

**TRADE MEASURES FOR ENVIRONMENTAL PROTECTION
IN THE WORLD TRADE ORGANIZATION (WTO): IMPLICATIONS FOR
DEVELOPING COUNTRIES**

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**TRADE MEASURES FOR ENVIRONMENTAL PROTECTION
IN THE WORLD TRADE ORGANIZATION (WTO): IMPLICATIONS FOR
DEVELOPING COUNTRIES**

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Kolej Undang-Undang, Kerajaan dan Pengajian Antarabangsa
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ABSTRAK

Kajian ini meneliti sejauh mana peraturan Pertubuhan Perdagangan Dunia (WTO) boleh memenuhi objektif perlindungan persekitaran menerusi penguatkuasaan tindakan perdagangan sehala, khususnya dengan merujuk negara sedang membangun. Potensi konflik antara prinsip substantif WTO dengan tindakan persekitaran yang berkait dengan perdagangan telah mengakibatkan berlakunya perselisihan yang serius antara negara membangun dengan negara sedang membangun semenjak tiga dekad terakhir ini. Meskipun hubungan antara peraturan WTO dengan tindakan persekitaran belum lagi dimantapkan dengan jelas, namun aplikasi Artikel XX(b) dan (g) daripada GATT telah menyediakan perkaitan antara objektif perdagangan dengan objektif persekitaran. Kajian ini mengguna pakai teknik pentafsiran dan analisis untuk menganalisis data. Kajian ini bertujuan menganalisis secara terperinci pendekatan kehakiman dan perundangan berhubung kebolehzinan dan kesahan tindakan perdagangan sehala yang didorong oleh persekitaran. Pendekatan kehakiman WTO meneroka perkembangan jurisprudens persekitaran yang dibentuk berdasarkan keputusan Lembaga Panel dan Rayuan. WTO mengusulkan Perjanjian Persekitaran Berbilang Pihak (MEAs) sebagai jalan penyelesaian yang lebih baik untuk menangani masalah persekitaran rentas sempadan. Kajian ini turut memberi tumpuan terhadap pendekatan perundangan WTO yang merangkumi program kerja Jawatankuasa Perdagangan dan Persekitaran (CTE) berkenaan perhubungan WTO-MEA. Kajian ini mencadangkan tatacara rundingan secara sukarela bagi menjelaskan tindakan perdagangan berhubung MEA dengan menggunakan prinsip asal yang dikemukakan oleh negara New Zealand dalam perundingan di Doha. Kajian ini dirumuskan dengan memberi penekanan terhadap perlunya tindakan positif yang lebih bersepadu dan inovatif untuk negara membangun digiatkan bagi mengimbangi implikasi negatif daripada tindakan perdagangan sehala.

Kata kunci: Pertubuhan Perdagangan Dunia, Langkah Perdagangan, Negara-negara Membangun, Perjanjian alam sekitar pelbagai hala, Pusingan Doha pembangunan.

ABSTRACT

This study examines the extent to which rules of World Trade Organization (WTO) can serve the objectives of environmental protection through the enforcement of unilateral trade measures particularly with reference to developing countries. The potential conflicts between the substantive principles of WTO and trade-related environmental measures have resulted in serious disagreement between developed and developing countries since last three decades. Although the relationship between WTO rules and environmental measures has not been clearly established, however, the applicability of Article XX (b) and (g) of GATT provides a connection between trade and environmental objectives. This study adopts interpretative and analytical techniques for data analysis. The purpose of this study was to undertake detailed analyses of WTO's judicial and legislative approaches with regard to permissibility and legality of environmentally motivated unilateral trade measures. Judicial approach of WTO explores the development of environmental jurisprudence established by the Panels and Appellate Body decisions. The Multilateral Environmental Agreements (MEAs) have been recommended by the WTO as a better solution to transboundary environmental problems. This study also focuses on the legislative approach of WTO, comprising of work programme of Committee on Trade and Environment (CTE) regarding WTO- MEA relationship. This study proposes a voluntary consultation procedure for clarification of MEA-related trade measures based upon the principles originally presented by New Zealand during Doha negotiations. The study concludes by emphasizing upon the need for more integrated and innovative positive measures for developing countries to offset the negative implications of unilateral trade measures.

Keywords: World Trade Organization, Trade Measures, Developing Countries, Multilateral Environmental Agreements, Doha Development Round.

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LIST OF ABBREVIATIONS

Art.	Article
AB	Appellate Body
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of Parties
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
EFTA	European Free Trade Association
EMIT	Environmental Measures and International Trade
GATT	General Agreement on Tariff and Trade
IISD	International Institute on Sustainable Development
LEDCs	Less Economically Developed Countries
MEAs	Multilateral Environmental Agreements
OECD	Organization for Economic Cooperation and Development
SPS	Sanitary and Phyto-Sanitary Measures
STO	Specific Trade Obligation
TBT	Technical Barriers to Trade
TEDs	Turtle Exclusion Devices
UNEP	United Nations Environment Programme
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Committee on Trade and Development
WTO	World Trade Organization

LIST OF RELEVANT GATT/WTO CASES

1. Brazil – Retreaded Tyres case (3 December, 2007. Appellate Body report adopted)
2. EC – Asbestos (Article 21.5) (5 April, 2001. Appellate Body report adopted)
3. Thailand – Cigarettes (7 November, 1990. Panel Report adopted)
4. US – Reformulated Gasoline (20 May, 1996. Appellate Body report adopted)
5. US – Shrimp/Turtle I (6 November, 1998. Appellate Body report adopted)
6. US – Shrimp/Turtle II (Article 21.5) (21 November, 2001. Appellate Body report adopted)
7. US – Tuna/Dolphin I (3 September, 1991. Panel Report not adopted)
8. US – Tuna/Dolphin II (16 June, 1994. Panel Report not adopted)

CHAPTER 1

INTRODUCTION

1.1 Background of the Study

Today most of the global environmental degradation is considered to be the direct consequence of increased scale of worldwide economic activity largely triggered by acceleration of International trade. Environment, serving as the prime resource for major industrial activities became its central target resulting in greater consumption, exploitation and contamination of natural resources. As a result, the concerns regarding resource depletion and environmental degradation have constantly been growing at the national, regional and international level, aiming to achieve slow paced resource exploitation and implementation of stringent environmental regulations.¹

The Millennium Ecosystem Assessment (2005) found that almost 60 percent of the world's ecosystem services are being degraded or exploited. Global carbon dioxide emissions have quadrupled and we are confronted with catastrophic era of climate change. Half of world's fish stocks are being fished at their biological limits and another quarter are beyond that point, or depleted. If the present trend is to prevail, three and a half billion people will have to face "water stress" having less than 1,000 liters of water per person per year. Every day almost 6,000 people particularly children lose their lives because of diseases caused by lack of access to clean water or sanitation.

¹ Kym Anderson, "Environmental Standards and International Trade," (Paper presented at the Eighth Annual Conference on Development Economics, World Bank, Washington, D.C., April, 1996) 317.

According to United Nations *Global Environment Outlook 2000 (GEO 2000)*², oceans and atmosphere have been turned into garbage dumps due to industrial wastes and contamination. Problems relating to water quality, quantity and distribution are constantly rising. One fifth of the total world's population is without the access of safe drinking water. The cases of skin cancers related to the ongoing depletion of protective ozone layer are alarmingly high. The reported cases of severe poisoning reach up to five million per year resulting from the excessive use of pesticides alone. One third of world's coastal areas are in a state of great peril particularly because of infrastructural developments (due to land base pollution sources).

In order to combat this dilemma of environmental degradation, the evolution of Multilateral Environmental Agreements (MEAs) is considered to be the greatest milestone of the past few decades with regard to international environmental law. The conclusion of MEAs signifies a 'multilateral' approach that is generally regarded as more efficient and effective than measures taken by states unilaterally, or efforts made by regional arrangements, like Association of South East Asian Nations (ASEAN), North American Free Trade Area (NAFTA) and European Community (EC).³ Principle 12 of 1992 Rio Declaration⁴ also endorses the preference for a multilateral approach to address the environmental problems of a global nature more appropriately.

² United Nations Environment Programme, <<http://www.unep.org/geo/geo2000.asp>> (accessed January 28, 2014)

³ Massimiliano Montini, "Improving Compliance with Multilateral Environmental Agreements through Positive Measures: The Case of the Kyoto Protocol on Climate Change," in *Economic Globalization and Compliance with International Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 157.

⁴ Principle 12 of the 1992 Rio Declaration reads as follows: 'States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries to better address the problems of environmental degradation...environmental

Currently the number of multilateral treaties (MEAs) aimed at environmental protection has reached up to more than two hundred.⁵ Multilateral treaties might be categorized as regional (between all states in particular geographic region) or global (between a large number of states situated all over the world).⁶ Resultantly, the international structure of environmental law appears to be extremely diversified and dynamic covering a wide range of issues, from toxic substances to endangered species, from air pollution to bio diversity and ozone depletion to climate change.⁷ But, most recently, the focus has been shifted from the creation of global frameworks dealing with diverse environmental issues to the compliance with those frameworks. Broadly speaking the development of environmental law can be discriminated into two main regimes, the regime of frameworks and the regime of compliance.⁸

According to Drumble, this process of legalization of international environmental policy (through environmental treaties and agreements) has not automatically resulted into any substantial improvements in overall environment. So presently, the greatest challenge most of international environmental regimes are confronted with, relates to the issues of enforcement and compliance.⁹

measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.’

⁵ Bharat H. Desai, *Multilateral Environmental Agreements; Legal Status of the Secretariats* (Cambridge University Press, 2010), 23.

⁶ United Nations Environment Programme, *Environment and Trade: A Handbook*, (International Institute for Sustainable Development, 2005), 14.

⁷ Alexandre Timoshenko, “UNEP Initiatives to Promote Compliance with Multilateral Environmental Agreements,” in *Economic Globalization and Compliance with International Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 129.

⁸ Micheal Ewing-chow and Darryl Soh, “Pain, Gain, or Shame: The Evolution of Environmental Law and the Role of Multinational Corporations,” *Indiana Journal of Global Legal Studies* No. 1, 16 (2009): 196

⁹ Mark A. Drumble, “Actors and Law Making in International Environmental Law,” in *Research Handbook on International Environmental Law*, eds. Malgosia Fitzmaurice and David M Ong, (Edward Elgar Publishing, 2010), 15.

The shortcomings in implementation of and compliance with MEAs prompt a search for alternative ways of ensuring environmental protection. The role of environmental trade measures, accepted by governments or MEAs, comes into play as an efficient means to ensure the enforcement of environmental standards. But, simultaneously these measures can be treated as being GATT-inconsistent when coming in clash with other GATT provisions. So the exceptions in Article XX Clause (b) and (g) of the GATT 1994 are of paramount significance in order to protect these trade measures from potential conflicts with substantive GATT provisions in prescribed circumstances in order to establish their legitimacy.¹⁰ The text of Article XX (b) and (g) of GATT 1994¹¹ reads as such:

“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 Member 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 environmental groups, specifically from industrial countries have emphasized upon the use and effectiveness of trade measures (trade restrictions) that their countries can employ as policy instruments for environmental objectives. For environmentalists the trade policy has always been attractive and useful because of two main reasons.

¹⁰ Eun Sup Lee, “Legitimation of Trade-Related Environmental Measures under the WTO,” *The Berkeley Electronic Press* (2006) <<http://law.bepress.com/expresso/eps/1788>> (accessed January 28, 2014).

¹¹ *The General Agreement on Tariffs and Trade*, 15 April 1994, 1867 U.N.T.S. 187; 33 *International Legal Materials* 1153 (Entered into force 1 January 1995) at Art. XX (GATT 1994).

In first place it can prove to be helpful in raising environmental standards both at home and abroad. For example with the imposition of import restrictions of certain products from the countries having lower environmental standards, the opposition of local firms to maintain higher standards at home country can substantially be reduced. Secondly, trade measures can be effectively used as “sticks” or “carrots” having immediate impact. Threats of trade sanctions alone can force a country to sign an international environmental agreement and follow its rules.¹²

On the contrary, unilateral use of trade measures has been characterized as “green protectionism” and “eco-imperialism” by supporters of free trade, particularly the developing countries. They claim to be subjected by strong countries for the imposition of their values on weaker countries. They have been concerned that imposition of trade measures, for not complying with the stringent environmental regulations of the developed countries, would badly hamper their market access which can also be used as an excuse for industrialized countries to protect their national industries and job markets.¹³

The problems of the developing countries are not without strong foundations. Some of which are worth mentioning according to the studies undertaken by United Nations Committee for Trade and Development (UNCTAD) and others¹⁴ – firstly, the

¹² Anderson, 319.

¹³ Gudrun Zegal, “The WTO and Trade Related Human Rights Measures: Trade Sanctions vs. Trade Incentives,” (Hong Kong Trade and Development Symposium organized by ICTSD, Hong Kong, December 2005), 120.

¹⁴ Studies have been carried out by OECD, Joint Working Party on Trade and Environment, “Development Dimensions of Trade and Environment, Case Studies,” (2001).

extension of stringent and complex environmental standardization policies to several new sectors by developed countries has rendered very high level of competition in exports for the developing countries.¹⁵ While these stringent environmental standards are supported by heavy subsidies in developed economies for their industry compliance, it is the absence of the same support system by the developing economies that these standards might have adverse trade effects upon developing countries.

Secondly, due to dominant reliance on standardized mass production at lower costs, developing countries find it difficult to introduce additional costs for environmental improvement which significantly eliminate their competitive edge in the world market. Thirdly, because of the potential differences between the pattern and phases of industrialization, developing countries and particularly the Less Economically Developed Countries (LEDCs), face severe competitive disadvantage in fulfilling structurally advanced environmental requirements from developed countries¹⁶. So, free traders view these restrictions on free access to international trade not only detrimental to the economic progress but also for the overall welfare of developing countries.

Another potential concern has been raised by developing countries about the nature of particular trade measures and the manner of their administration as their application has been held to be discriminatory in certain GATT/WTO disputes. In US – Reformulated Gasoline (1996) and US – Shrimp Products (1998), it was established that

¹⁵ UN Conference on Trade and Development, “Environmental Requirements and International Trade,” (Report presented at Trade and Development Board Expert Meeting, Geneva, October 2002) Report no. TD/B/COM.1/EM.19/2 http://www.unctad.org/trade_env/ (accessed January 28, 2014), 7-9.

¹⁶ UN Conference on Trade and Development, 6.

some environmental measures had been applied in a manner contrary and inconsistent with the chapeau (the introductory clause) of Article XX GATT 1994.¹⁷

According to this background knowledge, concerns regarding permissibility and legality of trade measures for environmental protection between the developed and developing countries are conflicting. Hence, it is quite interesting to study the characteristics, trends, dimensions and the probable implications of the use of unilateral trade measures with the perspective of developing countries in the World Trade Organization (WTO).

1.2 Problem Statement

The first and currently the greatest problem emerging from the previous discussion has been the one, confronted by most of the existing MEAs. This problem is related to the issues of effective implementation and enforcement of MEAs which resulted into unsatisfactory compliance with a number of MEAs and the growing multiplicity of environmental agreements.¹⁸ It has also been amplified by apparent incoherence between MEAs dealing with the similar subject matter.¹⁹ The lack of compatibility and mutual support between MEAs and international trade agreements has also become an issue of increasing significance. Further, the mutual collaboration between secretariats of MEAs has become more of ceremonial than substantive character.

¹⁷ GATT/WTO dispute settlement practice relating to GATT Article XX, (b), (d) and (g), Note by WTO Secretariat, doc no. WT/CTE/W/203, 8 March 2002.

¹⁸ Timoshenko, 128.

¹⁹ Reference has been made to the MEAs dealing with the same subject matter e.g. biodiversity-related MEAs, agreements on chemicals and wastes, ozone and climate protection regimes.

Although, increased focus on qualitative and effective improvement in implementation of MEAs has led to the elaboration of various compliance and enforcement procedures including conventional diplomatic means, facilitative means including economic stimulus or the threat or use of sanctioning tools in case of non-compliance of a party with its international commitments.²⁰ The MEAs, however, potentially lack a strong Dispute Settlement System (i.e. DSB of WTO) having compulsive sanctioning authority²¹ and except the International Tribunal for the Law of the Seas (ITLOS), there is no other global environmental regime of the similar level.²² Thus, there are still various ongoing and newly emerging challenges which the parties to MEAs need to resolve to meet their respective objectives successfully.

Secondly, the problem with the global environmental regime is that it lacks an internationally agreed legal framework on environmental issues, like the World Trade Organization (WTO), which is recognized to be the most powerful and effective system regarding its compulsive enforcement mechanism i.e. use of trade sanctions²³. Despite the flagship role of UNEP in assessing the status of global environment, it is still considered to be weak and toothless forum by many critics, because of its lack of sufficient institutional mandate to enforce agreements just like International Labor Organization

²⁰ Timoshenko, 125.

²¹ The question of sanctions in MEAs is complex and often misunderstood. Trade measures incorporated in the MEAs are mainly used as tools for achieving the purpose of MEA and are potentially different from trade sanctions as used in WTO.

²² Steve Charnovitz, "WTO Dispute Settlement as a Model for International Governance," in *Economic Globalization and Compliance with International Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 248, 252.

²³ Charnovitz, 252-3.

