declaration of the Doha Ministerial Conference in November 2001 adopted a Trade and Environment Work Programme, which includes the following:

(a) The relationship between WTO rules and trade restrictions in multilateral environmental agreements;

(b) Criteria for granting observer status and information exchange;

(c) Reduction and elimination of trade barriers for environmental goods and services; and

(d) Fishing subsidies.

In addition, the CTE has been entrusted to give particular attention to;

(i) The effect of environmental measures on market access, especially for developing countries;

(ii) Labelling requirements for environmental purposes;

(iii) Environment as parts of TRIPS Agreement.

Thus, the accommodation of protection of the environment and trade is still incomplete, however it is an ongoing process.

6. TRADE AND ENVIRONMENTAL ISSUES

(a) The WTO-MEA Relationship

The relationship between WTO and Multilateral Environmental Agreements (MEA) was a hotly debated topic during the last decade. There are at least *nearly 250 MEAs in existence, of which* the WTO Secretariat has identified 22 with potential trade policy implications. Many of these agreements protect specific groups and classes of flora and fauna while others facilitate the joint

management of resources taken in the global commons and still others focus on broader environmental problems.

There are long-standing expectations that the WTO can and should deliver in this area. The first concerns WTO disciplines and the extent to which they accommodate environmental concerns. In the CTE, some members have proposed that a legal framework be developed to clarify the relationship between the WTO and MEAs, with specific reference to the exception provision in Article XX. Other WTO members would like to see other areas of WTO disciplines clarified with respect to the environment, such as the TBT, SPS, TRIPS and Agriculture Agreements as well as GATS. Some other members would like to have environment related results in some or all of these agreements, while others feel confident that environmental concerns are already sufficiently dealt with these agreements. At this stage, individual proposals continue to be submitted in the CTE and its various committees that oversee each agreement.

The spectrum of proposals submitted to the CTE can be classified into four broad categories. Firstly the *status quo* approach, which is based on the premise that the WTO already has sufficient scope to accommodate the use of trade-related measures pursuant to MEAs and same only a small number of MEAs contain trade measures, thus by far there has not been any dispute concerning trade measures applied pursuant to an MEA.

The second approach is that of a waiver, under which WTO members would take a decision to authorise members to denial from their obligations for a limited period of time. Given the range of provisions in the WTO, some members consider that WTO rules do not require any amendments. A waiver is subject to adoption by consensus, although it is possible for a member to call for a vote, which would be subject to approval by three quarters of WTO members. A waiver is time-limited and can be renewed.

The third type of approach may be considered to provide for clarification of WTO rules. Many members have proposed for the adoption of an understanding or guidelines. In order to allow for predictability for guidelines, procedural and substantive criteria have been suggested.

Several members have advocated the fourth approach to clarify the relationship between WTO-MEA along the lines of co-operation. Such a clarification would increase predictability and legal certainty and avoid unnecessary conflicts.[22]

[22] **See, Sabrina Shaw and Risa Suchwartz, 'Trade and Environment in the WTO-State of Play', Journal of World Trade, 36(1), 129-154 (2002).**

Trade measures may include regulations on exports and imports. These may include outright prohibition or bans on trade, quotas and various licensing and registration schemes. Trade measures may have many motivations. International trade may expand or create markets that encourage over-exploitation of resources. Limiting or eliminating trade may assist national efforts to enforce limits on harvesting or to eliminate poaching.

In contrast, encouraging certain type of trade may ease the economic burden of achieving conservation and environmental protection goals. Sometimes trade measures that support environmental goals often conflict with the requirements of G ATT and other WTO agreements and may not qualify for one of the general exceptions provided by these agreements. The major problems lie in resolving conflicts emerging from actions taken by WTO members participating in an MEA that adversely affect the commercial interests of other WTO members who are not the participants in the MEA.

(b) **Environmental** Subsidy

There has been an increasing emphasis by many countries on 'win-win-win' outcomes from future WTO negotiations, which would benefit trade, environment and sustainable development. Several WTO members advocate for the removal of tariff escalation and tariff peaks for forest and leather products and subsidies in agriculture and fisheries in order to contribute to both environmental protection and trade liberalisation.

While initial discussion concentrated on the benefits of eliminating agricultural subsidies, recent proposals have highlighted the potential contribution of the WTO in addressing the major trade distortion affecting the fisheries sector, i.e. subsidies. Following the failure at Seattle, the US and some other countries are now striving to address those subsidies that contribute to the unsustainable use of global fisheries recourses. The fisheries issues are a complex and highly politicised matter and are a part of the larger issue of sustainable fisheries management. The complexities can be seen in the light of the recent wave of potential fisheries related disputes. The depleted state of global fish stocks has become a major economic and environmental concern—now central to the trade and environment debate in the WTO. The potential contribution of the WTO, which has a trade mandate, would be to examine the trade restrictions and distortions that impact upon this sector.

