IMPACTS OF INTERNATIONAL TRADE LAWS (UNDER WTO/GATT) AND/OR POLICIES ON THE ENVIRONMENT

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Abstract

Trade takes the lion's share of global environmental problems. It affects the environment and environmental protection efforts in a number of ways. Among trade factors affecting the environment are international free trade laws and/or policies. While international trade laws and policies regulate global trade liberalization, they stand out as important challenges in the global environmental protection/governance.

This study focuses on core GATT/WTO trade agreements including the exceptions. It provides an overview of the impacts of core international trade laws and policies on the environment. It further includes some outstanding trade-environment cases and important decisions therein.

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INTRODUCTION

The relationship between international trade and environment is becoming increasingly important and controversial. The steady increase in development between trade and environment stands out as an important challenge in global environmental governance, for trade liberalization in GATT/WTO affects the environment in various ways.

First, the GATT/WTO is exclusively a trade organization that is not necessarily competent to address environmental concerns besides GATT Art XX that simply addresses the general exception on human, animal and plant life and health.

Second, although trade is the major category of human activity as a source of environmental problems, there are wide range of multilateral environmental agreements negotiated and agreed upon outside the purview of trade institutions and which application for environmental reason often conflicts to free trade laws.

And third, while international trade laws regulate free flow of goods and services, they prohibit differential treatment of 'like products' which may result in the worst effect on environmental governance for there are like products and production methods that affect the environment.

Moreover, international trade laws create legal and practical challenges for the enforcement of multilateral environmental agreements because it intersects a number of different WTO rulings.

Besides, these multilateral environmental agreements use trade measures as enforcement tools to meet environmental protection goals while the application of trade measures in GATT/WTO is limited for restricting trade.

Most researches done in this area looks to emphasize on trade effects such as; product, scale, structural, technology and distributional effects and look-over the regulatory effect of international free trade laws on the environment. International trade laws, however, stand out as important challenges to the environment and environmental governance.

This study explores the regulatory impacts of international trade laws on the environment. It aims at addressing the impact of major international trade laws. It deals on GATT/WTO agreements and case laws and find out how it affects the environment.

The first section deals on the impact of multilateral trading system (core international trade principles) on the environment. It gives a detailed overview of how the principle of multilateral trading system affect environment and specifies major areas where these two regimes may conflict. The second section looks into the regulatory effect of the exceptions which include the GATT Article XX and others.

MULTILATERAL TRADING SYSTEM AND ENVIRONMENTAL POLICIES

The foundation of the international trade regime dates back to 1947 when the General Agreement on Tariffs and Trade (GATT) was concluded.[1] The GATT, with its successor WTO, has been the foundation stone for existing trade relation in the world. This agreement, salvaged from an un-ratified larger agreement called the International Trade Organization (ITO), was one piece of the so-called Briton-Woods system which was designed in the post-World War II environment to promote global economic development.[2]

The main reason behind the establishment of WTO/GATT was to bring about a new world order in which economic ties would be strong enough between all nations so that the economic crises that had been experienced in 1920s and 1930s would not reoccur.[3] Therefore, these trade laws are meant to liberalize trade and create peaceful world economic relation among members. It didn't have core objective of protecting the environment. Recent developments have shown that WTO contains environmental objectives following the Uruguay Round for sustainable development. Environment has become a mainstream trade issue in international trade governance, albeit the compatibility of the two objectives is still a question.

The multilateral trading system which founding bloc was the GATT has the principle of *non discrimination.* The core principles of non-discrimination are found in the following articles of GATT which together form the critical "discipline' of GATT**.** And the point of discussion remains on the regulatory impact of these principles on the environment.

[1] Trade measures-a Legitimate Tool for environmental protection? A comprehensive analysis and the case of India, may 2008, p 4&5 and Alexei vikhlyalev, The use of trade measures for environmental purposes globally and in the EU context may 2001,p.8

[2] The International Monetary Fund and International Bank for Reconstruction and Development- the World Bank were the other two main pieces

[3] This is because the environmental protection efforts of European countries in the 1950s and the following consecutive years could remind especial mention albeit the reason behind these (trade) agreements still was just not environmental protection. But trade/economic growth