(ILO), International Standards Organization (ISO), World Intellectual Property Organization (WIPO) and other standard setting international organizations.²⁴

Thirdly, the developing countries have exhibited their serious concerns on the imposition of environmentally motivated trade measures²⁵ which would potentially hamper their market access and could also be used as an excuse for industrialized countries to protect their domestic industries and job markets. Due to stringent and increasing environmental regulations, some of the common problems for many developing countries include: tough and high level of competition²⁶ in exports among them, introduction of additional production cost for environmental improvements potentially eliminates their competitive advantage and differentiation in the phases of industrialization causes severe competitive disadvantage for developing countries and particularly for LEDSc.²⁷

Fourthly, the developing countries perceive trade measures taken for environmental protection as “eco-imperialism” and a violation of their sovereignty and thus challenge their legalities under WTO rules. In this regard exceptional clauses under Article XX (b) and (g) of the GATT 1994 hold very significant position, through which these environmental trade measures are justified. However, combining this issue of

²⁴ Geir Ulfstein, “International Framework for Environmental Decision-making,” in *Research Handbook on International Environmental Law*, eds. Malgosia Fitzmaurice and David M. Ong (Edward Elgar Publishing, 2010),

²⁵ These environmentally motivated trade measures are used in case of non-compliance with the stringent and complex environmental product requirements and regulations of the developed countries.

²⁶ Environmental regulations are increasingly introduced by developed countries in a number of sectors, such as forestry products, leather, textiles and certain consumer products, where developing countries have become highly competitive.

²⁷ UN Conference on Trade and Development, 7.

environment and trade in WTO through environmentally motivated trade measures has created strong differences, drawing the dividing lines between the developed and developing countries.²⁸

The fifth problem relates to the restrictive nature of Article XX GATT itself as it can be seen as imposing limitations and constraints on the ability of WTO members to set their own domestic levels of environmental protection. Whereas, determination of national environmental policies has been recognized as an autonomous right, an essentially substantive principle upon which there has been a widespread consensus among WTO Members.²⁹ In cases like US – Gasoline and Brazil – Retreaded Tyres, the principle of autonomous determination of environmental objectives has also been emphasized. The problem related to restrictive aspect of Article XX becomes obvious when the Member states unilaterally impose environmental standards and import embargoes upon other countries.

These were the reasons that WTO focused its negotiations on significant dimensions of trade and environment relationship to explore the environmental implications of trade and to make appropriate recommendations on whether any modifications to WTO provisions are required or not.³⁰ Attempts have been made to incorporate environmental framework within the WTO legal framework, by WTO

²⁸ Laurence Boisson de Chazournes, “The Use of Unilateral Trade Measures to Protect the Environment,” in *Economic Globalization and Compliance with International Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 183.

²⁹ John H. Knox, “The Judicial Resolution of Conflicts between Trade and the Environment,” *Harvard Environmental Law Review*, vol. 28 (2004): 53.

³⁰ Nidhi Singh, “Trade Related Environmental Measures in Multilateral Environmental Agreements and the WTO: Irreconcilable Differences?” *American Journal of Economics and Business Administration* 1, no. 3 (2009): 249.

dispute settlement body (DSB), still there are many shortcomings due to which the issues of concern of developing countries, have not been appropriately addressed.³¹ It thus became necessary to address this matter concretely by examining different proposals, presented by various WTO members for the clarification of status of unilateral trade measures in the Committee on Trade and Environment (CTE) in perspective of Article XX.

1.3 Research Questions

The study has attempted to answer the following core research questions:

1. To what extent is the use of trade related environmental measures considered to be justified and accommodated within the exceptions described in Article XX paragraphs (b) and (g) of GATT 1994?
2. Does the legal framework of GATT/WTO recognize the enforcement of environmentally motivated unilateral trade measures?
3. How can the adverse effects and negative implications of environmentally motivated unilateral trade measures for developing countries be minimized?

³¹ Konrad von Moltke, 'After Doha-Assessing the outcomes of the WTO Fourth Ministerial Conference' *IISD Commentary* (April 2002) <http://www.iisd.org> (accessed January 28, 2014)

1.4 Research Objectives

This research has aimed to:

1. Analyze the scope of trade related environmental measures- (measures that restrict the international trade for environmental objectives) under GATT/WTO framework and applicability of Article XX (b) and (g) of GATT 1994 that deals with environmental exceptions and the criteria for their application.
2. Recognize the current value of status and future prospects of unilateral trade measures in the perspective of WTO jurisprudence with significant environmental disputes regarding the applicability of Article XX (b) and (g).
3. Propose suggestions for resolving the trade environment contradictions on issue of unilateral trade measures by specifically minimizing their adverse effects and negative implications for developing countries, in perspective of Doha negotiations.

1.5 Significance of Study

This study has been significant because it has aimed at establishing a sustainable connection between international trade law and international environmental law, focusing on the issue of whether by acknowledging such relationship will prove helpful as a means to support global environmental protection.

The study has also been significant because it has particularly focused on the applicability of article XX (b) and (g) of GATT 1994 (i.e. containing environmental exceptions) and thus aiming to create a link between international trade law and international environmental law to accommodate environmental interests with economic interests of the Member States.

Finally, the study has been of paramount significance because of the importance of establishing policy connections between environmental interests and economic interests in a broader perspective. These policy connections have often been noticed, but very few practical and procedural measures have been presented so far. Thus, the recommendations in this study have highlighted the fact that the progress of the global environmental protection would have been possible only if the developing world would become convinced of the fact that incorporation of environmental regulations in multilateral trade regimes would not imperil their trade and economic development process.

1.6 Scope of the study

As the research questions have suggested, this study is related to the identification of existing status of trade related environmental measures under GATT/WTO law and examination of developments in environmental jurisprudence of WTO dispute resolution system in respect therewith. It has particularly focused upon clarifying the status of

unilateral trade measures in the framework of Doha round of negotiations by discussing various proposals forwarded by individual states.

The relationship between environmental issues and trade agreements emerge in different perspectives in WTO. This study has explored this relationship through two different approaches, first through the interpretation of relevant environmental provisions (Article XX subparagraph (b) and (g) of GATT 1994) and the development of WTO case law, the judicial approach. Identification of the legal parameters in order to establish a trade measure as unilateral has been carried out through relevant environmental cases.

This relationship has further been examined through negotiations and discussions among member countries during Doha Ministerial meetings in 2001 as a second approach, the legislative approach. As consensus regarding issues related to WTO rules and specific trade obligations contained in MEAs during Doha meetings has been proved to be extremely difficult to achieve, the sharp differences between developed and developing countries appear to enhance in number and intensity.

For the purpose of this study the emphasis has been laid upon those MEAs that actually regulate trade or contain trade related provisions. Less than ten percent of entire multilateral environmental regime does substantially manifest the environment trade intersection by affecting trade flows or value of the trade flows at global scenario.³² The MEAs that are particularly relevant to trade regime, in contextual background of this study, include: Convention on International Trade in Endangered Species (CITES),

³² UN Environment Program,

Montreal Protocol on Ozone Depleting Substances (1987), Basal Convention on the Control of Hazardous Wastes (1992), Rotterdam Convention on the Prior Informed Consent for Hazardous Chemicals in International Trade (PIC) (1998) and Stockholm Convention on Persistent Organic Pollutants (POPs) 2001.

Specific focus has been placed upon an in-depth analysis of most relevant environmental provisions Article XX (b) and (g) of GATT 1994 to counter this false assumption that trade in certain ways avoids taking into account environmental considerations. This has been founded upon strong perspective of multilateral trading regime that it was primarily established for promotion and protection of international trade and not for environmental purposes.³³ The analysis of prescribed criteria and application requirements of environmental exception clauses of GATT 1994 (Article XX) has helped ascertain the degree to which objectives of environmental protection can be reconciled with the objectives of multilateral trade regime.

Another closely related issue arises when finding a solution to the dispute between trade measures in MEA and WTO out side the regime of World Trade Organization. This approach calls for the environmental solutions under environmental forums. The WTO member states do not desire WTO to play the role of an environment policy making organization or environmental standards enforcement agency.³⁴ However the institutional character of WTO, whether it should continue as the main platform for

³³ Joanna Gomula, "Environmental Disputes in the WTO," in *Research Handbook on International Environmental Law*, eds. Malgosia Fitzmaurice and David M Ong (Edward Elgar Publishing, 2010),

³⁴ Gary P. Sampson, "Effective Multilateral Environment Agreements and Why the WTO Needs Them," in *The Role of the WTO in Global Governance*, (United Nations University Press, 2001),

resolution of future environmental problems or not, does not come under the scope of this thesis.

Summary of the Chapter 1

In this chapter the general background and layout of the study has been presented. It includes the problem statement, research questions, research objectives, significance and scope of the study. For the survival and enhancement of the quality of life of humans and its sustainability on earth, proper and effective system for environmental protection is highly desirable. Despite having most modernized international environmental laws (MEAs), their effective implementation still remains to be a difficult and vital issue because of the involvement of several social and economic factors which make them an arena for extreme political and social disagreement.

In this situation environmental trade measures play a significantly crucial role as an efficient means to ensure the enforcement of environmental standards. However, developing countries perceive the use of these environmental trade measures as a threat to their sovereign authority and growth of their economic development in terms of trade expansion, while pro-environmentalist groups and developed economies consider it unreasonable and environmentally unsound to trade with the countries having lower environmental standards. Apart from the previously mentioned problems, developing countries confront a number of constraints due to their insufficient structural capacity as well which includes poor infrastructure, lack of awareness and information management,

inadequate resources and improper access to technology.³⁵ These structural factors imply very high cost of compliance and in most Less Economically Developed Countries (LEDCs) this situation is not expected to improve in the near future, because of the levels of public expenditure which have constantly been declining. Moreover, the fact that developing countries are mostly “standard-takers” rather than “standard-setters” leaves them at a competitive disadvantage.³⁶ Thus, developing countries view the trade and environment issues quite differently from developed countries. It appeared necessary to study the parameters and limitations of imposing unilateral trade measures, in order to ensure environmental protection, generally by industrialized countries on developing countries and also the mutual relationship between unilateral trade measures and their probable adverse effects and negative implications upon the developing countries.

³⁵ UN Conference on Trade and Development, *Environmental Requirements and International Trade*, TD/B/COM.1/EM.19/2, (Geneva, 2002), 8, 9.

³⁶ Developed countries often set the standards for products in which developing countries are the exclusive or predominant producers, like tropical beverages, spices or leather.

CHAPTER 2

LITERATURE REVIEW

2.1 Operational Terminologies

It is important to explain the key words and significant concepts in the first place, as they would be used in the context of this study.

2.1.1 Trade Measures

In trade policy perspective the term “trade measures” can be defined as “any policy instrument which attaches requirements, conditions or restrictions on imported or exported products or services themselves, or the process of their importation or exportation.” This definition carries within itself a wide array of instruments ranging from trade bans to product standards, from procedures of notification to labeling and reporting conditions, aiming to achieve a variety of objectives.³⁷ Unilateral trade measures utilized for the purposes of environmental protection have become the centre of attention of trade-environment discussion. These measures directly challenge the free trade principles of WTO/GATT system and are likely to become more visible and contentious as environmental concerns increase.³⁸

³⁷ Dale Andrew, “Trade Measures in Multilateral Environmental Agreements: Synthesis Report of Three Case Studies,” (1998) <<http://www.ecologic-events.de/eu-trade>> (accessed January 28, 2014), 10.

³⁸ Chazournes, 183.

In the context of this study, trade measures would be interpreted as restrictions affecting international trade, in the form of bans or embargoes, which potentially conflict with WTO agreements. These measures would be discussed in accordance with the environmental jurisprudence of WTO.

Keeping in view the international environmental policy almost twenty MEAs have also provided for trade measures but they are treated as instruments of treaty. In the Montreal Protocol on Substances that deplete the Ozone layer, the use of trade measures is instrumental in controlling the flow of ozone-depleting chemicals. Fisheries treaties also include trade measures but only as a tool for achieving the purpose of the treaty. According to Steve Charnovitz, the concept of trade measures employed in MEAs is complex and principally different from the ones used in WTO where it authorizes one member to sanction another.³⁹

MEA-related trade measures might be justified in terms of broader theoretical perspective, namely, the enforcement of national sovereignty.⁴⁰ The doctrine of national sovereignty has always possessed very restricted character where the state claimed exclusive jurisdiction over its territory, resources and the people, residing there. On the other hand, states have also been duty bound not to interfere with the exclusive jurisdiction of other states. However, the globalization of environmental degradation has

³⁹ Charnovitz, 252.

⁴⁰ The waste trade regime (The Basel Convention) and trade measures incorporated into them are basically grounded on the exercise of sovereign rights. It's the state that does not allow the entry into its territory of certain dangerous substances and decides whether to allow or not the transboundary movements (trade restrictions by using the prior informed consent procedure).

made the exercise of this absolute right quite uncertain. Thus, the limitation of sovereign rights has widely been acknowledged in the context of environmental protection.⁴¹

While examining trade provisions of different MEAs in detail, it becomes quite evident that several types of trade measures are used to address a wide range of environmental aspects for multiple objectives. Generally, trade measures are used as an adequate policy tool to achieve the main objectives of multilateral environmental agreements particularly

- a) when a multilateral approach is adopted to control and deal with international trade as a part of environmental problem,
- b) for comprehensive working of regulatory systems by the treaty, trade measures for changing production processes or governmental regulations are recommended,
- c) to ensure compliance with and enforcement of the environmental treaties, trade incentives can be used to attract membership,
- d) to stop free-riding (economic gains of being a non-member) which most often becomes a potential obstacle for efficient international co-operation, increase in the cost of non-membership can be introduced.⁴²

In many cases the MEAs incorporate multiple purposes and so do the trade provisions contained therein. Effectiveness of trade measures in MEAs is regarded as a

⁴¹ Kanami Ishibashi, "Environmental Measures Restricting the Waste Trade," in *Economic Globalization and Compliance with International Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 73.

⁴² Andrew, 40.

complex issue, depending mainly on the specific environmental issue and the nature and role of the trade measure in that particular agreement. In this thesis, use of the term “trade measures” has been carried out with reference of their utilization and employment in both the WTO and MEAs regimes.

2.1.2 Unilateral Trade Measures

As this study has particularly dealt with the use of trade measures when they are administered unilaterally, it is essential to first understand some of the basic characteristic features of unilateral trade measures as they have been employed in international economic law in a broader perspective and in WTO legal frame work in specific. The use of unilateral trade measures in the overall context of international economic relation has remained quite sensitive issue for developing countries. The sanctioning aspect and inflictive nature of unilateral measures have been perceived negatively largely by the target states of such measures and especially in the South, where the developing countries raise the issue of unequal balance of power with regard to their exports earnings.

The use of trade measures as an alternative to achieve environmental protection has gained substantial significance at two different scales. There have been unilateral and multilateral efforts to acquire the main objective. Although there are different strategic, social, political and predominantly economic motivations behind them but the visibility of unilateral trade measures as an effective tool for environmental protection has become increasingly contentious. Unilateral trade measures have been criticized for not being

proved as the best instrument for achieving environmental objectives because they do not directly address the root cause of the environmental problem.⁴³ Their use in the presence of other alternative and effective instruments has increased the unnecessary exploitation of world resources rather than decreasing global environmental degradation.⁴⁴ That is why they have now become the focus of attention on the agenda of trade and environment discussion in the WTO.⁴⁵

Although this term has been used with somewhat negative implications so far its international application is concerned, still no proper legal definition has been coined as yet. According to Chazournes, “unilateral measures are actions, instruments or policy measures taken unilaterally either by a state or a group of states jointly without following any procedure of any international agreement coercing other countries to alter their practice or laws”.⁴⁶ Unilateral measures might also be defined as measures imposed by a state without invoking WTO dispute settlement procedure or other multilateral international rules and mechanisms and which is driven entirely by the invoking country’s own criterion.⁴⁷

⁴³ Anderson, 323.

⁴⁴ The ban on ivory trade has reduced the incentives for rural Africans to tolerate elephants trampling their crops, thus ultimately resulting in more rather than less culling of elephants in some areas. Another unfortunate consequence is that national parks are being devastated by the increased number of elephants, which is endangering other species. Anderson, 335.

⁴⁵ Laurence Boisson de Chazournes, “The Use of Unilateral Trade Measures to Protect the Environment,” in *Economic Globalization and Compliance with international Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 181.

⁴⁶ Laurence Boisson de Chazournes, “Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues,” *European Journal of International Law* 11 (2000): 315.

⁴⁷ Japan Ministry of Trade and Industry, *Chapter 14: Unilateral Measures* at 230. JMTI <http://www.meti.go.jp/english/report/downloadfiles/gCT0014e.pdf> (accessed January 28, 2014)

While some states plead the right to conduct their own environmental policy without any trade-restriction considerations, others consider unilateral trade measures to be a mere cover for protectionism through which the weaker is forced to surrender before the will of the stronger. It is also interesting to note that unilateral measures in 1970s did not raise much concern because on the one hand they were not as numerous as they are in the present world, and on the other hand the general awareness about the effects of trade related environmental measure was not politicized this much.⁴⁸

2.1.3 Developing Countries

According to Howse and Trebilcock⁴⁹ there is no proper definition of developing countries and this concept of developing countries has undergone several debates. However, they are generally referred as countries having significantly lower per capita income as compared to the major industrialized nations. Nevertheless, the Human Development Index by United Nations Development Programme (UNDP) has included a wide range of indicators to exhibit the literacy rate, the condition of children and women, size of GDP and the social infrastructural development of any country. Yet, UNDP has not evolved any minimum threshold level below which a country can be declared as a developing country. Rather, it is the classification by UNDP that considers all countries other than Europe, Canada, the U.S., Australia, New Zealand, and Japan as developing countries. Similarly, WTO also does not provide any particular definition of “developed”

⁴⁸ Chazournes, 183.