(c) **TRIPS and Biodiversity**

Another long-standing debate covering the relationship of trade and environment is the compatibility of the TRIPS and the Convention on Biological Diversity 1992 (CBD). The issue has got a new lease of life in the recent discussions in the CTE, TRIPS Council and the CBD. The developing countries

are advocating for the implementation of TRIPS and CBD in a mutually satisfactory way. India has expressed the view that TRIPS Agreement is in conflict with the CBD, because the provisions of TRIPS regarding private rights are having the potential to overrule the sovereign rights recognised by the CBD. Currently, under TRIPS Agreement nothing prevents a person from patenting a genetic material, a plant, for instance, originally from another country without having to fulfil some of the basic principles of the CBD, such as benefit sharing, prior informed consent and protection of the traditional knowledge associated with the genetic resource.

(d) Precautionary Principle

Although precaution is a fixture in both the Preambles and working articles of many multilateral environmental agreements, recently the principle has been the focus of intense debate in the area of food safety and GMOS. The precautionary principle was first introduced in Germany in the 1984 International Conference on the North Sea. Although the principle was not referred to as such, the agreement contained the idea of limiting pollutants due to a lack of knowledge and in advance of proof of their harmful effects.

The precautionary principle has been defined as taking precautionary measures when there is insufficient scientific proof, yet when inaction could lead to irreversible damage or risks to human health or the environment. The controversial issue that surrounds the principle is the determination when the threshold shifts the burden of proof towards protection of the environment, or health or safety. This threshold can be high, when it involves serious or irreversible harm to the environment, or lower, when it may cause harm to the environment.

The flexibility of the precautionary principle is its strength as well as its weakness. It has been applied to many different environmental issues and is subject to varying interpretations and has many definitions, in international agreements. Several WTO members have complained that there is no internationally agreed definition of the precautionary principle. They claim that although the principle has been recognised in international agreements but it has not been explicitly mentioned in the WTO, although several key provisions explicitly allow for precautionary action. The concept of precaution which find mention in SPS agreement but in this agreement this is an alternative to insufficient evidence provided by a risk assessment, instead of a policy tool that allows action when the risk to the environment is considered to be unacceptable.

(e) **GMOs and** Bio-safety

The insecure status of the precautionary principle in the WTO, the SPS Agreement and in Hormones disputes[23], raises interesting issues for the CTE in the new trade related area of genetically modified organisms (GMO) and food safety. The framework regulation governing GM foods are still in the process of evolution. There is a greater concern among the developing countries for the protection of native species. Many environmentalists have been looking at the Bio-safety Protocol and WTO agreements, such as SPS and TBT agreements, to see whether this new upcoming framework is compatible with WTO rules. The issue is not solely about compatibility, but also about how signatories implement the provisions of the agreement.

7. CONCLUSION

Trade liberalisation and environmental protection share a common aim to enhance social welfare by improving the quality of life. In pursuing this cherished common goal, considerable amount of conflict arose over the adoption of approaches and emphasis. The issues concerning environment have grown in prominence for both domestic and international policy agendas. The environmental issues affecting or effecting trade, draw the attention of the policy makers. The problem of environment has revealed the ecological inter-dependence. No country has complete environmental independence. For the redressal of the problem, international co-operation is required.

Just as environmental issues are increasingly shaping trade policy, the economic interdependence of the world is influencing the dynamics of environmental policy. There exists the linkage between trade liberalisation and environmental protection. For this, WTO has now laid the foundation for reconciling both actual as well as potential conflicts between international trade and protection of the environment. Now it is up to the CTE and the Ministerial Conference to evolve the additional aspects of the trade and environment agenda. The new trade and environmental conflicting issues, especially in the area of food safety, subsidies, intellectual property, and services, urgently required attention keeping in view the interests of the developing countries. There is an urgent need to evolve a thorough and transparent decision, making process within the institutional framework of the WTO. Only then can the conflict of trade and environment be reconciled.

There is also a need for the WTO to give specific recognition to environmental values. Article XX (b) & (g) of the GATT 1994 might be amended to provide a general exception for trade measures that are reasonably necessary for the protection of the domestic environment. In addition, Article XX may also be

[23] EC Measures concerning Meat and Meat Products (Hormones) -Complaint by the United States, Appellate Body Report, WT/DS 26/AB/R, WT/DS 48/R, DSR 1998:1.

amended to provide a safe harbour for multilateral environmental agreements that employ trade measures, which are reasonably necessary and related to the subject matter of the agreement. Further, there is a need for adopting a clear policy on the international use of environmental taxes, especially energy taxes and food safety.