1. **GATT Article I ("Most Favored National Treatment")** which requires each contracting party to grant every other contracting party treatment at least as favorable as it grants any country with respect to imports and exports of `like products`. What matters is not whether products keep environmental standards or its method of production harms the environment but whether they are like products, and treatment is accordingly.[4] Thus, Article I requires equal treatment for like imported products without regard to their condition of manufacture in the exporting nations.
2. **GATT Article contains the "National Treatment Obligations,"** which imposes a rule of non-discrimination between goods that are domestically produced and those that are imported.[5] National treatment in the environmental context was at issue in the super fund case[6], which involved a provision of the US Comprehensive Environmental Response, Compensation, and Liability act (Known as "*super fund*") that imposed a tax on imported oil greater than the charge for domestically produced petroleum products.[7] In defending the tax, the United States argued that the resulting discrimination was competitively insignificant and that it was for a benign purpose: to finance pollution control measures, the cleanup of hazardous waste sites. The dispute settlement panel found, however, that the GATT's national treatment policies are applicable to all taxes regardless of their policy purposes. Therefore, whether the imposition of an internal tax on imported products meets the national treatment requirement of Article III (2) depends on whether like domestic products are taxed, directly or indirectly, at the same or a higher rate. Applying this test to the taxes in dispute, the panel concluded that the petroleum tax did not satisfy Article III (2) because it levied a higher charge upon imported petroleum. As for the tax on critical imported chemicals, the panel concluded that the imported and like domestic substances bore equivalent burdens; therefore, the tax met the requirement of Article III (2).[8]

Thus, in the petroleum case, the domestic environmental measure that U.S. imposed has been considered discriminatory.

[4] The most celebrated application of this principle is the *Belgian family allowances case*, GATT, BISD, 1st supp. 59 (1953) and it has no environmental decision by itself except that I discussed below in relation to process and production method

[5] Thomas J. Schoenberg Agora, Trade and environment, free international trade and protection of the environment: irreconcilable conflict, American journal of international law (vol.86:700.) p .707

[6] United States-Taxes on Petroleum and Certain Imported substances GATT BISD,34th supp.136(1988)

[7] Supra note 5 p.708

[8] Supra note 6 at 162 article 11(2.a)of the GATT

3. **GATT Article XI ("Elimination of Quantitative Restrictions')** which forbids any restriction other than duties, taxes or other charges on imports from and exports to other WTO members which may impact environmental protection policies of countries.[9] This article too, has impact on the environment for it forbids any sort of discrimination (including environment measures) except duties, taxes and other charges.

THE PRINCIPLE OF NON-DISCRIMINATION BETWEEN "LIKE PRODUCTS"

As discussed above, the major principles of the multilateral trading system are enshrined in the core GATT principle of non-discrimination. The discussion on the impact of free trade laws on the environment remains the question on the principle of non-discrimination between "like products".

In normal circumstances, the principle of non-discrimination between "like products" doesn't seem to have much to do with environment and seems inappropriate to relate to the issue raised above. But there are three possible areas where conflict can arise.[10] These areas include product standards, product and production methods (PPMs), and the enforcement of multilateral environmental agreements.

1. Product Standards

Product standards lay down specifications for product characteristics (such as performance, product safety, dimensions) and requirements for packaging or labeling which have direct relation to environment. They need to be distinguished from PPM standards which stipulate how goods are to be produced. PPM standards, as discussed in detail below, apply to the production stage, i.e. before products are placed on the market for sale. The underlying issue here is whether all like products are to be considered environmentally sound so that the above principles of non-discrimination are made effective.

GATT/WTO agreements in general treat products which have the same physical form as "like products" and prohibits any sort of discrimination either on the bases of its environmental effect or not. Therefore, if a country used to produce a certain product having environmental impact for lack of alternatives and/or skilled man power and is to prohibit

[9] Supra note 5 p.708

[10] Duncan Brack, Trade and Environment After Seattle, Royal Institute of International Affaires (RIIA) briefing paper new series NO.13 April 2000.p.2

imports of like products from another country for environmental reason, it is against the principle of non-discrimination (national treatment).But this measure may mitigate the impact on the domestic environment of the importing country.[11]

Though the general principles in GATT frown on trade restrictions and are still problems in protecting the environment, Article XX suggests that countries should be able to ban or restrict the import of products which will harm their own environment, as long as the standards applied are non-discriminatory between countries and between domestic and foreign products. Therefore, environment unfriendly products could be discriminated on the basis of its domestic environmental impacts. But what if there is a situation like the above one-it produces a product that could affect the environment for her necessity but prohibits imports of the same product for at least mitigating the problem.

There are two extensions of GATT in WTO agreements governing the application of potential trade restrictive measures in the field of product standard though its application is limited.[12]

First, under paragraph 2.2 of the TBT Agreement, technical regulations could be used where necessary to fulfill legitimate environmental objectives. However, the phrase '*where necessary'* is not clear and may be understood differently by countries.