⁴⁹ M. J. Trebilcock and R. Howse, *The Regulation of International Trade*. London: Routledge, 1995, 475.

and “developing” countries either.⁵⁰ It is left upon the WTO member to declare whether it is a “developed” or “developing” country. Certain rights are attached with the status of developing country in the WTO. Some WTO agreements have provisions for developing countries to avail longer transition periods before their full implementation along with specific technical assistance.

However, for the purpose of this study, the broader definition of developing countries, including the LEDCs⁵¹, has been utilized.

2.1.4 Environmental Protection

It is ironic to note that while even the preamble to the WTO agreement mentions about the proximity of trade and environment relationship, the scope of environmental protection within the WTO has not been made clear till date. Bringing together the economic objectives of development and growth for all members through trade liberalization, the purpose is mentioned to be the “optimal use of world resources...seeking both to protect and preserve the environment⁵²”.

The protection of global environment has been recognized as an important and urgent problem currently facing the world which needs to be treated almost equally to that of human beings, animals or plants health and life mentioned in exceptional clauses

⁵⁰ World Trade Organization, “Who are the Developing Countries in the WTO? Definitions,” <http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm> (accessed January 28, 2014)

⁵¹ Least economically developed countries (LEDCs).

⁵² Vorgelegt Khalilian, “Trade Measures – A Legitimate Tool for Environmental Protection?” (Masters thesis, Freien University Berlin, 2008), 18.

of Article XX of the GATT 1994. There cannot be drawn any distinctive criteria though which any of these elements could have been prioritized upon each other. The measures for environmental protection need urgent attention as the measures dealing with the issues of human life, animal and plant health or lives. In this study the concept of environmental protection has been dealt in the perspective of environmental trade measures in the GATT/WTO framework and further by their interpretation by the WTO Dispute Settlement process in order to assess the extent to which the objectives of environmental protection have been met in the WTO Agreement.

The environmental provisions and the judicial resolution of dispute settlement process of WTO have opened the doors of criticism and protest for the environmentalists, civil society and both developed and developing countries. In early 1990's, environmental critics proposed reforms to environmental provisions from contradicting with trade obligations with out disturbing the substantive principles of trade law and urged governments to adopt those reforms in political agreements. Unfortunately governments were not inclined towards incorporating critic's reforms. Rather, they started relying on trade tribunals.⁵³

To a great surprise, the Appellate Body of WTO has performed the job that governments were expected to do: reaching a comprehensive resolution of trade environment conflicts incorporating most of the critics' proposals. The Appellate Body has significantly altered the GATT interpretation of Tuna – Dolphin case. It has avoided

⁵³ Knox, 2.

construing other trade agreements in ways leading to conflict with environmental laws. It has even encouraged inputs in its deliberations by environmental groups.⁵⁴

2.2 Environment and trade in the WTO framework

In this chapter primary focus is on the background knowledge and basic concepts comprising the legal, historical, economic and political economic framework of the World Trade Organization in order to analyze and discuss the trade and environment relationship in the GATT 1994 (Article XX (b) and (g)) and WTO. Literature review will begin with the background and institutional development of environmental issues in negotiation rounds from GATT 1947 to later under GATT 1994 or the WTO.

Although the first formal recognition of environmental issues on the negotiating agenda of WTO at the Doha Ministerial in 2001 played a significant role to highlight the environment trade relationship, however this relationship is not new by any means.⁵⁵ This issue had already been raised in the GATT/WTO system with the initial stages of Uruguay Negotiations Round. Later on this relationship underwent several evolutionary phases with the course of time.

⁵⁴ Knox, 3.

⁵⁵ Hugo Cameron, "The Evolution of Trade and Environment Debate at the WTO," in *Trade and Environment: A Resource Book*, eds. Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (International Institute for Sustainable Development, 2007), 3-5.

2.3 The GATT Years

The original text of General Agreement on Tariffs and Trade (GATT) 1947⁵⁶ did not include any explicit provisions for environmental protection because the main priority for the creators of this agreement was to reduce tariffs and formulate the code of conduct related to international trade in goods.⁵⁷ The environmental issue was however mentioned in Article XX that contained exceptions to the basic rules of the Agreement. Surprisingly, Article XX⁵⁸ has proved to become the most significant provision through which the trade related environmental measures are being justified today within the WTO. Article XX permitted member states to impose measures “necessary to protect human, animal or plant life or health” or “relating to the conservation of the exhaustible natural resources” so far as those measures did not create unfair discrimination against foreign products or act as disguised restrictions on trade for protectionist purposes.

The next move towards the environmental cause was made in the beginning of 1970s, where the GATT Secretariat submitted a report regarding environmental protection policies and their implications and potential to create barriers for trade at the United Nations Conference on the Human Environment, held in Stockholm 1972. The report entitled “Industrial Pollution Control and International Trade”⁵⁹, however, did not

⁵⁶ The General Agreement on Tariffs and Trade was opened for signatures on 30th October 1947 and became effective in January 1948.

⁵⁷ Gomula, 401-4.

⁵⁸ Article XX originating from GATT 1947, was taken over as it is by GATT 1994.

⁵⁹ World Trade Organization, “Introduction to Trade and Environment in the WTO: The 1971 GATT Study,” <http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> (accessed January 28, 2014).

focus on the greater issue of balancing between economic development and environmental protection.⁶⁰

The late 1960s and early 1970s is considered to be an era of growing environmental recognition where notable attempts were made to bring the objectives of environmental protection closer to the GATT. In 1971 a Group on Environmental Measures and International Trade⁶¹ (EMIT) was established by the GATT Council of Representatives to advise it's Contracting Parties on trade policy and pollution issues.⁶²

However, EMIT group remained inactive for almost twenty years until 1991, when UN Conference on Environment and Development was going to be conducted in Rio de Janeiro, in 1992. After two years of meeting sessions on environment trade relationship EMIT came up with a report mentioning that there was no inherent contradiction between environmental protection at domestic or multilateral policy making level and the GATT system. However, GATT was not considered to be an appropriate forum for developing international environmental standards. The scope of environmental concerns with respect to international trade was not clearly addressed and EMIT report was restricted to the significance of GATT's orientation towards free trade.⁶³

⁶⁰ Globalization 101, "Globalization and the Environment," The State University of New York, <http://www.globalization101.org/globalization-and-the-environment> (accessed January 28, 2014).

⁶¹ EMIT was the first institutional framework within the GATT to address the environmental issues since the creation of GATT 1947 < http://www.wto.org/english/tratop_e/envir_e/tr_envbadoc.htm> (accessed January 28, 2014)

⁶² Cameron,

⁶³ Globalization 101, "Are International Trade and Protection of the Environment Enemies?" The State University of New York, <http://www.globalization101.org/are-international-trade-and-protection-of-the-environment-enemies/> (accessed January 28, 2014).

During 1971 to 1991, there was a growing impact of environmental policies on international trade. As the trade flows had multiplied manifolds, the effects of trade on environment also became more evident.⁶⁴ So in 1970s and 1980s, the growing interconnections between economic growth, social development and environment were examined at the Stockholm Conference.

During the Tokyo Round (1973-1979) of trade negotiations, the issue of trade related technical regulations and standards for environmental purposes led to the adoption of the agreement on Technical Barriers to Trade (TBT), or the “Standards Code”. The TBT agreement called for non discrimination and transparency in the adoption and application of technical regulations and standards thus marking the first significant reference to environment in a GATT agreement.⁶⁵

It was during GATT Ministerial Meeting 1982 when the decision regarding the export of domestically prohibited products⁶⁶, on the grounds of harm to human, animal and plant life or health, or the environment, was made. Resultantly a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances was established in 1989 to control the exports of domestically prohibited products causing harm to health and environment.

⁶⁴ World Trade Organization, “Early Years: Emerging Environment Debate in GATT/WTO,” <http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> (accessed January 28, 2014)

⁶⁵ Cameron, 3.

⁶⁶ “In 1982, a number of developing countries expressed their concern at the fact that products prohibited in developed countries on the grounds of environmental hazards, or for health or safety reasons, continued to be exported to them.....”

Interestingly, when the environmental concerns were being incorporated into international trade agreements, trade measures were also being introduced as an instrument for achieving global environmental objectives. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1975 mandated a policy of trade restrictions and bans on free movement of endangered species. Several Multilateral Environmental Agreements (MEAs) also introduced these trade restrictions as their essential elements which include Montréal Protocol 1987 (restricting trade in ozone depleting substances) and Basal Convention 1989 (restricting trade in hazardous wastes).⁶⁷ Both regimes, environmental and trade regime continued to evolve side by side until 1990s where they started to come into increasing contact with each other.

The Brundtland Report, a document introducing the term “sustainable development” for the very first time, was launched by the World Commission on Environment and Development during 1987. Poverty was held to be the strongest factor behind environmental degradation and higher economic growth coupled with greater access to international trade was called for to combat the “pollution of poverty”.

It was during 1991 when environment trade conflicts were legally materialized in the first infamous Tuna-Dolphin decision, a dispute between Mexico and the U.S. The GATT penal issued a ruling against the U.S. ban on Mexican tuna imports, based on

⁶⁷Cameron, 4.

Marine Mammal Protection Act 1972⁶⁸, to be inconsistent with international trade regulations. The first major issue on which the dispute focused was that whether the GATT party had the right to unilaterally determine life and health protection policies and impose them outside its jurisdiction. The second issue concerned whether a discriminatory measure could be based on characteristics relating to the process of production of the product and not on the characteristics of the product itself.⁶⁹The decision was given in favor of Mexico. Although Tuna–Dolphin report was not adopted by the concerned parties, the decision substantiated the opinion of GATT as an institution offering little reassurance towards environmental protection and consequently a series of protests was initiated by environmentalists and civil society activists against GATT and its handling of environment related disputes.

The 1990s is attributed as the era of trade environment discussion. In 1991, the European Free Trade Association (EFTA)⁷⁰ requested for an urgent meeting of the EMIT group in order to create a forum within which trade related environmental issues could be discussed. 1992 United Nations Conference on Environment and Development (UNCED) was approaching and GATT was required to provide input in this regard. This reemergence of EMIT group was met with positive response except from certain developing countries who were initially reluctant to discuss environmental issues in the

⁶⁸ Marine Mammal Protection Act (MMPA) was enacted on October 21, 1972 to take measures for the protection of all marine mammals.

⁶⁹ Gomula, 402-3.

⁷⁰European Free Trade Association (EFTA) in those days comprised of Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

background of GATT 1947 but eventually agreed on a structured debate on environment trade issue.⁷¹

With a mandate of examining the possible effects of environmental protection policies on the working of GATT 1947, the major areas of concern for EMIT group became,

- The impact of new eco-labeling schemes on international trade,
- The relationship between the rules of international trade (GATT) and trade provisions in Multilateral Environmental Agreements (MEAs) – i.e. the Basal Convention,
- Multilateral transparency of national environmental regulations having an impact on trade.⁷²

In 1992, the Conference on Environment and Development, also called Rio Earth Summit significantly shaped and developed the international legal order. Instruments such as the Rio Declaration and the Programme of Action Agenda 21, adopted at the conference entrenched the significance of endorsing sustainable development through international trade. Although the meaning of sustainable development would have differed from one region to another, particularly between the developed and the developing countries, and the priority given to environment has been a source of dissention for them as well, Rio Declaration nevertheless, succeeded in developing a consensus around the concept of sustainable development. It was defined as development

⁷¹World Trade Organization, “EMIT ---GATT Group on Environmental Measures and International Trade,” <http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> (accessed January 28, 2014)

⁷²Drumble, 4.

that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁷³ This concept acquired rhetorical power for reconciling different interests and for establishing links between environmental protection and development in general.⁷⁴

2.4 Emergence of World Trade Organization (WTO)

The winding up of eight year Uruguay Round⁷⁵ negotiations, resulted in emergence of the WTO on January 1, 1995, as a part of “Marrakech Declaration”, entirely replacing the GATT secretariat as the organization for administration of multilateral trade regime. While sustainable development was declared as the ultimate goal, the WTO agreements instituted a Committee on Trade and Environment (CTE) with a broad based agenda that included:

“To identify the relationship between trade measures and environmental measures, in order to promote sustainable development;

To make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non discriminatory nature of the system...”

⁷³ Principles 3 and 4 of the Rio Declaration on Environment and Development, reprinted in 31 *International Legal Materials* 874 (1992)

⁷⁴ Chazournes, 184-5.

⁷⁵ The Uruguay Round is a trade negotiation spanning over a period of eight years from 1986 to 1994 transforming the GATT into the WTO. It was launched in Punta Del Este in Uruguay followed by negotiations in Montreal, Geneva, Brussels, Washington D.C. and Tokyo, with the 20 agreements finally being signed in Marrakech – the Marrakech Agreement.

The framework of the CTE was contained in the Ministerial Decision and the membership comprised of all WTO Members. Moreover observer status was granted to various intergovernmental organizations later on.

The CTE was first convened to analyze different items on its agenda in 1995. In preparation for Singapore Ministerial Conference in December 1996, a report comprising of CTE discussions and conclusions was presented. It also organized different information sessions with MEA secretariats to enhance Members' comprehension of relationship between MEAs and WTO rules. Several public symposia for non-governmental organizations (NGOs) have also been held. Civil society and environmental groups had been raising the issue of lack of transparency with respect to GATT stance that various key GATT documents were considered confidential. Improvements were witnessed with CTE coming into existence when formal meetings between NGOs and WTO secretariat started taking place and an official WTO website was introduced with an open access to public for previously deemed confidential documents.⁷⁶

During the WTO Ministerial Conference held in Geneva, in May 1998, the role of WTO in diminishing protectionism was acknowledged. While on the contrary, environmental groups were more concerned about the harmful impacts of free trade on the environment, particularly with regard to developing countries where environmental policies are weaker or non-existent. According to them the WTO should assist

⁷⁶ United Nations Environment Programme, 108.

governments to manage the effects of the impact of the trade liberalization on people and nature.

The third Ministerial Conference in Seattle in November 1999 collapsed for striking down labor standards and environmental rules with intensive street protests in which several environmental and other civil groups participated.⁷⁷ The conference which was expected to initiate mainly the labor and environmental issues (initially taken up in Singapore Conference) failed to acquire consensus on this agenda. The main reason behind this failure was the unwillingness of developing countries to accept the incorporation of environment and labor standards, being pushed by certain OECD countries strongly supported by many NGOs, on the believe that it would support development.⁷⁸

WTO members were, however, reassured that international trading system wanted to find out certain means to address the environmental issues. In the WTO the issues of environmental protection have always been treated as a controversy because of two main reasons. Firstly, because the developing countries emphasize upon the significance of economic growth in order to heighten up their own environmental standards so for them environmental measures are nothing more than exports barriers. Secondly the developments in the WTO with particular reference to CTE imply the risk of potential conflicts between provisions in MEAs relating to trade measures and WTO legal framework.

⁷⁷ Cameron, 6

⁷⁸ Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization: Law, Economics and Politics* (London and New York: Routledge Global Institutions, 2007)

2.5 The Doha Round of Negotiations

On the WTO agenda the recognition and acknowledgement of environmental issues has always been slow yet steady. In the first Singapore Ministerial (1996), environment was neglected by declaring it as part of the continuing agenda and the focus of discussion remained the “Singapore issues”⁷⁹. Later in 1999 during Seattle Ministerial, environmental concerns were treated as one of the most contentious issues. While, at the same time the dispute settlement system of WTO was addressing the disputed cases involving environmental dimensions in order to enhance the actual understanding of WTO rules. Except the progress made by the Appellate Body, all the other efforts were preliminary in nature.⁸⁰

As the initial attempts to conduct the next round of multilateral trade negotiations collapsed in Seattle, the negotiation round was finally launched in Doha, Qatar, in 2001, with the “Doha Declaration”. This fourth Ministerial Conference in Doha is credited to have established significantly new challenges particularly regarding its environmental dimension.⁸¹ Although the environmental discussion is not new with respect to trading system yet the official inclusion in negotiating agenda exhibits its significance. It has also been regarded as a significant step because the level of environmental concerns was uplifted from the stage of CTE studies to an appropriate negotiation forum of WTO

⁷⁹ “Singapore Issues” include four agenda items i.e. competition, investment, trade facilitation, and government procurement.

⁸⁰ United Nations Environment Programme, 103.