Second, the SPS Agreement allows WTO members to take productive measures in the field of a threat from a number of specific causes as long as certain conditions are met and the measure be based on a risk assessment. This still has limited application for scientific uncertainties regarding some environment measures. This was a key point in the 1998 *beef hormone dispute*, in which the US argued that an EU ban on imports of beef from cattle treated with growth hormones was WTO-incompatible. The Appellate Body found that the ban could be justified as long as the EU provided convincing scientific evidence of the danger to human health. When the European commission failed to supply this within the set period, the WTO authorized the US to levy tariffs on specific categories of EU exports.[13] This proved that the impact of the measures may be scientifically difficult to prove, the principle of non-discrimination still affects the environment.

[11] Id.p.32
[12] Supra note 10.p.3
[13] Ibid

b. Product and Production Methods (PPM)

The fundamental issue raised is whether products produced through environmentally harmful processes and production methods are considered "like" environmental friendly products by trade laws.

A PPM (product and production methods) refers to how a product is made. Many products go through a number of stages, and therefore a number of PPMs, before they are ready for use. For example, making paper requires trees to be grown and harvested, the wood to be processed, the pulp often to be bleached, and so on. The various processes will have different environmental impacts- biodiversity, forest-based streams and wildlife, human health from chemical pollution of waterways, or in terms of air pollution and energy use. Other papers may be made from post-consumer waste, a different process involving a different set of environmental impacts.[14] Therefore, each has to be regulated accordingly for environmental protection.

The way a product is produced is one of the three central questions for an environmental manager: how is it made, how is it used and how is it disposed of. So, from an environmental perspective, it makes sense to also be able to discriminate at the border between otherwise like goods that were produced in clean and dirty ways.[15]

GATT/WTO agreements treat products which have the same physical form as "like" products, even if they have been produced in different ways.[16] And it does not allow countries to discriminate among like products, whatever their environmental impact. As a result, "PPM" has become one of the most debated sets of letters in trade law history and for many people, this debate lies at the heart of the trade and environment relationship.[17]

The rules of the TBT agreements further do not allow countries to prohibit or restrict imports on the ground that the imported products had not been produced according to the PPM standard imposed on domestic industries. It makes a single exception to this rule: a country may prohibit imports of a product when the PPM used affects its characteristics or quality.[18]

[14] Ibid
[15] Ibid
[16] Ibid
[17] Supra note 10 p.3-4
[18] Alan Oxley, WTO and Environment, September,2001,p. 4-5

Despite WTO laws, pressure from environmental lobbyist are forcing governments to introduce laws which have an impact on trade because imports are then restricted on the ground that they have not been produced according to the methods of production imposed by these laws. Such methods include: management practices for fattening animals or for enhancing the milking capacities of cows and methods for killing animals.[19]

In practice allowing discrimination based on PPMs would present some difficulties for the trading system. It would give governments' greater opportunity in their struggle to protect their industries unfairly against foreign competition. Motivated not by environmental but by economic considerations, a government might conduct an inventory of environmentally preferable PPMs used by its domestic industries, and make new regulations penalizing those producers (that is, foreigners) not using them. This might result in environmental improvement, if only in certain industries and only if the inefficiencies thus created did not overwhelm the environmental benefits. But there are two other fears.[20]

The first is that the standards thus imposed might be environmentally inappropriate for some foreign competitors. For example, a country where water scarcity is a major issue might enact laws discriminating against products produced in ways that waste water is to be used recycled. But this would force exporters in water-rich countries to follow standards that are irrelevant to their local environmental conditions.[21]

The second is a related argument from developing countries that argue their social priorities differ from those of developed countries. They may, for example, be more concerned about clean water than about any other environmental issue. If so, it is unfair for developed countries to discriminate against their exports based on environmental issues that are not high on their agendas, forcing them to either adopt rich country environmental priorities or suffer a loss of wealth-creating exports. Many developing countries worry that if the WTO allows PPM-based discrimination on environmental grounds, it will also be forced to allow it on social grounds, such as human rights, labor standards and so on, increasing the scope of the threat to their exports.[22]

[19] These are reflections from the major cases raised before the Appellate Body at different times and is illustrated in the example herein.
[20] Supra not 10
[21] Ibid
[22] Ibid

Another part of this argument is that rich countries became wealthy by burning a lot of fossil fuels, cutting down most of their forests, destroying the ozone layer and otherwise cashing in on environmental resources. Now that the wealth they have gained allows them to maintain high environmental standards, it is hypocritical to forbid developing countries to follow the same path. At a minimum such demands should be accompanied by technical and financial assistance to help bring about environmental improvements, and other forms of capacity building.[23]

Finally, there is a sovereignty argument. If the environmental damage in question is purely local, then it is really the purview of the exporting country, not the importing government. This argument weakens if the environmental damage in question is not purely local-if it involves polluting shared waters or air streams, depleting populations of species that migrate across borders, or damaging the atmosphere. The need for international co-operation is obvious.[24]

MEAs[25]are one such form of cooperation, and are the most commonly recommended way to prevent PPM-based environment and trade conflicts. That is, countries should collectively agree to either harmonize standards or live with a negotiated menu of different national standards. Many such agreements are in force today. Such agreements, however, take many years to negotiate and even more to take full effect a problem, if the environmental issue in question is urgent. As well, some subject areas may not be ripe for agreement; countries often disagree on the need to regulate or the mechanisms for doing so. These factors may make the international option unattractive for addressing issues of great importance to some countries.

However, an importing country may not restrict imports solely because a product has been produced in a plant which does not meet its national standards for water or air pollution, or because the product has not been made according to the methods of production the country prescribes. Any such requirement would be tantamount to obliging an exporting country to adopt the PPM of the importing country, which the exporting country may have good reasons not to use because of its environmental and ecological conditions.

MAJOR CASES INVOLVING THE PPM

[23] Ibid
[24] Ibid and the chapeau clause
[25] Its main concept is vest discussed in the next paragraph

Major cases relating to PPMs are discussed in one way or another here and other sub sections. The need to raise these cases here is simply for reference.

The first of these cases is the US-Restriction in Imports of Tuna from Mexico (Tuna) which was the measure to save the incidental kills of dolphins while using 'purse seine' nets to catch tuna fish.[26] The next case is the US restriction on import of Tuna (Which is commonly called Tuna II)[27] which fact is identical to the first except that the measure is on a different country and it relates to jurisdiction question. Others include the US shrimp /turtle case and the US Gasoline cases.[28]

C. Enforcement of Multilateral Environmental Agreement (MEAs)

I. The Role of Multilateral Environmental Agreements

MEAs are agreements among governments that address shared environmental problems. They are voluntary commitments among sovereign nations that seek to address the effects and consequences of global and regional environmental degradation. They address environmental problems with trans-boundary effects, domestic environmental issues that raise jurisdictional concerns, and environmental risks to the global commons.[29]

In recent years the importance and scope of MEAs has increased dramatically as the international community struggles to address increasing global environmental problems such as the spread of toxic pollutants, biodiversity loss, and global warming. There are now over 200 MEAs to co-ordinate the activities of states on issues related to environmental protection in an effort to achieve sustainable development**.**

MEAs address a broad range of international environmental issues. Among other things, MEAs identify cooperative solutions, create mechanisms to equitably share benefits and burdens, and limit the use of unilateral measures. Generally, MEAs create a balance between

[26] Simeneh Kiros, The Trade Environment Debate: The Normative and Institutional Incongruity, Mizan Law Review vo1. 2, No.2, July 2008, p.325
[27] Id.,p.326
[28] Id .p.327-29
[29] See United Nation Environmental Program(UNEP)- Trade Related Measures and Multilateral Environmental Agreements,2004, p.5

the three pillars of sustainable development (environment, social and economic) by applying integrated approaches to achieve their objectives.[30]

MEAs also serve a number of other functions. They create a forum for measuring the state of the environment and the issues affecting it. They establish frameworks for negotiating new obligations through protocols and decisions for involved parties. They provide guidance and assistance for implementation. And they create mechanisms to enhance compliance and resolve disputes.

II. MEAs and Its Enforcement Tools

Central to many of these MEAs are trade or trade related measures. Trade measures are an essential policy instrument in the toolbox of measures available to environmental negotiators; they are now used in over 20 MEAs.[31]

Trade measures in MEAs serve a number of purposes, including the regulation of trade in environmentally risky products such as hazardous waste, and genetically modified organisms, discouraging unsustainable exploitation of natural resources such as endangered species, and enhancing compliance with MEAs rules. MEAs include or require a variety of other measures too that might affect trade and that may be covered by trade rules. These trade related measures include, among other things, national policies and measures that affect trade or market access, obligations to encourage technology transfer, and measures related to risk assessment or prior informed consent.[32]

Trade restrictions required by MEAs have four major objectives:[33]

- To restrict markets for environmentally hazardous products or goods produced unsustainable.
- To increase the coverage of the agreements provisions by encouraging governments to join and/or comply with the MEAs.

[30] WWT-CIEL Discussion Paper, Legal and Practical Approaches to MEA–WTO linkages towards coherent environmental and economic government, 2001, P.7
[31] Ibid
[32] Supra note 30, p. 7-8
[33] Supra note 10, p. 4-5

- To prevent free riding by encouraging governments to join and/or comply with the MEAs.