⁸¹ Moltke,

member states, where the final results were to be incorporated in the legally binding outcome of negotiations, in the form of Doha declaration.⁸²

Issues of concerns regarding environment and sustainable development are to be found in most parts of the Declaration. While sustainable development and environment are explicitly pointed out in only a few paragraphs, however trade and environmental linkages have been discussed twelve times in Doha Declaration.⁸³ As a response to the developing countries concern that these negotiations might discriminate against their products, the CTE has been given a special and forward mandate to investigate the impacts of environmentally motivated trade measures upon the market access of developing countries products. On the other hand environmentalists were worried that these negotiations would be narrowly focused upon free trade issues while Doha declaration surprised them by reaffirming that the proper forum for environmental solutions is through MEAs and not the GATT. With regard to lack of international organization for coordination of global environmental policy, the environmentalists have attached very high hopes with this new round of negotiations, which would facilitate them to introduce more environmental concerns in multilateral trading system, it has been referred as “greening the GATT.”⁸⁴

⁸² Globalization 101, “The Doha Mandate on the Environment,”

⁸³ United Nations Environment Programme, 104.

⁸⁴ Globalization 101,

The Committee on Trade and Environment Special Session (CTESS)⁸⁵ was particularly set up to conduct the discussions on trade and environment issues. The work assigned to both CTE and CTESS can be summarized in the form of a diagram as below:

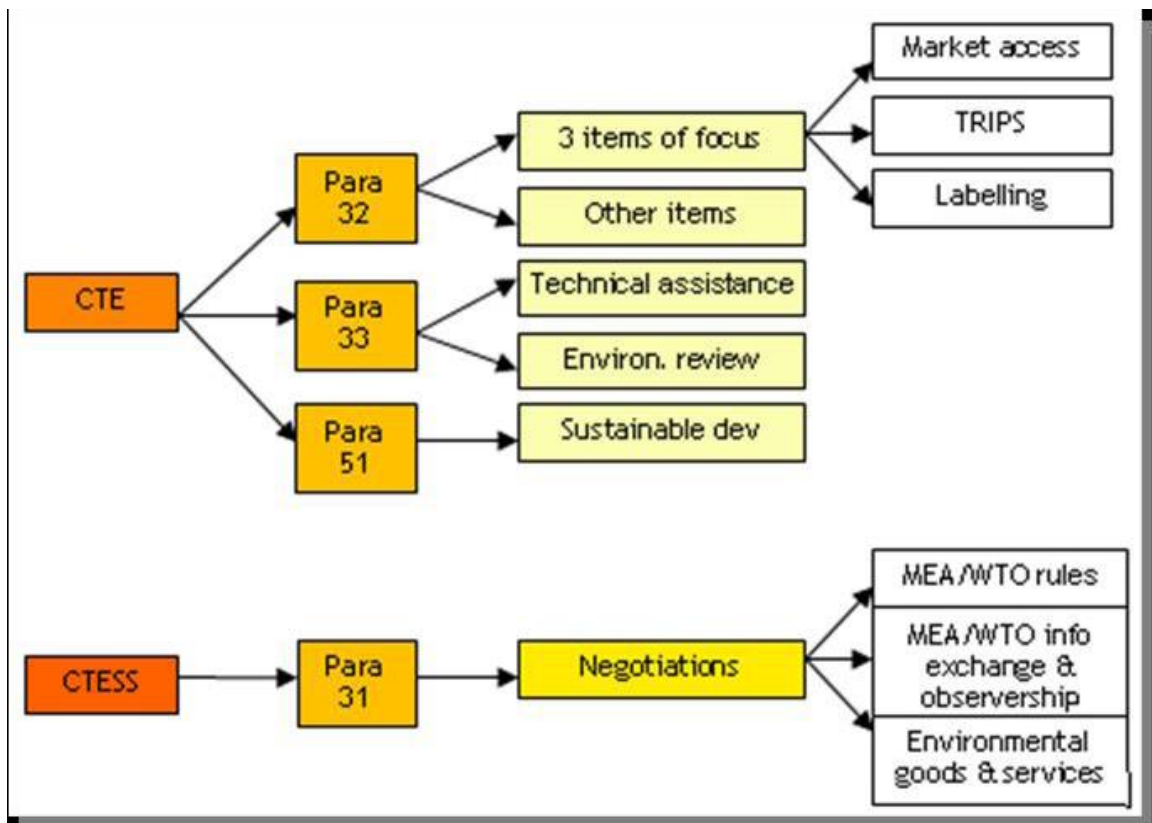


Figure 1
The work assigned to the CTE and CTESS⁸⁶

The environmental issues in the perspective of Doha Negotiations Round can be categorized into these three main groups:

⁸⁵ The CTESS was set up to conduct the negotiations (mandate contained in paragraph 31 of the Doha Ministerial Declaration).

⁸⁶ World Trade Organization, “The Work assigned to the CTE and CTESS” http://www.wto.org/english/tratop_e/dohaexplained_e.htm (accessed at January 28, 2014)

2.5.1 Environmental issues scheduled for negotiation

Paragraph 31 of the Doha Declaration sets out three issues for negotiation, which were primarily supported by the developed countries, they include: the mutual relationship of WTO rules and “specific trade obligations”⁸⁷ (STOs) in multilateral environmental agreements; process of information exchange between MEAs and pertinent WTO committees and granting the observer status to certain MEA secretariats; and issues of tariff and non tariff barriers in trade of environmental goods and services.⁸⁸

2.5.2 Environmental issues to be considered for further discussion

Three more items for further discussion have been mentioned in Paragraph 32 of the Doha Declaration, selected from the CTE’s original framework. It was also agreed that in the absence of exceptional developments, these items would not be adopted in any agreement concluding the Doha Round.⁸⁹ These issues include: effects of environmental measures on market access and the environmental benefits of eliminating trade distortions; the relevant provisions of Trade-Related Intellectual Property Rights (TRIPS) Agreement; and the labeling requirements for environmental protection.

⁸⁷ The term “specific trade obligations” has not been defined. Generally it is meant to include those particular measures that have been explicitly authorized by MEAs as distinguished from the unilateral trade measures taken by individual parties at national level “pursuant” to an MEA. As many MEAs specify their objectives only, while the selection of measures is left upon the discretion of member countries.

⁸⁸ Cameron, 6.

⁸⁹ United Nations Environment Programme, 105.

2.5.3 Environmental issues implicit in negotiating other matters

Environmental dimensions span over a wide range of trade negotiations even when these are not explicitly highlighted as a part of the discussion schedule. Particularly key areas include agriculture and investment. The environmental aspect of agricultural trade and problems related to environmental subsidies emerged as central issues for debate. Similarly since Singapore Ministerial, investment negotiations have remained quite controversial due to the lack of consensus upon them. In Doha Declaration it was taken up as matter for formal negotiations once again. Other aspects like services and fisheries are also covered under the same category.

2.6 Active supporters of trade environment linkage discussion

After Doha, the Member states conducted various meeting through the CTE Special Session to work upon the negotiating agenda. Traditionally the key perpetrators of trade environment relationship have been European countries and the U.S. In this regard the strong commitments of European Union and its central allies (Switzerland and Norway) for the inclusion of trade discussions at the multilateral level are worth mentioning. European Union has maintained a strong position for multilateral environmental solutions and acknowledgement for environmental issues at the WTO. The EU has taken serious initiatives to incorporate its trade policy with the objectives of sustainable development. Many such steps taken by EU include trade promotion and incentives for sustainably-produced goods, funds for technical assistance on environment

and trade and online consultancy for exporters from developing countries on Europe's complicated import policies, however developing countries view these efforts as a form of hidden protectionism in the name of social and environmental concerns.

On trade and environment issues the U.S. own stance has been somewhat defensive.⁹⁰ While viewing the track record of supporting PPM-based trade measures at the WTO, proposing reforms of fisheries subsidies criteria and introduction of environmental provisions at regional and bilateral trade level, indicates that U.S. affirms the need to balance trade regulations with efficient implementation of environmental policies. While contrarily, the categorical refusal from effective participation in specific trade related MEAs like those on climate change, biosafety and biodiversity has raised serious questions on its commitment to environmental agenda.⁹¹

During Doha round the efforts of U.S. for including trade and environment on negotiating agenda were seen to be quite restricted as compared to EU however it was helpful in achieving the Ministerial Declaration to support the main objectives of EU.⁹² In fact since Doha, the U.S. could have been seen as promoting the agenda of developing countries to adopt a limited interpretation of MEA-WTO relationship.

⁹⁰ Moltke,

⁹¹ Cameron, 11.

⁹² Moltke,

2.7 Role of developing countries in trade environment relationship:

The acknowledgement and active role played by developing countries on the issues of trade and environment was firstly witnessed at the GATT during 1980's. Where a number of developing countries raised their concern about the environmentally hazardous products (pesticides and chemicals), strictly banned in the developed countries, were constantly being exported to them. Due to lack of certain scientific knowledge developing countries were unable to make any informed decision concerning their imports.⁹³ So, later on the issue of Domestically Prohibited Goods was adopted as standing item on the framework of CTE.

With regard to the participation of developing countries at WTO level, it is interesting to note that they have traditionally taken a defensive stance on trade and environment issues.⁹⁴ This defensive position is based on two main arguments. Firstly, they apprehend that environmentally motivated trade measures could be used against them as barriers to their trade. Secondly, developing countries have also strongly opposed any further latitude in WTO rules for the use of unilateral trade measures for implementation of environmental standards. They hold that environmental priorities must be drawn out according to the developmental levels of a country and must not be subjected to the domestic environmental policies of other countries.⁹⁵

⁹³ Cameron, 13.

⁹⁴ Moltke,

⁹⁵ Cameron, 13.

The least developing countries (LEDCs) have reiterated the significance of financial resources for technological capacity enhancement in order to successfully meet the Northern environmental and health standardization policies.⁹⁶ They seem to plead a strong case that since the developed countries enjoyed the superior technological level and the extra “space” to catch up technologically, the developing countries also need that extra “space” to catch up technologically in order to establish their technologies and become more climate-efficient.⁹⁷

During the Fifth Ministerial Conference in Cancun (2003), China, India, Brazil and South Africa all being the active members of the Group of Twenty (G20) of developing countries, dismissed the U.S. and EU agricultural market liberalization policies. The EU on the other hand kept insisting on linking further agricultural liberalization to concessions on NAMA (Non-Agricultural Market Access) by other WTO members, particularly India and Brazil. Developing countries rejected these attempts and claimed instead that agreements reached in the Uruguay Round, in particular on liberalization of textiles and agriculture, have still not been implemented.

To the utter disappointment for all, this round finished prematurely, leaving significant matters like agriculture and investment undecided. Although a realistic roadmap for accomplishing the Doha round was to be worked out. The declaration by the

⁹⁶ United Nations Conference on Trade and Development, 8.

⁹⁷ Martin Khor, “Climate Change: A Development Perspective,” (Note prepared for the Special UN General Assembly Session on Climate Change, New York: July 31st-August 2nd, 2007) <<http://www.twinside.org.sg/climate.htm>> (accessed January 28, 2014), 14.

chair that consensus could not have been attained left the entire Doha agenda in a state of utter uncertainty.⁹⁸

Through the Hong Kong Ministerial (2005) on environmental issues another endeavor to reaffirm the mandate in Para. 31 of the Doha Ministerial Declaration have been made obvious. Members tried to set out the deadlines for the ongoing negotiations but the debate upon environmental questions and their implication on international trade according to Doha mandate has not reached any conclusion. Some most debated topics include mutual relationship of WTO and STOs defined in multilateral environmental agreements, criteria for the observer status for MEA secretariats, the information exchange programme and trade barriers on environmental goods and services.⁹⁹

Table 1 as given below depicts key actors and the evolution of the trade and environment debate ranging from pre-1990s to post Doha negotiations.

Table 1.

*Key actors and the evolution of the trade and environment debate*¹⁰⁰

Actors	Pre-1990s	1990s	Seattle-Doha	Post Doha
Europe	<ul style="list-style-type: none"> • Intra-EU harmonization • Support for multilateral solutions to environmental problems 	Support for MEAs	<ul style="list-style-type: none"> • Support for clarification of MEA-WTO relationship • Seek recognition of eco-labelling in WTO agreements 	<ul style="list-style-type: none"> • Push for broad interpretation of Doha mandate • Support negotiations on eco-labelling

⁹⁸ United Nations Environment Programme, 107.

⁹⁹ World Trade Organization, “The Work Programme of Doha Declaration,” <http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#environment> (accessed January 28, 2014).

¹⁰⁰ Adapted from Hugo Cameron, ‘The Evolution of Trade and Environment Debate at the WTO’ in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development 2007)

Table 1 (Continued)

US	Support for MEAs	Use of unilateral trade-based solutions to environmental problems	<ul style="list-style-type: none"> • Support for increased transparency and NGO participation 	<ul style="list-style-type: none"> • Not a <i>demandeur</i> on WTO-MEA negotiations • Support liberalization of environmental goods and services • Rejection of the precautionary principle in trade
Developing Countries	<ul style="list-style-type: none"> • Concern over trade in domestically prohibited goods (DPGs) • Support for MEAs • Suspicion over use of trade measures for environmental purposes 	<ul style="list-style-type: none"> • Market access concerns, specially over unilateral use of trade measures environmental purposes • Support for TRIPS-CBD linkage 	Resistance to inclusion of environmental negotiations in the WTO	<ul style="list-style-type: none"> • Reluctant acceptance of WTO environmental agenda • Push for narrow interpretation of Doha environment mandate • Strengthened “Southern” agenda
MEAs	<ul style="list-style-type: none"> • Some key agreements adopted: CITES, Montreal Protocol, Basel Convention • UNEP, OCED contribution on coordination and analysis 	<ul style="list-style-type: none"> • Implementation of MEAs with trade measures and negotiation/adoption of new MEAs • Rio Earth Summit highlights trade-environment linkages 	<ul style="list-style-type: none"> • UNEP, WTO and UNCTAD collaborate on building synergies • Important capacity building role • Certain MEAs accredited as observers to CTE 	Limited inclusion of MEAs and UNEP at CTE negotiations on MEA-WTO relationship

While the second part of review will present an extensive discussion upon the principles of Article XX (b) and (g) of GATT 1994, permitting the WTO members to apply trade restrictive measures for environmental purposes, provided certain specified conditions are fulfilled. Otherwise such measures could be held as GATT-inconsistent, violating the

substantive trade rule such as principle of non-discrimination (Article I and III GATT) and the limitations upon quantitative restrictions and licenses (Article XI).

2.8 The Environmental Exceptional Clauses of Article XX of GATT 1994

With the inception of the new international legal framework under the WTO, the trade and environment debate has centered not only on the rules of the GATT¹⁰¹ but also of other elements of the WTO framework, particularly the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement). These agreements contain important principles for the application of domestic regulation, including regulations protecting the environment and public health. Like the debate concerning legality of restrictions on trade in genetically modified organisms (GMOs) has involved primarily the SPS Agreement.

Moreover interpretational linkages do exist between different WTO agreements as well. For example the general exceptions clause under the General Agreement on Trade in Services (GATS) has been largely interpreted on the methodological elaborations under Article XX of the GATT.¹⁰² However it is beyond the scope of this thesis to find out interpretational linkages of environmentally motivated trade measures with other agreements like SPS and TBT. So for the determination of the criteria and the extent to

¹⁰¹ GATT permits trade measures on several grounds, i.e. Art. XI (2) and Art. XXI of the GATT 1994 allows deviation from the rule on grounds of macro-economic imbalance and security interests respectively.

¹⁰² Nathalie Osterwalder et al., *Environment and Trade: A Guide to WTO Jurisprudence* (London: Earthscan, 2006), 77.

which environmental trade measures may be justified and accommodated within the exceptions of Article XX (b) and (g), a detailed analysis of legal text and the interpretation of key principles and concepts has been carried out as under.

There are a number of particular instances mentioned in the General Exceptions clause of Article XX where WTO members might be exempted from GATT rules. With regard to environmental and public health protection the WTO members are permitted to justify their GATT-inconsistent trade restrictive measures under Article XX where subparagraphs (b) and (g) are of significant relevance.¹⁰³ Environmental protection under these exceptions accommodate issues related to human, animal and plant life or health along with the conservation of exhaustible natural resources. By using these exceptions and following specified criteria, WTO member states can prioritize their environmental goals over trade interests and issues of market access.

The text of environmental exceptions in Article XX (b) and (g) of GATT 1994 is given as under:

“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 Member 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;

- - -”

¹⁰³ World Trade Organization, <http://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm> (accessed January 28, 2014)

The country invoking the environmental exceptions under Article XX has to clear two main hurdles. At the first place it has to create the provisional justification for using Article XX by proving that subparagraph (b) or (g) are applicable in this particular situation. Next the final justification has to be established by showing that the challenged measure does not breach the introductory paragraph or the chapeau of Article XX.¹⁰⁴

Appellate Body has also reiterated that proper sequence of steps must be followed in case of application of Article XX. The interpretation of WTO case rulings exhibits that the WTO dispute settlement body has employed its own legitimacy test on the use of trade measures. As a first step the member state would have to verify whether the GATT-inconsistent measure comes under one of the exceptions in Article XX; and secondly confirmation of whether the measure also fulfils the requirements of the chapeau. This criterion is fundamental for the prevention of abuse and misuse of the listed exceptions in Article XX, according to the Appellate Body's reasoning.¹⁰⁵ Furthermore, a measure falling within any of the exceptions listed in Article XX does not meet the prescribed criteria of the chapeau of the said Article automatically.

2.9 Article XX (b) of the GATT: Necessity to protection of human, animal or plant life or health

In order to seek the protection of Article XX (b), a GATT- inconsistent measure has to establish:

¹⁰⁴ United Nations Environment Programme, 37.