- To insure the MEAs effectiveness by preventing leakage - the situation where non-participants increase their emission, or other unsustainable behavior, as a result of the control measures taken by signatories.

And the legal and practical challenges to these objectives are discussed below.

III. Legal and Practical Challenges at the MEAs-WTO Interface

The rules established by MEAs and the WTO intersect in a range of areas.[34] For example, WTO rules on trade in goods may cover the trans-boundary movement of genetically modified organisms, endangered species, hazardous waste, or persistent organic pollutants. WTO rule on intellectual property can affect biodiversity. WTO rules to liberalize services, such as transportation, energy and other highly energy consuming services could affect climate change. Thus, the relationship between MEAs and WTO gives rise to a range of legal and practical challenges.

Two issues in particular have been the subjects of longstanding discussion. The first is whether trade measures taken pursuant to MEAs are compatible with the WTO, for they take the upper hand in WTO governance.

The second is the issue of measures regarding non-parties to MEA, which are designed to prevent benefits flowing from MEAs to non-parties that have incurred with no corresponding obligation.[35]

a. The WTO-Compatibility of Trade Measures in MEAs

Despite the central role of trade measures in many effective MEAs,[36] the relationship between trade measures in MEAs and WTO rules remains unclear.[37] The potential for conflict between WTO obligation and the use of trade measures in MEAs was explicitly

[34] Robyn Eckersley, the Big Chill: The WTO and Multilateral Environmental Agreements, http://muse.jhu.edu, Massachusetts Institute of Technology, 2004, p.25-29
[35] Id, p.27
[36] Supra note 30, p.10
[37] Ibid and the Decision on Trade and Environment, adopted by ministers at the meeting of the trade negotiations committee in Marrakech on 14 April, 1994

acknowledged by WTO members in 1994.[38] At the end of the Uruguay Round the WTO committee on Trade and Environmental (CTE) was established with a mandate to examine "*the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreement*." The mandate of the committee also includes making "*appropriate recommendations on whether any modifications of the provision of the multilateral trading system are required*." But over the year's operation, the CTE has made little progress regarding ways to strengthen and clarify the relationship between MEAs and the WTO.[39] Despite proposals by a number of WTO members to amend WTO agreements, the CTE has offered no recommendations to modify the rules of the trading system or other measures to address the tensions between the WTO and the use of trade measures in MEAs.[40] As a result, a number of WTO agreements continue to raise questions about the use of trade measures in MEAs. Until greater legal certainty is achieved, the use of trade and trade-related measures in MEAs will likely remain underdeveloped.[41] And MEAs that include trade measures will be inadequately implemented. Thus, both the laws and its manner of application therein affect the environment too much.

b. MEA Measures Regarding Non-Parties

Trade measures in multilateral trading system exist to influence the behavior of their parties. However, trade related measures in MEAs are often designed to influence the behavior of non-parties.[42] They provide a means to compensate against any competitive advantage gained by non-parties at the expense of parties taking on environmental obligation. Trade measures create incentives for non-parties to join MEAs and eliminate leakage by reducing the extent to which non-parties gain a competitive advantage by not joining. Such measures are often essential for maintaining the integrity of the MEA. However, the extent to which these measures are consistent with WTO rules is unclear, even in those cases where membership in an MEA exceeds membership in the WTO.[43]

[38] Supra note 30, p.10
[39] Ibid
[40] Ibid
[41] Supra note 30, p.10
[42] Ibid
[43] Ibid

The potential for a WTO dispute between WTO Members, one of which is a non-party to the MEA, has, arguably, increased. This argument is based on the decisions by some powerful states not to join key conventions such as the convention on Biological Diversity, the Bio safety protocol, the UN convention on the Law of the Sea, or the Kyoto protocol. While the WTO has stated a preference for multilateral solutions to environmental problems, it remains unclear whether trade measures involving non-parties to MEA are consistent with the WTO.[44]

c. Applying the Precautionary Principle Under MEAs

In addition to the above two issues, there are a number of others that may affect the environment. One is the precautionary principle. The precautionary principle is a cornerstone of many MEAs and national environmental policy. Nevertheless, it is not well regarded by the trade community. Indeed, there is a debate in some segments of the trade community about the role of, and limit to, the precautionary principle and how "science-based" WTO rules might be used to ensure that it does not inhibit trade[45]. Thus in as much as there is no scientific certainty, trade measures are not going to be applied for it affects trade. The *beef hormone case* is one of such an example in this area.

EXCEPTIONS TO MULTILATERAL TRADING RULES

INTRODUCTION

In the previous section, an attempt was made to explore core trade principles affecting the environment. It began with identifying fundamental principles of international trade laws and discussed in detail how each may affect the environment and environmental governance.

In this section discussion will be made on basic exceptions to the above multilateral trading rules. They consist of the general exceptions to the principle of GATT (basically Art XX (b, g)), the chapeau, and others. These exceptions are often referred to as environment, health and safety exceptions in WTO free trade governance.

[44] Ibid

[45] Ibid and this part of the paper has also been discussed under the exception section

This section briefly addresses historic development of exceptions GATT Art XX (b and g) and most notable cases on the area and the chapeau. It gives an over view of the exceptions and its regulatory impact on the environment.

BRIEF HISTORY

The historical development of GATT/WTO is a trade liberalization effort to the benefit of developed countries. Since GATT establishment, it has included some environment exceptions though the content of these exceptions[46] were not understood for a long time. While for instance the provisions of GATT Art XX were there since 1948, these exceptions are invoked only in early 1990s.[47]

These provisions are basically general exceptions, deviations from the basic principles of international trade.[48] For these exceptions to come to existence and serve as regulatory framework within WTO, various ups and downs have been experienced. The first debate as to whether environmental exceptions should be included traces back to 1920s during the preparatory period for the Abolition of Import and Export Prohibitions and Restrictions. That convention contained an exception for trade restrictions imposed for the protection of public health and the protection of animals and plants against disease and extinction.[49] A generation later, the debate was rekindled in the drafting of the charter of the International Trade Organization and GATT.[50]

The debate on trade and environment was revived in 1970s and then became quiescent again. By the late 1980s, the GATT had developed an inward-looking personality and began to be perceived as being unsympathetic to the challenges of protecting the environment.[51]

A new era in the trade environment debate began in 1996-98. This era was fostered by the enlightened Appellate Body jurisprudence and boosted by the attention given to the

[46] Supra note 26 .p.320 and sup era note 30 p.11
[47] Ibid
[48] Supra note 26.p.321
[49] Steve Char Ovitz, The WTO's Environmental Progress, Journal of international Economics law 10(3),685-706 august 2007,p.1
[50] Ibid
[51] Ibid

environment by trade negotiations in the waning days of the Uruguay Round.[52] Recently greening efforts has been made and environment has become mainstream issue.

The slow progress of these provisions is not without effect to the environment.

THE GENERAL EXCEPTIONS TO THE PRINCIPLE OF GATT (ART. XX, B & G)

GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules; a situation where the above core multilateral trading principles could be revoked. As mentioned above, the content of these provisions were not understood for long time and has largely affected the environment. Currently, however, WTO trade-environment jurisprudence has developed well.[53]

Two exceptions of the GATT are of particular relevance to the protection of the environment: Paragraphs (b) and (g) of Article XX. The legal text of the provisions of GATT Article XX reads as "*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 (the GATT) 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 ……..,,[54]

As could be referred from the above provisions, GATT Article XX on General Exceptions consists of two cumulative requirements: requirements under Art. XX sub Article (b, or g) and the chapeau.

For a GATT environmental measure to be justified under Article XX a member must perform a two-tier analysis proving: first that its measures fall under at least one of the exceptions (e.g. Paragraphs (b) or (g) and then that the measure satisfies the requirements of the

[52] Ibid
[53] Supra note 26 p.321
[54] GATT, the legal text, http:// www.wto.org/english/docs-e/gatt47-e-pdf-sujin.com. np last accessed on 11/08/2009, at 10.07

introductory paragraph (the "chapeau" of Article XX), i.e., that is not applied in a manner which would constitute "*a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*" and is not " *disguised restriction on international trade*".[55]

The two requirements are cumulative, in the sense that they shall be met for the member's environmental measure deserve justifiability.

ENVIRONMENTAL POLICIES COVERED BY ARTICLE XX

Although exceptions remained unrecognized for long time, there have been a number of occasions where WTO members' autonomy to determine their own environmental objective, have been re-affirmed by the Appellate Body decisions.[56] For example, the US Gasoline and Brazil retreated tires and a number of policies fall within the realm of these two exceptions: policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing health risks posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tires (under Article XX (b)); and policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air (under Article XX (g)). Further, interestingly, the phrase "exhaustible natural resources" under Article xx (g) has been interpreted broadly to include not only "mineral" or "non – living" resources but also living species which may be susceptible to depletion, such as sea turtles.[57]

Besides in the US Shrimp case,[58] the Appellate Body accepted as policy covered by Article XX (g) one that applied not only to turtles within the United States waters but also those living beyond its national boundaries. The Appellate Body found that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States of Article XX (g).