¹⁰⁵ Bernasconi-Osterwalder et al, 78. U.S. – Shrimp/Turtle I Appellate Body report, paragraph 120.

- 1) that the policy with regard to the measure is designed to protect human, animal, or plant life or health;
- 2) that this measure in question is necessary to fulfill the policy objectives; and
- 3) that the GATT-inconsistent measure was applied in conformity with the requirements of the chapeau of Article XX.

Article XX (b) permits a WTO member to give priority to environmental policies and public health over objectives of trade liberalization.¹⁰⁶ The linkages between environment and public health can generally be noticed in areas such as air and water quality, food safety, safety in workplace and epidemic diseases etc. Several disputes have dealt with the Article XX (b) exceptions including the U.S. – Gasoline, Thailand Cigarettes, EC – Asbestos¹⁰⁷ and Brazil – Retreaded Tyres cases while establishing and interpreting the concepts that resulted in the “necessity test”¹⁰⁸.

The necessity requirement is a condition applied by the DSB in WTO case decisions for determining whether a GATT-inconsistent measure may still be covered under exceptions of Article XX (b). Through this approach and condition the necessity of that particular measure is identified that is otherwise inconsistent with GATT 1994 provisions. This “necessity test” comprises of two steps: 1) the policy objectives followed by the challenged measure must be the protection of life or health

¹⁰⁶ In Thailand – Cigarette case the Panel examined whether Thailand’s import prohibition of cigarette -- inconsistent with Art. XI of GATT 1947—was justified under Art. XX (b) and ruled: “The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Art. XX (b) it had to be ‘necessary’.”

¹⁰⁷ With EC – Asbestos case for the first time an “environmental measure” passed the necessity test.

¹⁰⁸ Osterwalder et al., 149, Several GATT and WTO panels have interpreted the term “necessity” within the context of relevant Art. XX exceptions.

of humans, animals or plants; and 2) for the fulfillment of those policy objectives this inconsistent measure must be necessary.¹⁰⁹

Further examination of the necessity test makes it clear that the objective that GATT-inconsistent measure aims to pursue plays a significant role in determining the conformity of the measure with WTO rules.¹¹⁰ Some of the instances of the policy objectives pursued by the measures while dealing with Article XX (b) and fulfilling the first step of the “necessity test” include: policies for protection of dolphin life and health,¹¹¹ for reduction in air pollution increasing from the consumption of gasoline¹¹², for reduction in the risks resulting from use of asbestos fibers¹¹³ and policies against consumption of the cigarettes. It is also significant to note that it is not the necessity of policy objectives that must be taken into consideration rather it’s the necessity of the measure to achieve those objectives.¹¹⁴ Hence, the criteria spelt out in Article XX (b) does not inquire about the necessity of environmental policies adopted by a WTO member, rather it’s the necessity of the measure through which these policies get accomplished and implemented, that is questioned in accordance

¹⁰⁹ This two step necessity test was required to be established by the Panel in U.S. – Gasoline case, where the U.S. as a party had invoked the exception under Article XX (b) for its measure.

¹¹⁰ Osterwalder et al,

¹¹¹ In the two Tuna cases, the panel and the parties accepted – implicitly in US – Tuna (Mexico), explicitly in US – Tuna (EEC) – that the protection of dolphin life or health was a policy that could fall under Art. XX (b).

¹¹² In the US – Gasoline case, the panel and the parties argued that “the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of Art.XX (b).”

¹¹³ In EC – Asbestos case, the Appellate Body upheld the finding of the panel and found that “the panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.”

¹¹⁴ Already in the US – Tuna (Mexico) case the panel noted that it was the measure and not the policy goal that had to meet the requirements under Art. XX. (Note by the Secretariat of WTO, No. WT/CTE/203, 8 March, 2002)

with the provisions of GATT 1994.¹¹⁵ The second criteria for necessity test will be met while proving that the challenged measure is necessary to fulfill policy objectives aimed to protect human, animal or plant life or health.

This necessity requirement can take different forms depending upon the facts of each case, however, the meaning and degrees of this concept “necessary” has been carefully examined by the Appellate Body of WTO. The first WTO case involving an analysis of the term “necessary” under Article XX is the Korea – Beef case. Where the scope of word “necessity” was not considered to have been restricted to “absolutely necessary” or “inevitable” or “indispensable” measure to ensure the implementation of objectives of environmental policies, rather other measures may also be covered under this exception.¹¹⁶ The Appellate body decided that a measure with comparatively slight effect upon imported products may be easily considered as “necessary” than a measure with stringent or broader restrictive impacts.¹¹⁷ It is also noteworthy that approaches to identify the necessity requirements are quite similar in both paragraphs (b) and (d) of Article XX.¹¹⁸

Therefore, a GATT-inconsistent measure is held to be necessary and might be justified, only when no other alternative GATT consistent or less trade restrictive measures are reasonably available. In order to determine that the measure is

¹¹⁵ None of the Appellate Body and panel reports questioned the environmental or health policy choices made by governments.

¹¹⁶ Bernasconi-Osterwalder et al, 167.

¹¹⁷ Korea – Various Measures on Beef, Appellate Body Report, paragraph 161.

¹¹⁸ The range of degrees of necessity in Art.XX (d) may be adopted to determine the necessity in Art. XX (b). In accordance with pre-WTO/GATT cases and Korea – Beef, the Appellate Body reaffirmed that a member was free to choose its level of protection (EC – Asbestos AB report, paragraph 174).

“necessary” when it is not per se “indispensable” under Article XX (b), a weighing and balancing process¹¹⁹ is also recommended consisting of three factors as enunciated in Korea – Beef case. These factors involved the contribution of the measure for legitimate objective, significance of values and common interests protected and impact of the measure on trade. After the necessity requirement has been fulfilled by the challenged measure as per criteria mentioned above, this measure needs to get justified under the introductory clause (chapeau) of Article XX.

2.10 Article XX (b) and Sanitary and Phytosanitary Agreement (SPS)

With reference to the WTO laws providing sufficiently advanced approach for the protection of the environment,¹²⁰ Agreement on Sanitary and Phytosanitary Measures (SPS) was negotiated by WTO members during the Uruguay Round which established new substantive and procedural disciplines for a wide array of human, plant and animal health measures. The SPS agreement has been structured on Article XX by defining certain parameters for the application of member-states’ policies for the protection of human, animal and plant life or health.¹²¹ The SPS Agreement deals with various measures, known as SPS measures within the territory of member state relating to food safety and health risks, arising from pesticides, additives,

¹¹⁹ In relation to Korea – Beef, the Appellate Body created a three factor balancing test for deciding whether or not the measure is necessary when it is not per se indispensable. This test also established the answer to the question of whether or not there was an alternative, less trade restrictive, measure that would achieve the same end as the contested measure. Bernasconi-Osterwalder et al., 149-50.

¹²⁰ World Trade Organization, <http://www.wto.org/english/tratop_e/envir_e/envir_req_e.htm#committee> (accessed January 28, 2014)

¹²¹ Cameron, 5.

contaminants and other disease-causing organisms as well as animal and plant health (phytosanitation) with regard to imported pests and diseases¹²².

The basic principle behind Article XX and the SPS Agreement is that every country can set its regulatory policies and standards to safeguard its own environment, life, health and the conservation of its exhaustible resources.¹²³ However the applicability of this principle must be carried out on a Most Favored Nation (MFN) basis¹²⁴, and there must not be some arbitrary or unjustifiable discrimination¹²⁵, and it should also not be “more restrictive than necessary”¹²⁶. However, in addition to these GATT-incorporated requirements, the SPS Agreement includes a series of science-related requirements. Particularly, the SPS measures are required to be founded on scientific principles maintained upon sufficient scientific evidence¹²⁷ and through adequate risk assessment¹²⁸.

In EC – Hormones (Canada) case¹²⁹, the relationship between the SPS Agreement and Article XX (b) has been explained by the Panel¹³⁰. Although it became evident that some provisions of SPS Agreement elaborate on provisions already contained in

¹²² Tim Josling, Donna Roberts and Ayesha Hassan, “The Beef-Hormone Dispute and its Implications for Trade Policy,” Working Paper, Stanford Univ. (September 1999) http://fce.stanford.edu/publications/beefhormone_dispute_and_its_implications_for_trade_policy_the/ (accessed January 28, 2014)

¹²³ SPS Agreement Arts. 2 and 5, GATT Article XX (b) and (g)

¹²⁴ SPS Art. 2.3

¹²⁵ SPS Art. 2.3

¹²⁶ SPS Art. 2.2 – i.e. another measures should not be available that would ensure the same protection and would be significantly less restrictive to trade.

¹²⁷ SPS Agreement, Art, 2.2

¹²⁸ SPS Agreement, Art, 5.1

¹²⁹ EC – Hormones was the first big test of the WTO’s new food safety rules SPS. It gained broad precedent setting power for other health related trade disputes that are governed by the SPS rules.

¹³⁰ EU case on hormone beef against the US, where it was held that there is not enough evidence for the risk to health, and the trade measures were held to be not necessary.

GATT and particularly in Article XX (b). However, the wider approach adopted in Article XX (b) is basically different from the approach employed in the SPS Agreement¹³¹. Article XX (b) fundamentally deals with a general exception which can be invoked to validate any violation of another GATT provision while the SPS Agreement deals with specific criteria to be fulfilled by a member state to enact or maintain particular type of measures i.e. sanitary and phytosanitary measures¹³².

The SPS measures were framed to reduce the conflict over food safety rules which further had to encounter the complexities of scientific standards, interpretation of rules and implications for health, trade and consumer protection.¹³³ Despite the various ambiguities of SPS measures they still uphold the primary objective of the furtherance of the use of harmonized sanitary and phytosanitary principles on the basis of international standards and guidelines between the member states.

2.11 Article XX (g): Relation with the conservation of exhaustible natural resources

Article XX (g) is aimed to allow WTO members to undertake GATT-inconsistent measures to protect and conserve exhaustible natural resources falling under its criteria. The applicability of Article XX (g) was established through the U.S. –

¹³¹ World Trade Organization, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm> (accessed January 28, 2014)

¹³² EC – Hormones (Canada) Panel report, paras. 8.41-8.42.

¹³³ Josling, 21.

Gasoline and the Shrimp – Turtle cases by the Appellate Body. It was ruled out that for taking the cover of this exception, a challenged measure has to satisfy three conditions. Firstly, there must be involvement of the conservation of “exhaustible natural resources” with respect to the concerned measure. Secondly, the measure must “relate to” the conservation of exhaustible natural resources and as a last requirement the measure must be made “effective in conjunction with” the limitations and restrictions on domestic production and consumption. Although With the completion of these requirements, a GATT-inconsistent measure with the purpose of protecting exhaustible natural resources can be provisionally justified, however, the validity of such measure can only be guaranteed with the fulfillment of the fourth criteria¹³⁴. In order to declare a measure as lawful, it has to further comply with the conditions of the chapeau of Article XX.¹³⁵

The first requirement of a GATT-inconsistent measure involves the conservation of “exhaustible natural resources”. The examples of measures recognized as dealing with the conservation of exhaustible natural resources by the Panel and Appellate Bodies include: conservation of tuna stocks¹³⁶, of herring and salmon stocks¹³⁷, of clean air¹³⁸, of petroleum¹³⁹, and of sea-turtles¹⁴⁰. “Exhaustible natural resources” is a

¹³⁴ World Trade Organization, Shrimp – Turtle report 1998, “Although provisionally justified under Article XX (g)..... if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses – the ‘chapeau’ – of Article XX.”

¹³⁵ P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford, New York: Oxford University Press, 2002), 702.

¹³⁶ In the US – Canadian Tuna case the panel noted that “both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management.

¹³⁷ In the Salmon and Herring case, the panel agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources.’”

¹³⁸ In US – Gasoline case the United States argued that clean air was an exhaustible natural resource(it had value) since it could be exhausted by pollutants such as those emitted through the consumption of gasoline.

concept sufficient enough to include “non-living, living, renewable and non-renewable resources”.¹⁴¹ The logic of including “living” natural resources is that despite of their capability of reproduction they might become “exhaustible” and for that matter they do not have to be essentially rare or exhaustible. Hence, almost all living or non-living natural resources may be protected under Article XX (g), specifically those undertaken by a multilateral trade.¹⁴² Therefore, the “exhaustibility” of a living natural resource cannot be questioned when it is protected by a multilateral treaty. It is also important to note that the concept of “exhaustible natural resources” must be interpreted according to the conservation and protection concerns in relation with the environment.¹⁴³

The second step of the Article XX (g) “relating to” the conservation of exhaustible natural resources depends on the relationship between the GATT-inconsistent and the objective of the policy it aims to serve. The challenged measure needs to be primarily aimed at the conservation of an exhaustible natural resource to be held as relating to conservation within the meaning of Article XX (g). A measure

¹³⁹ In US – Automobiles case the panel, “noting that gasoline was produced from petroleum, an exhaustible natural resource, found that the policy to conserve gasoline was within the range of policies mentioned in Art. XX (g).”

¹⁴⁰ In the US – Shrimp case, the Appellate Body noted that the text of Art. XX (g) was not limited to the conservation of ‘mineral’ or ‘non-living’ natural resources and that living species, which are in principle ‘renewable’ are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.

¹⁴¹ “The Appellate Body has interpreted the term exhaustible natural resources to include living, renewable and non-renewable resources.” Bernasconi-Osterwalder et al., 79.

¹⁴² A ‘resource’ may be living or non living, and it need not be rare or endangered to be potentially ‘exhaustive’. Thus, dolphins, clean air, gasoline and sea turtles all qualify.....particularly those addressed by multilateral environmental agreements, would qualify. Birnie and Boyle, 709.

¹⁴³ World Trade Organization, Shrimp – Turtle report 1998, “The words of Article XX (g), ‘exhaustible natural resources’ were carefully crafted more than 50 years ago. They must be read by a treaty interpreter in the light of the contemporary concerns of the community of nations about the protection and conservation of the environment.”

does not have to be essential or necessary for the conservation of exhaustible natural resources, rather it needs to be “primarily aimed” at the preservation of exhaustible natural resources so that it can be considered as “relating to” conservation under Article XX (g).¹⁴⁴ A measure which does not promote the objectives of conservation of an exhaustible natural resource cannot be regarded as being “primarily aimed” at such conservation of exhaustible natural resources. In order to be considered as “related to” the conservation of natural resources, a measure have to exhibit a “substantial relationship” with it.

Although it has been held that the concepts of “relating to” and “primarily aimed” are somewhat similar, however uncertainties exist regarding the interpretation of “related to” because both these terms cannot be held as synonyms and “primarily aimed” is not treaty language.¹⁴⁵ Simultaneously, to fulfill the requirement “relating to” is also quite complicated. The WTO members have faced difficulties in establishing that a challenged measure is directly connected with the policy of conservation of exhaustible natural resources.¹⁴⁶

The third element of Article XX (g) is “made effective in conjunction with restrictions on domestic production or consumption”. According to the Appellate Body in the U.S. – Gasoline case, “made effective” means that the act or regulation

¹⁴⁴ Bernasconi-Osterwalder et al, “The Appellate Body has made clear distinction between the terms “necessary” used in paragraph (b), and the term “relating to”, used in paragraph (g).”

¹⁴⁵ In US – Gasoline case, the Appellate Body noted that the phrase ‘primarily aimed at’ is not itself treaty language.

¹⁴⁶ “The WTO/GATT panels have interpreted ‘relating to’ to mean that it must be ‘primarily aimed at’ conservation. The question arises whether the ‘primarily aimed at’ interpretation of ‘related to’ is correct. Certainly these phrases are not synonyms. The ‘primary aimed at’ requirement seems to be an unwarranted amendment of Art.XX.” Birnie and Boyle, 709.

that restricts the trade to protect the exhaustive natural resources must be in force and that “made effective in conjunction with restrictions on domestic production or consumption” means that the act or regulation must be in force in conjunction with restrictions not just in respect to imported products but also with respect to domestic products as well. In other words we can say that the third requirement of Article XX (g) is an “even-handedness” criterion.¹⁴⁷ The measure in force either in the form of government act or regulation, must impose restriction on imported and domestic products in such a manner that they are dealt even handedly. Even though, Article XX (g) does not require imported and domestic products to be treated equally, but requires that they have an even-handedness treatment. In case this third requirement is not fulfilled, the measure cannot be accepted as primarily or substantially implementing a preservationist objective.

After the GATT-inconsistent measure has been previously justified under paragraph (g) of Article XX, it is necessary to comply with the introductory clause of Article XX, also known as chapeau of the Article.¹⁴⁸

¹⁴⁷ Appellate Body in U.S. – Gasoline case, “put in slightly different manner, we believe that the clause ‘if such measures are made effective in conjunction with restrictions on domestic product or consumption’ is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of evenhandedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”

¹⁴⁸ Trebilcock and Howse, 530-34. The role of the chapeau is to analyze the manner in which the measures are applied, i.e. the application of measure, not whether the measures themselves are such justified under some paragraphs of the Art. XX.