Although the WTO trade-environment jurisprudence has developed well and helped for the establishment of these environmental policies still its application is very limited and has a bad effect on environmental protection.

[55] WTO-Trade and Environment, http://www.wto.org/english/tratop-e/issue3-e.htmhome> trade topics>trade and environment> the rules, 9/8/2008, last accessed on 29/09/2009 at 2 pm.

[56] These case are discussed below under the section major cases that involve the exception article XX

[57] These environmental policies are all derived from each of the corresponding cases that has come to the Appellate Dispute Resolution Body and got a decision

[58] Report of the panel U.S import prohibition of certain shrimp and shrimp products (15 may 1998) Para 2.3 and http://www.wto.org/english /tratop-e/envir-e/edis08-e.htm

INTERFACE BETWEEN MEANS AND ENVIRONMENTAL POLICY OBJECTIVES

Member states of WTO can exceptionally restrict trade for safeguarding their domestic environment, and for trade related environmental measure to be eligible under the exception XX (b and g), a member has to establish a connection between its stated environmental policy goal and the measure at issue. The measure specifically needs to be either:[59]

- Necessary for the protection of human, animal or plant life or health (paragraph (b) or,
- Relating to the conservation of exhaustible natural resources (paragraph (g)).

In determining whether a measure is "*necessary*" for the first requirement; to protect human animal or plant life or health under Article XX (b), the Appellate Body used to weigh and balance series of factors including the contribution made by the environment measure to the policy objective, the importance of the common intersect or values protected by the measure and the impact of the measure on international trade.[60]

If the analysis yield to a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

But these requirements are of broad and complex and may bring about enforcement hurdles in achieving environmental goals. Member states might be faced with difficulties in defining which measures are "*necessary*" for the protection of human, animal or plant life or health and which measures are "*relating to*" the conservation of exhaustible natural resources for the terms are vague. There are instances in which production methods (rather than products) cause environmental problems and a situation where product standards may not be applicable all the time for environmental purpose, it is tedious to apply these criteria. Finally, the criteria that the measure shall be 'less trade restrictive' may take precedence to environmental exceptions.

[59] Supra note 55
[60] Ibid

The following are major cases that illustrate these challenges. They will also show how GATT Art. XX (b and g) has been applied in relation to trade-environment jurisprudence.

MAJOR CASES INVOLVING GATT ART, XX (B, G)

Brazil – Retreated Tyres case [61]

In this case, the Appellate Body found that the import ban on retreated tires was "apt to produce a material contribution to the achievement of its objectives" i.e. the reduction in waste tyres volumes. The proposed alternatives which were remedial in nature were not found real alternatives to the import ban which could prevent the accumulation of tires. But, more concern has been employed to less trade restrictive measures which can affect the environment.

It further recognized that certain complex environmental problems may be tackled only with a comprehensive policy comprising a multitude of interacting measures and further pointed out the results obtained from certain actions can only be evaluated with the benefit of time.

EC – Asbestos case[62]

In this case the Appellate Body, after considering a series of factors, found that there was no reasonably available alternative to a trade prohibition and the value pursued by the measure was found to be "*both vital and important in the highest degree*" designed to achieve the level of health protection chosen by France. The Appellate Body noted that the more vital the common interests pursued, the easier it was to accept as necessary measures designed to achieve those ends. Thus, for a certain measure to be considered necessary, the common interest shall be of the highest importance. Nevertheless, a measure which is less trade restrictive may be well deliberate unnecessary for it isn't important at the higher degree. For the second requirement (paragraph g), a substantial relationship between the measure and conservation of exhaustible natural resources needs to be established. In the words of the Appellate Body, a member has to establish that "*means are reasonably related to the ends.*" The chosen measure shall be reasonably related to the stated policy goal of exhaustible natural resources. For the measure to be justified under Article XX (g) it must be applied in conjunction with restrictions on domestic production or consumption".

[61] Brazil retreated case http://www.wto org/english/tratop-e/dispu-e/ds332-e.htm,9/08/2009 at 5.00 pm
[62] Ibid

The US – Gasoline Case[63]

In the US – Gasoline case, the US had adopted a measure regulating the composition and emission effects of gasoline to reduce air pollution in the United States- *Gasoline rule*. The quantity baseline established was subject of dispute for its presumed discrimination between domestic and importers' refiners. The Appellate Body found that the chosen measure was "*primarily aimed at*" the policy goal of conservation of clean air in US and thus fell within the scope of paragraph (g) of Article XX.

The US Shrimp case[64]

In this case, the Appellate Body considered that the general structure of the measure in question was " *fairly narrowly focused*" and that it was not a blanket prohibition of the importation of shrimp imposed without regard to the consequences to sea turtles; thus it concluded that the measure was "relating to" the conservation of an exhaustible natural resources within the meaning of Article XX(g) and the measure had been made effective in conjunction with the restrictions on domestic harvesting of shrimp as required by Article XX(g).

THE CHAPEAU AND MANNER OF APPLICATION OF TRADE RELATED ENVIRONMENTAL MEASURES

The introductory clause of Article XX is commonly referred as the chapeau and it fundamentally emphasizes on the manner of application of trade related environmental measures. It specifically points out that the application of trade related environmental measures must not constitute a "*means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade*." Therefore, the measure should not constitute an abuse or misuse of the provisional justification made available under Article XX exceptions and is required to be applied in good faith.[65] It is similar to the principle of non – discrimination in prohibiting trade related environmental measures.

The Appellate Body decisions in Brazil Retreated tyres case reminds that the chapeau serves to ensure that members' right to avail themselves to exceptions is exercised in good faith not

[63] The U.S gasoline case http://www.wto.org/english/tratop-e/envir-e/edis/07-e.htm.12/09/2009 at2.00 pm
[64] Supra note 58
[65] The chapeau, http://www.wto.org/english/docs-e/legal/-e/gatt-47-02-e.htm, Article XX

as a means to circumvent one members obligations towards other WTO members. It should maintain balance between the right of a member to invoke an exception and the rights of other member under GATT highlighting that the measure is applied in accordance with the chapeau. [66]

Experience in WTO jurisprudence demonstrated that measures have been applied in accordance with the chapeau clause. Some of most important cases showing whether measures have been applied in accordance with the chapeau include: *the US – Gasoline decisions and the US shrimp case.*

Both the US-Gasoline and US-shrimp case decisions show that for the measure to be in line with the chapeau, it has to have the role in international cooperation and coordination,[67] required to be the flexible enough to take into account different situations in different countries[68] and may not result in protectionism.[69]

These requirements, however, might make the application of the exceptions very limited for they are broad and complex.

CONCLUDING OBSERVATIONS

International trade laws have great deal of impacts on the environment. They affect environmental laws and processes and cause impediments to many of environmental protection efforts. They produce ambivalences in much of their crossroad areas which in effect affect environmental agreements. They have overriding effect on the environment exceptions in the WTO trade governance. They are most influential on the decision making bodies to the extent that the decisions affect the environment. Major case laws on trade-environment issues reflect that these responsible organs are more concerned to trade than environment in the administration of justice- they have special interest to trade laws and issues.

[66] Supra note 55

[67] U.S shrimp Art21.5 and in the US-Gasoline decision, the Appellate Body considered that US hadn't sufficiently explored the possibility of entering in to co-operative arrangements with affected countries to mitigate the administrative problems raised by the US in the justification of the discriminatory treatment

[68] In the US shrimp case the Appellate Body was of the view that rigidity and inflexibility in the application of measures constitute unjustifiable discrimination.

[69] US shrimp case Art 21.5, The fact that the revised measures allowed exporting countries to apply programs not based on the mandatory use of Turtle Excluder Device(TED) and offered technical assistance to develop the use of TEDs showed that the measure was not applied so as to constitute a disguised restriction on international trade

And more specifically while regulating international trade relations: First, they affect the environment prohibiting simply differential in treatments between 'like products' with no regard to their legal and practical challenge on the environment. The big concern given for is whether the products are alike and treatment by member states is accordingly. Second, they stand against trade restrictive measures except on the otherwise expressly specified areas and appear important challenges at the enforcement of multilateral environmental agreements. They often conflict in the area of product standards and product and production methods (PPM). The way GATT/WTO agreements treat products is against discrimination at the border between otherwise like goods that were produced in clean and dirty ways and there is no law on the area that restrict imports on the ground that they haven't been produced according to the methods of production. Thus, for the set standards are practically trade oriented, truly speaking, their effect on the environment is getting worse.

Third, it may be for the reason that WTO is strong and dominantly a trade organization lobbying other trade-environment sub organs or for the reason that these sub organs are more trade oriented too, important decisions on the area (Case laws) reflect the overriding effect of trade laws on the environment exceptions/ laws. And more important on the environment exceptions is that their application is very limited for the requirements in the chapeau are broad and complex and the terms are vague.

And therefore, it is my suggestion that we can't avoid these bad impacts of trade laws on the environment unless there shall be both normative as well as institutional amendment/ changes. Environment issues should be treated separate and environmental laws and institutions should take hold of the upper hand position over trade laws.