2.12 Environmental Trade Measures in the GATT/WTO Framework

Non-discrimination principle is regarded as one of the fundamental and strongest features of WTO regulatory framework. It carries two different dimensions within itself: the most-favored nation (MFN) principle and the principle of national treatment. According to the MFN treatment if some special treatment and concession¹⁴⁹ is granted to “like” goods and services of one member state it must apply to all WTO member countries equally. Secondly, the national treatment principle requires the WTO members to treat “like products and services” from other countries exactly as their own domestically produced goods and services (like introduction of internal taxes and policy regulations). This approach calls for the imposition of environmental, safety and health regulations on equal basis upon the foreign and domestic products.¹⁵⁰

The entire framework of WTO consists of multiple agreements which cover a wide range of multiple issues relating to trade measures and restrictions for international trade. It was during Tokyo Round that through The Agreement on Technical Barriers to Trade (TBT), the Standard Code was introduced in order to regulate the effective use of standards (safety, quality, packaging, etc.) and to discourage their use as non-tariff barriers to trade.¹⁵¹ Along with the internationally agreed Standard Code, countries were given freedom to apply stringent conditions than others if they desired to preserve “human animal or plant life or health...(and) the environment”. It was however assured

¹⁴⁹ Any advantage, like in the form of tariff reductions.

¹⁵⁰ United Nations Environment Programme, *Environment and Trade: A Handbook*, (International Institute for Sustainable Development, 2005), 31.

¹⁵¹ United Nations Environment Programme, 38.

that such measures would not create unnecessary hurdles in international trade. This step marked the historical milestone in GATT rules and regulations by explicitly using the word “environment” for the very first time.¹⁵²

The Agreement on Sanitary and Phytosanitary Measures (SPS) being the restricted version of the TBT is concerned with health issues, arising from the pesticides and other contaminants. It deals with the international standards allowing member states to maintain strict health and safety standards supported by strong scientific evidence behind it. These measures must be least trade-restrictive and necessary¹⁵³ from safety and health perspective.¹⁵⁴ General Agreement on Trade in Services also deals with the similar issues.

These agreements which can be seen as an effort to enhance harmonization of national standards relating to environmental protection, however gathered severe opposition from both developed and the developing nations. Industrialized countries and the social activists were concerned that international harmonization of standards would adversely affect their already established higher safety and health standards. Contrarily, the developing countries had the apprehension that such higher standards would be extremely difficult and expansive for them to meet and maintain. Another criticism commonly faced by these agreements is related with the scientific justification for application of this measure.

¹⁵² Cameron, 3.

¹⁵³ In EU – Hormone Beef case against the U.S. it was held that there is not enough evidence for the risk to health, thus the trade measures were held to be ‘not necessary’.

¹⁵⁴ Trish Kelly, “The WTO, the Environment and Health and Safety Standards,” *The World Economy* No. 2, 26 (2003): 133. <<http://www.people.fas.harvard.edu/~hiscox/Kelly.pdf>> (accessed January 28, 2014),

Some critics also question the expertise of WTO panels, which mainly consist of trade officials and lack the scientific professionals to decide the presence or otherwise of sufficient scientific evidence for health and safety regulations.¹⁵⁵ In this regard EU has become the main supporter of precautionary principle so that countries may be facilitated with preventive action in cases of scientific ambiguity or insufficient evidence.

The GATT/WTO framework does allow the use of trade measures on different grounds. Article XX of GATT 1994 comprises of the justifications upon which these trade measures can be invoked including the environmental concerns. These environmental justifications and exemptions hold particular significance in this research.

In WTO, different agreements use these trade measures to acquire their specified objectives. Keeping their objectives in sight environmental trade measures can be categorized in three different forms:¹⁵⁶

1. Environmental measures in the form of direct restrictions on trade. In their nature they can be GATT- inconsistent, violating the principles of Article XI until they qualify for the exemption criteria under Article XX. U.S. ban on shrimp and shrimp products is an example of this kind of restrictive measures.

2. Measures taking the form of product standard, relating to the basic feature of the product, it's labeling and packaging etc.

¹⁵⁵ Kelly, 134.

¹⁵⁶ Jon Hutton, "Sustainable Use of Natural Resources, the WTO and MEAs," 5:8 Bridges.(October 2001) ICTSD < <http://www.ictsd.org>> (accessed January 28,2014),

3. The next category of measures relates to the production and process method (PPM), they are permitted on the ground of the procedure of the production. PPM standards are maintained through TBT. WTO environmental jurisprudence has come up with many conflicts where ban on imports on environmental goods relates to the process or the procedure through which the product is produced.

Environmental trade measures, which our first research question is concerned with, come under the first category. The best example of such measures is the U.S. imports prohibition on shrimp and shrimp products in the U.S. – Shrimp Turtle case. We are concerned with the question of justification and accommodation of trade measures for environmental concerns within GATT/WTO framework and it is interpretation of Article XX that sets out the compatibility criteria of trade measures with GATT/WTO principles.

Article XX of GATT details out the exemptions from the non-discrimination rules and other general principles of GATT. According to its chapeau (introductory clause) no discrimination is permitted between the member states where the same conditions apply and all forms of disguised restrictions on international trade are prohibited.¹⁵⁷ Article XX holds that measures are compatible with GATT/WTO provisions when they are:

“b)...necessary to protect human, animal or plant life or health”, and

¹⁵⁷ The objective and the purpose of the chapeau of Art. XX is to avoid the misuse or abuse at the exceptions listed in Art. XX.

“g)...relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

According to the WTO dispute panel, the meaning of “necessary” in XX (b) can be understood as no other alternative measure exists to possibly achieve the end of animal, human or plant health that would have been more compatible with GATT rules and principles.

Article XX makes it clear that all measures must hold generally for both foreign and domestic producers so that all members must receive similar treatment concerning their trade. The sole objective of the country introducing the measure should indeed be the “preservation of exhaustible natural resources” and not the protection of domestic producers. The goal of preservation of natural resources should not be made the responsibility of foreign producers alone. Similar issue was raised during Thailand – Cigarettes case where imposition of trade restrictions on imported tobacco and tobacco products was argued to be “necessary” under Article XX (b).¹⁵⁸ On the other hand Thailand permitted the sale of domestic cigarettes. The U.S. complained that the import measures were inconsistent with Article XI of the GATT.

The GATT panel held that the scope of Article XX (b) encompassed the measures, intended to reduce consumption of cigarettes. However, discrimination against imported cigarettes was not held to be “necessary” because Thailand did not restrict the

¹⁵⁸ Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel report (BISD 37S/200)_ adopted 7 November 1990.

production and sales of domestic cigarette industry.¹⁵⁹ While in the EC – Asbestos case the Appellate Body upheld a French ban on manufacturing, sale and import of construction materials containing asbestos to protect the health of workers and consumers. The Appellate Body confirmed this measure because strict regulations were equally imposed on domestic producers as well.¹⁶⁰

The above discussion shows that environmental provisions have succeeded in occupying their place not only in the rules of GATT but also in other elements of the WTO framework, particularly in the Agreement on Sanitary or Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT).¹⁶¹ For example, the issue of legality of restricting trade in genetically modified organisms (GMOs) is primarily linked with the SPS Agreement¹⁶². There are other interpretational linkages between various WTO agreements as well.

However, the scope of the research is restricted to the question of permissibility or legitimacy of unilateral environmental measures under GATT 1994 Article XX. As it has been established that environmental measures are being recognized under GATT/WTO system, next question arises about the process of this recognition, how and in which circumstances they are being applied and acknowledged. So to further probe this issue the controversies regarding interpretation of Article XX hold a special significance.

¹⁵⁹ Bernasconi-Osterwalder et al., 92-93. The chapeau of Art. XX does not prohibit discrimination per se, but rather, arbitrary and unjustifiable discrimination. Thus, a measure may discriminate, but not in an arbitrary or unjustifiable manner.

¹⁶⁰ Bernasconi-Osterwalder et al., 175.

¹⁶¹ Hutton, 2.

¹⁶² Bernasconi-Osterwalder et al., 77.

2.13 Summary of the chapter

Environmental protection was not prioritized by the framers of GATT 1994 when it became into force¹⁶³ despite the fact that general awareness about environmental problems was already increasing. This was perhaps because of the assumption that international trade would be adversely affected by environmental preservation policies and would also turn out to be a disguised form of protectionism.

The EMIT¹⁶⁴ group was created in early 1970's to examine the interrelationship between international trade and implications of environmental policies. Later on it was the Tuna -- Dolphin case in 1991 and the consequent protest by various international environmental and civil society groups against the GATT through which global environmental issues gained international acknowledgement.¹⁶⁵ WTO since its establishment in 1995 has been quite serious and sensitive to the issues of environmental protection. Along with so much criticism, WTO has been credited to encourage and enhance the public participation through NGOs, disclosure of previously "classified" documents for public access including law students, legal researchers and practitioners and opening the doors to discuss trade environment relationship by the civil society.

In 2001 a new round of negotiations began in Doha with a significant environmental dimension offering a unique combination of multiple opportunities and

¹⁶³ Gomula, 402.

¹⁶⁴ The proposal to convene the EMIT group, submitted by member countries of the European Free Trade Association. EC. *Statement on Trade and Environment*, WTO doc. MTN.TNC/W/47 (1990). <<http://docsonline.wto.org>> (accessed January 28,2014)

¹⁶⁵ Cameron, 5.

risks at the same time. It was the first round of negotiations where environment and sustainable development agenda became surprisingly extensive including MEA-WTO relationship, agriculture and reduction of fisheries subsidies etc.¹⁶⁶ However maintenance of adequate balance between trade, environment and development policies is the central task in this negotiations round that needs to be tackled.

The objectives of Doha development programme have been discouraged by some environmental activists that are destined to remain just a decorative language rather than materializing into visible reality. Contrarily, it has also been established by some critics that exceptional power of developing countries in Doha negotiations and later on, would continue to influence the ongoing proceedings.¹⁶⁷ Resultantly the dynamics of this round would deviate substantially from that of the Uruguay Round which was predominantly affected by U.S. concerns.

In order to find the answer of the extent to which environmental trade measures are considered as justified and accommodated within the exceptional clauses of Article XX, it is significant to understand that WTO members might adopt GATT-inconsistent policy measures provided they are necessary to protect human, animal or plant life or health or relating to the conservation of exhaustible natural resources according to paragraphs (b) and (g). In order to justify a GATT-inconsistent challenged environmental measure, a WTO member has to establish:

¹⁶⁶ Moltke.

¹⁶⁷ Moltke.

- Firstly, that the said measure falls under any one of the exceptions at least e.g. paragraphs (b) or (g) under Article XX, and
- Secondly, the measure fulfills the criteria of the chapeau of Article XX.

Under Article XX (b) to be held eligible, an environmentally motivated trade measure needs to be established as necessary for the protection of human, animal or plant life or health. A connection between the stated environmental policy goal and the measure at issue has to be established i.e. policies relating to the reduction in the cigarette consumption, protection of the dolphins and reduction in risks for human, animal and plant life and health resulting from the accumulation of waste tyres.

In order to justify a GATT-inconsistent measure under Article XX (b), it must be proved:

- 1) that the policy with regard to the said measure is designed for the protection of human, animal or plant life or health;
- 2) that the challenged measure is necessary for the fulfillment of the policy objectives; and
- 3) that the GATT-inconsistent measure was applied in conformity with the criteria of chapeau of Article XX.

Furthermore, the determination of the issue that whether a measure is necessary under Article XX (b) requires a weighing and balancing process through which series of considerations are undertaken such as:

- 1) the contribution of the contested measure;
- 2) the significance of the values and common interests protected; and
- 3) the impact of the challenged measure on international trade.

After the “necessity test” when a preliminary conclusion has been made that the measure is necessary, it must be further confirmed by making comparisons with possible alternatives, which might be less trade restrictive while equally contributing in achieving the specified objectives.

While in order to justify a GATT-inconsistent measure under Article XX (g), it needs to relate to the conservation of exhaustible natural resources, for example: policies designed for the protection and conservation of tuna, herring, salmon, turtles, dolphins and clean air. Or it can be said that the measure has to follow three-step procedure in order to secure the exception under Article XX (g).

- 1) the measure is concerned with the conservation of exhaustible natural resources;
- 2) the measure must be related to the conservation of exhaustible natural resources;
and
- 3) the measure must be effective in conjunction with restrictions on domestic production or consumption.

Finally, a GATT-inconsistent measure also has to be in complete accordance with the extra requirements of the chapeau of Article XX. The introductory clause of Article

XX or its chapeau emphasizes the manner in which the challenged measure is applied. Particularly, the application of the measure must not constitute a “means of arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade”. The application of trade related environmental measures must be carried out in good faith in order to protect legitimate values and interests.

CHAPTER 3

RESEARCH METHODOLOGY

It must be always remembered that legal research process is unique. It is unique in the sense that it cannot be dictated by a measured and formal research ‘methodology’ as it is generally practiced in other disciplines like sciences where the credibility of the whole project is dependent on the application of exact and explicit methodology. Rather legal research involves an exercise in reasoning, logic and common sense so it accordingly makes use of several techniques at the same time, even subconsciously, during the process of constructing a legal argument according to established and conventional norms of this discipline.¹⁶⁸

3.1 Research Design

Research design is referred to the framework that acts as a guideline to determine the method of conducting research. The research design might also be defined as mapping out the journey from research questions to the conclusion. According to Robson, research design comprises of five main elements.¹⁶⁹ The first element is its “purpose”: what the research basically intends to achieve? “Theory” being the second element of research design, directs or guides the research. The “research question(s)” are regarded as

¹⁶⁸Paul Chynoweth, “Legal Research,” in *Advanced Research Methods in the Built Environment*, eds. Andrew Knight and Les Ruddock (Wiley-Blackwell, 2008),

¹⁶⁹ Colin Robson, *Real World Research: A Resource for Social Scientists and Practitioner – Researchers*, (Oxford: Blackwell Publishers, 2002), 18.

the third element: which question or questions the research is intended to answer in a particular time frame and available resources. The fourth element is known as the “methods”: which particular techniques would be employed for the collection of data for answering the research questions and how the data would be analyzed. The last element is “sampling strategy” which directs the researcher towards the location of data.

The actual “purpose” of this undertaken study has been the identification of existing status of unilateral trade measures for environmental protection in the GATT/WTO legal system. A subsidiary purpose of the result related to evaluation of the negative impacts of the unilateral trade measures upon the developing countries and ultimately to suggest the improvements in the system for them.

The broader theoretical contexts that have been framed in this study include Sustainable Development and Global Co-operation. The objective of sustainable development, which includes the protection and preservation of environment, has been widely acknowledged by entire membership of World Trade Organization. This study has been founded on the principle that environment trade conflicts and clashes should be resolved through existing rules and mechanisms of WTO and other international agreements i.e. rules and procedures of MEAs, and in the absence of such rules, new rules should be structured under the WTO or harmonization process of international systems should be carried out. With the help of these theories, the phenomenon under study might be understood in a wider perspective of human knowledge.

The primary “research question” in this study was to determine whether the enactment of unilateral trade measures has been recognized to be legitimate in the legal framework of GATT/WTO? A closely associated research question was to specify the criteria for the trade measures for environmental protection to be justified and protected under the environmental exception clauses of Article XX (b) and (g) of GATT 1994.

The data collection “methods” for answering the research questions include literature review and the case study of WTO. The literature review has provided the historical background and institutional developments of environment trade relationship in the WTO. It has also presented the detailed account of the most relevant law and the prescribed criteria for its application on the issue of trade measures for environmental concerns i.e. Article XX (b) and (g) of GATT 1994. The case study of Judicial and Legislative systems of WTO presented the factual information and examples of disputed cases and negotiation proceedings from the “real world” in relation to the research questions.

The methodology employed in this study is qualitative which adopted a library-based, doctrinal and mainly non-empirical research pattern. The reasons of selecting qualitative research approach are caused by the objectives of this study. Qualitative research has been considered as the most appropriate strategy for the nature of the issue being studied here, which belongs to a “real world” problem in a wider context. The strength of qualitative approach is to examine the human side of an issue which means

the contradictory behaviors, beliefs, opinions and relationships as well as organizational functioning, social and cultural phenomena and interaction between countries.

Such problems cannot be addressed by fixed quantitative designs like experimentation in scientific laboratories. Quantitative designs can be applied to several other environmental dimensions like the levels of major pollutants in air and seas. However, assessing the effectiveness of environmental trade measures in judicial and legislative regimes of WTO brings in many qualitative issues, such as whether environmental exceptional clauses of GATT 1994 are likely to play or have played a significant role in protection of environment from further degradation.

According to Paul Chynoweth, the doctrinal approach is mainly concerned with the formulation of legal 'doctrines' by carrying out the analysis of legal rules (legislation and cases). As distinguished from non doctrinal legal approach, the main focus of doctrinal research is always upon the philosophical and theoretical perspectives of legal rules like 'what actually the law is?', that is why it is also termed as 'research in law'.¹⁷⁰ Coming to the world of reality and practice, it is noticed that in order to clarify some difficult and ambiguous legal provision or legal phenomena we can have resource to the historical, political or social perspective of the rule or phenomenon. So when the doctrinal research shifts its ultimate reliance from pure legal domain and makes certain connections with external realities, the new research direction is termed as non doctrinal or interdisciplinary approach. Third approach of legal research which is the combination of both doctrinal and interdisciplinary research is recognized as 'comparative legal

¹⁷⁰ Chynoweth,

approach'. While considering the objectives and purpose of this study, it includes the interpretation of legal text of Article XX, detailed analysis of environmental disputes under WTO dispute settlement mechanism and a comprehensive account of legislative approach of WTO for the clarification of unilateral trade measures, which seems to combine both doctrinal and interdisciplinary approaches, thus rightly be termed as comparative legal approach.

3.2 Types of Data

Two major types of legal data include primary data and secondary data.

3.2.1 Primary Data

The data acquired from the primary resources of law is known as primary data. Since the study delves on the issue of international economic law (international trade), the particular sources of international law research have also been taken into consideration as well. According to Article 38 (1) International Court of Justice Statute¹⁷¹, there are four sources of international law. These sources include:

- a) International Conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidence of a general practice accepted as law;
- c) The general principles of law that are recognized by civilized nations; and

¹⁷¹ Article 38 (1) of the Statute of International Court of Justice is acknowledged as a definitive statement of the sources of international law. It provides a widely accepted set of standards for ascertaining when a pronouncement should be considered a legally binding obligation.

- d) Subject to the provisions of Article 59¹⁷², judicial decisions and the teachings of the most highly qualified publicists¹⁷³ of the various nations, as subsidiary means for the determination of the rule of the law.

Primary resources for this study include International Conventions and Treaties: the texts of GATT 1994 (especially provisions related to environmental exceptions) Article XX subparagraphs (b) and (g), the Agreement Establishing the World Trade Organization, the Uruguay Round Agreement Decision on Trade and Environment, and relevant provisions/articles of specific Multilateral Environmental Agreements (MEAs). While the WTO Panel and Appellate Body reports, primarily of the Tuna–Dolphin and Shrimp–Turtle cases also play vital yet subsidiary roles.

3.2.2 Secondary Data

Secondary data is gathered from secondary resources. Secondary sources are legal writings possessing secondary authority that comprise of narrative commentary on the law as it exists or as the author perceives, it should be.¹⁷⁴ The importance of secondary sources in legal research is marked by the fact that they not only lead the researcher towards his primary sources (legislation and cases) but also clarify the current status of research development in their respective area of study.

¹⁷² “The decision of the court has no binding force except between the parties and in respect of that particular case.”

¹⁷³ Drumbl, 14. Publicists such as International Law Commission and judicial bodies such as the International Court of Justice, as well as national courts also play vital – albeit subsidiary – roles.

¹⁷⁴ Douglass T MacEllven, *Legal Research Handbook* (Butterworths, 1983), 7.

Secondary resources for this study include legal books or chapters in books, printed or electronic journals, research papers, theses and dissertations, conference proceedings, organizational documents, law commission reports, official and trusted websites, legal encyclopedias and dictionaries and last but not the least magazines and newspapers.¹⁷⁵

3.3 Data Collection Methods

Secondary data for this study has been collected from books on international and more specifically environmental and trade law, reports carrying proposals made by WTO members in the Committee on Trade and Environment and Ministerial Meetings available at official website of WTO, reports on Doha round of negotiations, other official websites of International Institute of Sustainable Development (IISD) and United Nations Environment Programme (UNEP), scholarly research articles, commentaries on trade environment disputes decided by WTO DSB and legal encyclopedias.

Because of access to internet the entire perspective of legal research has extraordinarily changed, so careful and vigilant use of different legal websites (Westlaw, Lexus nexus and www.ssrn.com) and reference to online journals and electronic

¹⁷⁵Sandra Meredith and Donal Nolan, eds., *Oxford Standard For the Citation of Legal Authorities* (Oxford University Press, 2010),

encyclopedias through University Utara Malaysia library website has been undertaken, in this regard it can be partially referred as ‘computer assisted legal research’.¹⁷⁶

3.4 Analysis of Data

The analysis techniques applied upon the research data are interpretative and analytical. Interpretative process is used in most of the qualitative studies particularly in legal research, to understand and make sense of the data, since the data is detailed and complex and might not be necessarily available in a straightforward and precise form.¹⁷⁷ In legal research, many of the past studies have used interpretative technique for the data analysis.¹⁷⁸

In order to describe, explain and interpret the legal text and understanding the criteria for applicability of Article XX (b) and (g) of GATT 1994 as a defense of WTO inconsistent measure established by the Panels and Appellate Body decisions of WTO, an interpretative technique is appropriate while for comprehensive understanding and detailed analysis of the relevant case law the analytical technique of data analysis has been employed.

¹⁷⁶ Glanville Williams, *Learning the Law*, 14th ed. (Thomson Reuters, 2010), 214.

¹⁷⁷ Paul Oliver, *Understanding the Research Process*, (Sage Publications, 2010), 73-74.

¹⁷⁸ (a) Sonia Gabiatti, “Trade related environmental measures under GATT Article XX (B) and (G),” (LLM thesis, University of Iceland, 2009), (b) Jessica Antoine, “Recognizing a Sustainable Relationship between International Human Rights and International Trade Law in a Pursuit to have Human Rights taken more Seriously,” (LLM thesis, University of Toronto, 2009), (c) Arne Vandaele, “International Trade Law as a Means to Enforce Workers’ Rights in Developing Countries: The Way Forward?” (LLM thesis, McGill University, 1997),

3.5 Summary of the Chapter 3

This chapter has elaborated the research methodology used in this study. This study has been conducted through a qualitative, doctrinal and non-empirical research design. Undertaking a doctrinal approach it carries out the critical evaluation of legal texts i.e. Article XX (b) and (g) of GATT 1994 in order to identify the legal parameters through which environmental trade measures are acknowledged and recognized as legitimate and acceptable under WTO framework. Methods for data collection include the literature review and case study of WTO. The broader theoretical contexts employed in this study include sustainable development and global co-operation for environmental protection. The techniques used for data analysis in this study are interpretative and analytical.

Chapter 4

TRADE MEASURES AND ENVIRONMENTAL JURISPRUDENCE OF WTO: AN ANALYSIS OF JUDICIAL APPROACH OF WTO

This chapter has presented an extensive review on the jurisprudence of the Appellate Body of the WTO as it deals with the environment-trade agenda. Analysis of various Appellate body decisions has highlighted the conflicts between trade and environment. The interpretation of WTO dispute panel judgments has been carried out in order to assess how far this interpretation could have been held as an appropriate test for the legitimization of the use of trade measures for environmental protection. The relationship of WTO and Multilateral Environmental Agreements has also been explored through the dispute settlement process of WTO.

For some scholars the rationale of interlinking trade measures for environmental purposes is founded on the track record of effective use of trade measures in other areas like human rights, protection of labor standards and arms control.¹⁷⁹ However, the urgency, intensity and international character of environmental problems cannot be equated with any of these areas. With regard to environmental implications, Shrimp-Turtle (1998) case holds a quite dominant place in WTO jurisprudence.¹⁸⁰ Where the Appellate Body held the disputed U.S. law, restricting the imports of shrimp, caught without the use of “turtle excluder devices” to be justifiable under Article XX, but the

¹⁷⁹ Khalilian, 10.

¹⁸⁰ The U.S. measure in the Shrimp Turtle case is a typical instance of unilateral measure with in the framework of the GATT.

way it was implemented was held to be discriminatory. So the Appellate Body did not ask U.S. to dismantle its state legislation rather the change in implementation policy was recommended. This ruling turned out to be disturbing issue on behalf of developing countries, who shared particular concerns on how the WTO laws are applied and interpreted by the Appellate Body. For them, the Shrimp-Turtle decision could have been interpreted as permitting WTO members to use unilateral actions based on the way in which products are produced (i.e., the manner of harvesting the shrimp).¹⁸¹

The reason for this specific focus on the legal context and the analytical review of WTO trade and environment debate, in this chapter, is that the rulings of WTO dispute settlement procedures has been widely accepted as authoritative by all its member states. However, it is also essential to have a brief outlook at the controversial characteristics of unilateral trade measures as opposed to multilateral measures and what are their implications for the developing countries.

4.1 Unilateral vs. Multilateral approach

In order to understand the complexity of the question of legalization of unilateral trade measures in the context of WTO it seems feasible to first discriminate and distinguish between the two different approaches in which environmental trade measures could have been used and employed. In fact the unilateral approach is contradictory with the basic principle of all international organizations like WTO, which have been

¹⁸¹ Cameron, 6.

established on the grounds of multilateral cooperation and mutual consensus among the member states. This multilateral approach is envisaged by the countries' compliance with international rules, including those specifically provided by the agreements themselves (WTO) and their relevant dispute settlement procedures. In case of disputes arising out of the agreement or among the members, available dispute settlement mechanism should be resorted to instead of unilaterally motivated measures.¹⁸²

In order to justify the use of unilateral measures generally two rationales are presented. Firstly it is argued that international rules and regulations are incomplete both in procedural and substantive aspects. So “justified disobedience” in the form of unilateral measures can be adjusted for making existing rules more efficient and effective. The second justification has its own political and economic grounds, arguing that use of threat of unilateral measures is effective for the maintenance of a free trading system from a strategic perspective.¹⁸³

Neither of the justification is persuasive. For the first rationale it is contested that new multilateral arrangements like WTO cater for world wide coverage and recommend the most authentic dispute settlement mechanism as compared to the earlier trade agreements. The “strategic justification” argument is also unacceptable. Whatever it suggests through the use of unilateral measures, is actually managed and controlled trade and not the free trade. As far as practice is concerned, this approach can be best suited for achieving required market outcomes rather than removing genuine trade barriers.

¹⁸² Japan Ministry of Trade and Industry, *Chapter 14: Unilateral Measures* at 230. JMTI <http://www.meti.go.jp/english/report/downloadfiles/gCT0014e.pdf> (accessed January 28, 2014)

¹⁸³ Japan Ministry of Trade and Industry,

Moreover, it is the enforcement of an international standard or regulation unilaterally by a member state that highlights the contrasting nature of unilateral and multilateral approaches. According to one point of view, the enforcement of international standards through unilateral actions might create conflict. So it has been considered disruptive for the international system thus raising the preference for multilateral enforcement procedures. While on the other hand, multilateral enforcement arrangements in their true nature are either missing or inefficient.¹⁸⁴ That's why where multilateral options do not exist; unilateral actions still have to perform their important role.¹⁸⁵

4.2 Unilateral trade measures obstruct development of developing countries

The use of unilateral measures has always been considered as a lethal weapon to imperil the development of the developing countries being a disguised form of protectionist approach and an infringement of their sovereignty. This criticism is based upon interpretation of international free trade theory. This idea has gained wide acceptance by not only the Western world but also by the developing countries as well for the greater benefit of their development. For developing countries, their standardized

¹⁸⁴ Philippe Sands, "'Unilateralism', Values and International Law," *European Journal of International Law* No. 2, 11 (2000): 275 , 292

¹⁸⁵ Unilateralism has been favored by several legal scholars over multilateralism for the reason that ideal and effective multilateral action is not possible in certain areas because multilateral arrangements tend to be extremely demanding and difficult so far as acquiring international cooperation is concerned.

mass production at lower cost (low wages) is the biggest competitive advantage,¹⁸⁶ so unilateral trade measures for environmental objectives introducing trade restrictions are clearly an attempt to render their products less competitive by denying their comparative advantage.

This development based argument has recently taken two dimensions. Firstly, unilateral measures when used against trading partners who also happen to be WTO members appear to violate international rules of free trade and take the form of illegitimate protectionism. These protectionist measures might result into worst circumstances for domestic as well as international welfare. Preference of the use of unilateral trade measures over multilateral options might give rise to further retaliation from the target country thus resulting into trade war of increasing retaliation. The U.S. Smoot-Hawley Act of 1930¹⁸⁷ is the best example of that legislation through which the tariff rates were escalated to the highest level in the U.S. history, eventually resulting in the collapse of entire global trade regime. Furthermore, if the efforts to harmonize environmental standards through trade measures end up in retaliation and counter-retaliation, resultantly, the entire multilateral trading system could be weakened, upon which developing countries heavily rely in order to liberalize their economies.¹⁸⁸

The second dimension of the development argument springs out of the basic principles of international law. The developing countries have registered serious concerns

¹⁸⁶ Anderson, 329.

¹⁸⁷ The critics of unilateral trade measures refers this act as an example of those tariff increasing legislations during the 1930's which ultimately resulted in a sharp contraction in trade and stagnation of the world economy.

¹⁸⁸ Anderson, 331

with these unilateral measures which seem to interfere with their sovereignty. They assert that scope of a country's legislation should be restricted to its own territorial limits. Where unilateralism in the international context is intrinsically linked to sovereignty, territory and jurisdiction,¹⁸⁹ the concepts of "state jurisdiction", policy of "non-interference" and the "extraterritorial" application of domestic legislation become a matter of concern for developing countries.

It also becomes obvious that international principles of jurisdiction play significant role in assessing the legality of unilateral trade measures. The trade and environment relationship has often been viewed through the angle of extra-territorial jurisdiction. Which for some countries, may be an issue of domestic application of their legislation and for others may be an issue of 'universal application' of a domestic statute. From the perspective of developing countries it is the unilateral imposition of Western domestic standards upon them which can potentially obstruct their export-oriented trade development.¹⁹⁰

4.3 Environmental Jurisprudence of WTO: A Journey from Tuna — Dolphin to Shrimp — Turtle

It is the case law of WTO Dispute Settlement Body that helps to identify the legal parameters qualifying a trade measure as unilateral and the criteria resorting to it. With

¹⁸⁹ The report of the UN Special Rapporteur of the International Law Commission. International Law Commission, *First Report on Unilateral Acts of States*, 1998 UN Doc. A/CN.4/486.

¹⁹⁰ Chazournes, 187.

regard to applicability of Article XX (b) and (g), GATT/WTO has dealt with six main disputes so far. Some of them had two or more decisions because of the appeal. However, most controversial debate about unilateral use of trade measures for environmental protection has been carried out through two historical cases: the U.S. – Tuna/Dolphin case and the U.S. —Shrimp/Turtle case. The decisions of these cases significantly highlight the key principles to assess the legality and right of countries to resort to unilateral measures within the prescribed limits. It also becomes significant to observe that although the panel and Appellate Body decisions are binding upon those WTO members being party to a particular dispute and not upon others, they have served as strong platform for resolving the upcoming cases brought before the Dispute Settlement Body.¹⁹¹

In 1991, Tuna dolphin case was the first decision by a GATT panel to bring the attention of world trade community and environmental groups on the validation of unilateral trade measures (measure taken by Member state to protect resources outside its jurisdictional limits).¹⁹² The central issue in Tuna – Dolphin I case was the U.S. ban prohibiting the imports of tuna fish caught by using “purse seine” nets resulting in incidental killing of dolphins. This ban was imposed in pursuance of U.S. Marine Mammal Protection Act. While in Tuna – Dolphin II case another embargo was highlighted which prohibited the imports of tuna products from countries processing tuna,

¹⁹¹ Note by the Secretariat of WTO, document no. WT/CTE/203, 8 March 2002. <http://docsonline.wto.org> (accessed January 28, 2014), “the Appellate Body held that ‘Adopted panel reports are an important part of the GATT *acquis*, ... They create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute... In the same case the Appellate Body agreed with the panel finding that unadopted panel reports had no binding effects but could nevertheless serve as “useful guidance”.

¹⁹² The Panel’s decision in the Tuna/Dolphin case has indicated that sovereign states do not have the right to impose such measures beyond their territory.

caught by the offending countries. Imposition of embargoes in both tuna – dolphin disputes had to be analyzed under environmental exceptions of Articles XX (b) and (g) through which U.S. tried to seek the justification of said measures necessary for the “conservation of natural resources.”

U.S. ban was challenged by Mexico as being inconsistent with Articles XI and XIII. The GATT panel found the embargo to be illegal because it failed the necessity requirement of Article XX (b). It was found that U.S. trade measure was not necessary as the purpose of environmental protection could have been achieved by other available alternatives as well. The available alternative measures might include some international cooperation agreement or any different import embargo.¹⁹³ The basic requirement of necessity test is the exhaustive examination of all possible alternatives so that no available measure, more compatible with GATT/WTO basic principles, should be left out and the least trade distorting alternative must be utilized. Thorough investigation of available measure would include their respective domestic costs and hurdles in implementation procedure as well.¹⁹⁴

The embargo in Tuna – Dolphin I also did not qualify for exemption under Article XX (g) because its scope was restricted to the measures conserving resources within the jurisdictional limits of the party imposing them and it did not permit U.S. to force other Members to change their environmental standards, by imposition of a unilateral measure. It was clearly mentioned in the decision that GATT-inconsistent measure might be taken

¹⁹³ GATT (1994), U.S.—Tuna/Dolphin I, Panel report, para 5.28

¹⁹⁴ Part of ruling on EC–Asbestos case, Bernasconi-Osterwalder et al,

under Article XX (b) and (g), only if its implementation is limited within its respective “territorial jurisdiction.”¹⁹⁵

This decision was strongly condemned and criticized by various environmental groups. In their view not only the scope of environmental policy was restricted but the decision damaged the basic foundation of environmental law.¹⁹⁶

In Tuna – Dolphin II, panel ruled that environmental conservation plans could be enforced as “extra-territorial restrictions” but this enforcement was valid only to the extent of state’s own nationals and vessels.¹⁹⁷ With respect to Article XX (b) and (g) it held that it might have “extra-territorial, but not extra-jurisdictional effect”. Thus, Tuna – Dolphin II further extended the scope of measure coming under the range of Article XX (g), however, environmentalists were once again disappointed by the decision because of its limited approach. According to them, the issue of differentiation between areas of national jurisdiction and areas of global commons¹⁹⁸ was not adequately addressed in panel decision.¹⁹⁹

¹⁹⁵ GATT, United States – Restrictions on Imports of Tuna, GATT BISD,39th Supp. 155, GATT Doc. DS21/R (1991), 30 *International Legal Materials* 1594 (1991) paras. 891-892.

¹⁹⁶ The speech of Pascal Lamy the Director-General of WTO at Yale University on 24th October 2007 at http://www.wto.org/english/news_e/sppl_c/sppt9_e.htm (accessed January 28, 2014),

¹⁹⁷ In contrast to the previous report, U.S-Tuna/Dolphin II extended the scope of Article XX (g) of the GATT a little further. The panel cited previous GATT cases, the principle of national jurisdiction and Article XX (e)’s provision relating to products of prison labor as example of ways in which countries are allowed to enact measures relating to things located or actions taken outside of its territorial jurisdiction (at paragraph 5.15-5.17). Keeping these considerations in view, the panel ruled that U.S. policy at issue, although aiming conservation of dolphins outside its territory, covered by the range of policies under Article XX (g) (at paragraph 5.20). However the findings were exclusively restricted to conservation on the U.S. exercise of jurisdiction upon its own nationals and vessels (at paragraph 5.17). Osterwalder et al, 245.

¹⁹⁸ While drafting the decision in Tuna – Dolphin II the GATT panel did not take into consideration, the use of measures for the protection of resources like oceans and atmosphere which lay out side the jurisdictional limits of all states.

¹⁹⁹ Bernasconi-Osterwalder et al, 245.

As the reasoning behind these decisions was founded on the extraterritorial scope of the measure imposed so the Panel did not further investigate its unilateral dimension. The issue of unilateral character of trade measures and other important trade and environment aspects have been thoroughly analyzed by WTO Appellate body in the Shrimp – Turtle case. In 1998, a U.S. import ban was imposed on shrimps and shrimp products from non-certified countries (countries using methods detrimental to sea turtles) under section 609 or the Sea Turtle Act.²⁰⁰ This act was introduced in 1989 and the objective of this act was to protect sea turtles²⁰¹ from being killed during unregulated harvesting operations of foreign shrimping trawlers. In the Convention on International Trade in Endangered Species (CITES) sea turtles have been acknowledged as an endangered species and consequently the use of Turtle Excluder Devices (TEDs) was compulsorily enforced in U.S. during 1990.

In 1996, Malaysia, India, Thailand and Pakistan challenged the ban on shrimp import under Section 609 and consultation process was requested with the U.S. in pursuance of Article 4 of WTO Understanding on the Settlement of Disputes.²⁰² The consultation process eventually failed to reach some amicable result and the WTO DSB was requested by the plaintiffs to establish a Panel to decide on the status of shrimp

²⁰⁰ *Endangered Species Act*, 16 U.S.C. 35 609 (1991).

²⁰¹ *Endangered Species Act*, Section 1573 (b) (2).

²⁰² World Trade Organization, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan and Thailand)* WTO Doc. WT/DS58/R (1998) (Panel Report) <http://www.wto.org/english/tratop_e/dispu_e/58r00.pdf> (Shrimp-turtle panel) paragraph 98.

import ban under Section 609 and other regulations as GATT- inconsistent, contrary to the Article XI and XIII²⁰³.

According to plaintiffs argument the U.S. ban could not be justified under the exceptional clauses of Article XX (b) and (g), which allow the application of measures necessary to protect human, animal or plant life or health and relating to the conservation of exhaustible natural resources. As a defense, U.S. raised the point that Section 609 was covered under exceptions of GATT 1994 Article (g), where the imposition of import prohibitions is permitted for the preservation of an “exhaustible natural resources” so far as the measure imposed equally applies to the domestic consumption and protection as well. Article XX (b) was also raised as a defense by U.S. which allows import restrictions “necessary to protect human, animal, or plant life or health.” In favor of Section 609 to be declared as “necessary”, the U.S. claimed that it addressed the risk of sea turtles already recognized by the parties at an international forum.

On the issue of “exhaustible natural resources”²⁰⁴ in Article XX (g) the Appellate Body had to look beyond the language of the text to examine whether living resources, like endangered species of sea turtles are covered by this term or not. The U.S. government emphasized that endangered turtles are covered under the plain meaning of Article XX (g) because they are natural resources and being at the verge of extinction they are

²⁰³ Article XI and XIII of GATT 1994 provide for the prohibition of quantitative restriction and non-discriminatory application of quantitative restrictions.

²⁰⁴ Appellate Body searched for the agreed principle on exhaustible natural resources outside the text and found two relevant treaties – 1982 UNCLOS, and 1992 CBD and two non-binding documents – Agenda 21 by UNCED in 1992 and a resolution adopted in the Convention on the Conservation of Migratory Species of Wild Animals in 1979. Each of the documents refers to natural resources as including living resources.

definitely exhaustible. On the other hand the complaining parties insisted that Article XX (g) refers only to resources that are finite like minerals and do not include living resources at all. However Appellate Body agreed with the U.S. confirming that they are not restricted to non-living natural resources rather they include living resources which are at the brink of extinction or exhaustion.²⁰⁵

According to final report of WTO Dispute Settlement Panel in 1998, the U.S. import ban under Section 609 was held to be inconsistent for discriminating arbitrarily and in an unjustified manner under Article XX, and it also “implied a unilateral imposition of U.S. environmental legislation on other countries”. The U.S. legislation compelled the foreign producers to adopt similar shrimp fishing procedures to its own (same TEDs) and did not allow for other alternatives to be utilized. According to Panel’s finding different conditions of foreign shrimp producers and their respective national conservation policies were not brought under full consideration by U.S. and on a second note U.S. negotiated with various countries in Latin America and the Caribbean while offering them technology transfer for employing TEDs and a three year phase-in plan while the plaintiffs were not made the part of any such plan.²⁰⁶ So, U.S. was held to have acted in an unjustifiable discriminatory manner and its ban on shrimp imports was held as an impermissible “prohibition” under Article XI (I) of GATT 1994.²⁰⁷

²⁰⁵ Knox, 55.

²⁰⁶ US – Shrimp/Turtle Panel report, paragraph, 43. The wider Caribbean and Western Atlantic region states had a three year phase-in period, while the “newly affected nations” were given four months or less to change shrimp harvesting practices.

²⁰⁷ World Trade Organization, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) (1998). <http://www.wto.org/english/tratop_e/dispu_e/58 abr.pdf> (Shrimp/Turtle case), (Appellate Body Report), paragraphs 172-176.

The same year U.S. went forward to file an appeal against the Panel decision upon some legal issues and interpretations related to the ruling that Section 609 cannot be saved under exceptional clauses of Article XX. The approach of the Appellate Body was substantially different from previous key findings of GATT panels.²⁰⁸ The presence of migratory species in U.S. oceans turned out to be a justification for a GATT-inconsistent measure to be protected under Article XX (g). So, Appellate Body decision somewhat permitted the enactment of any measure by a WTO member for the protection of migratory species in its territorial jurisdiction independent of the extra-jurisdictional powers. According to some critics this ruling has however, given rise to uncertainty to the scope of measures by a WTO member, preserving resources, located exclusively outside its territorial limits.²⁰⁹ Nevertheless, the U.S. restrictions failed in their application and were declared as “unjustifiable” and “arbitrary” discrimination under the chapeau of Article XX.²¹⁰

The U.S. import prohibition was not removed even after the Appellate Body gave its decision rather adjustments were made to incorporate the ruling with U.S. policy. In 2000, a complaint was brought before WTO DSB against U.S. for not making adequate adjustments with the Dispute Settlement Understanding (DSU). According to the panel report on this case U.S. – Shrimp/Turtle 21.5 (2001), the U.S. was found to have acted

²⁰⁸ In U.S. – Shrimp/Turtle case, the Appellate Body accepted the policy covered by Article XX (g), that applied to turtles not only within the U.S. waters but also living beyond its national boundaries. It was found that sufficient nexus exists between the migratory and endangered marine populations involved and the U.S. for purposes of Article XX (g).

http://www.wto.org/english/tratop_e/envir/_envt_rules_exceptions_e.htm (accessed January 28, 2014)

²⁰⁹ Based on AB decision, migratory species occurring within the territory of the Member enacting the measure may be protected independent of any jurisdictional power the Member has over national and vessels. However, the extents to which Members can protect resources located solely outside their jurisdictional boundaries remain uncertain. Osterwalder et al, 252.

²¹⁰ US – Shrimp/Turtle case, AB report, paragraph, 110.

consistently with the previous panel decision (U.S. – Shrimp/Turtle I) by having initiated the negotiation proceedings with all the concerned members.

The framework of guiding principles for import restrictions was altogether revised and made even more flexible. These new changes were introduced to accommodate other comparable and equally effective programmes in spite of exactly the similar U.S. techniques. U.S. attempted to reach an international agreement although the efforts did not become actually successful. These efforts were held consistent with U.S. – Shrimp/Turtle I decision because of undertaking negotiations proceedings as “serious good faith effort to cooperate”.²¹¹ The Appellate Body has closely linked the question of cooperation with the specific inquiry on arbitrary or unjustifiable discrimination in pursuance to the chapeau of Article XX.

So far as the question of unilateral aspect of these measures is concerned the Appellate Body seems to allow them to a specific degree under Article XX. Surprisingly, the use of language in the ruling of U.S. – Shrimp/Turtle I case is a bit strange as it does not imply what it decides rather what it has not decided: “We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly they can and should.”²¹²

²¹¹ US – Shrimp/Turtle 21.5(2001), paragraph 133. Bernasconi-Osterwalder et al, 134.

²¹² US – Shrimp/Turtle I, paragraph 185.

So unilateralism has been recognized as a “common aspect”²¹³, and the dispute settlement body is willing to allow the unilateral trade measures for environmental purposes provided they clear the test of the chapeau under Article XX (g). However, at the same time WTO jurisprudence does not allow for unilateral measures in all circumstances, rather certain stringent parameters are set out under which permission for unilateral measures is granted.

During the interpretation of Article XX, the question of unilateralism has been addressed from the perspective of good faith efforts to cooperate. Appellate Body has dealt with several questions in assessment of good faith efforts to cooperate on one hand and the actual meaning and basic constituents of cooperation (i.e. capacity enhancement, financial support and technology transfer) on the other.²¹⁴ Keeping this analysis in view it becomes clear that the right to impose unilateral measures for environmental purposes under Article XX of the GATT 1994 has been recognized by WTO only to a certain extent; however WTO has not provided any prospective guidelines and specified criteria for their future use or permissible scope as yet.

From above WTO jurisprudence it can be inferred that the unilateral measures may be crafted and developed in only particular contexts. Chazournes in his essay “The Use of Unilateral Trade Measures to Protect Environment” goes on to describe important factors through which imposition of any measure may be qualified as unilateral.

²¹³ US – Shrimp/Turtle I case, paragraph 121.

²¹⁴ Bernasconi-Osterwalder et al, 83.

The first factor is its “exclusive” nature, where the term exclusive does not allow any kind of flexibility or “equivalency” of measures for achieving the same objective. The next factor is about the proportionality of the measure with respect to the countries that are target of the unilateral measures. In this regard the Appellate Body used the concept of economic embargo for condemning the measures which ignore the specificity of a country. This approach implies that a unilateral measure does not have to be disproportionate and the fulfillment of this requirement greatly depends upon the specific circumstances of the concerning country.²¹⁵

According to Chazournes, another prerequisite for unilateral measures is the necessity to engage in meaningful negotiations for the conclusion of commonly agreed solutions with other countries. The country willing to adopt measures for the protection of the environment must try to reach an agreement on concerned action with all other concerned states, and not only with some of them because the preference for a multilateral approach for acknowledging respect for environmental protection should be manifested in an inclusive manner. While not abiding by this rule might crate violation of non-discrimination rule under GATT 1994 as well.²¹⁶

The Appellate Body in Shrimp-Turtle 21.5 provides some clarifications on how to interpret the necessity for behaving in a “multilateral” manner. Whether there should be an obligation to negotiate or an obligation to negotiate and reach an agreement? The Appellate Body favors the first interpretation and requires serious attempts for

²¹⁵ Chazournes, 187-188.

²¹⁶ Chazournes, 187.

conducting negotiations in good faith. However in this judgment it upheld its preference for measures taken under international agreements over unilaterally taken measures. Negotiated agreements were regarded as the preferred method for solution of environmental issues and considered as central principle of this decision.²¹⁷ Requiring these tough criteria to be met successfully, the door for resort to unilateral measures is left half open.

It can also be noticed that Appellate Body considered and referred to different MEA²¹⁸ provisions that recognized multilateral actions to be the most efficient conservation measures. In this regard particular citation of Principle 12 of Rio Declaration is worth mentioning. Although Appellate body did not recognize MEAs to be foundational basis for seeking protection under environmental exceptions, it however recommended the multilateral approach for environmental solutions.²¹⁹

4.4 Evolution in political positions of WTO members on unilateral trade measures in the context of WTO environmental jurisprudence

Although it cannot be asserted that Appellate Body has finally succeeded in achieving a political consensus at an international level, however it is interesting to note

²¹⁷ US –Shrimp/Turtle 21.5, paragraph 13.

²¹⁸ In Shrimp-Turtle case, United Nations Convention on the Law of the Sea (UNCLOS), The Convention on Biological Diversity, The Resolution on Assistance to Developing Countries (adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals), and the CITES

²¹⁹ US – Shrimp/Turtle case, paragraph 185-186.

the evolutionary changes in the positions of different governments on the issue of unilateral measures over a period of time. In both the Tuna – Dolphin cases in 1991 and 1994 thirty nine out of forty countries disagreed with U.S. view. Similarly, in Shrimp – Turtle I in 1997 before panel proceedings the four complaining countries and all of the third parties took a position and denounced the U.S. measures again. It was only the U.S. government which stood firm in defending its measure. However, At this point the EC came up with a remarkable statement which is believed to prefigure upcoming Appellate Body decision.²²⁰ The imposition of U.S. measure was criticized by EU in the same Tuna/Dolphin manner however EU went further to pronounce that “in order to justify unilateral measures out side the jurisdiction of a Member in pursuit of commonly shared environmental concerns, a Member had to demonstrate that it had made genuine efforts to reach a multilateral solution.”²²¹

During the appeal in Shrimp – Turtle II, the changes in the positions of different countries became more evident. Japan and Australia, previously the long standing critics of unilateral restrictions on trade categorically stated that GATT 1994 does not restrict these trade measures and there was no legal obligation for U.S. to conclude an agreement prior to imposition of such unilateral actions. In case of developing countries like India, Mexico, Thailand, Malaysia and Hong Kong, their criticism was also not as stronger as it had previously been in Shrimp – Turtle I. while India’s criticism was just confined to the arguments about proceedings of the U.S. domestic court.²²²

²²⁰ Knox, 70.

²²¹ U.S. – Shrimp/Turtle I, Appellate Body Report, paragraph 139.

²²² Knox, 71,

Later in 2001, during the DSB discussion of Shrimp – Turtle II, developed countries like Canada, the EC, and United States appreciated the Appellate Body ruling. Though, for developing countries it was not a positive outcome yet they preferred not to criticize too much. In spite of eight developing countries who participated actively three years back in the DSB discussion of Shrimp – Turtle I, only three countries participated this time. The criticism by Malaysia largely focused upon procedural grounds and it highlighted that Malaysia would never stop the way of any consensus reached upon by panel and appellate reports. India however categorically rejected the decision of the case that U.S. measure was held to be considered justifiable under Article XX, so long as the U.S. government undertook good faith efforts to conclude a multilateral agreement.²²³ In fact the change is striking with reference to developed countries like Australia, Japan and Canada whose previous position in Tuna – Dolphin II was that the U.S. trade restriction could not possibly be justified under Article XX (b) and (g) which does not provide protection to unilateral actions devised to protect the environment beyond the jurisdictional limits of importing countries.

Of course with this discussion it cannot be established that Appellate Body's decisions were the main or the only reason of this shift in positions. Gregory Shaffer²²⁴ however recommends the EC's statement in Shrimp – Turtle I as the prime event where the acceptability of unilateral measures was conditioned with the genuine efforts to negotiate a multilateral agreement. As already mentioned it is not at all necessary to believe that Appellate Body has single handedly formulated this political consensus or

²²³ Knox, 72.

²²⁴ Gregory Shaffer, United States – Import Prohibition of Certain Shrimp or Shrimp Products, 93 *Am.j.Int'l L.* 507, 509 (1999) as cited in John Knox, 73

that the entire WTO membership is happy with this resolution, rather the most significant fact is that finally a resolution has been crafted by the Appellate Body to which most countries can give their agreement.²²⁵

4.5 Trade-related MEAs and WTO Framework – A move towards International Co-operation

In order to tackle transboundary and global environmental problems international cooperation has been regarded as the most appropriate measure by jurists, scholars and legal experts. It has also become evident from the above discussion that WTO members, as well as panel and Appellate Body reports have strongly emphasized upon the use of multilateral agreements to deal with such matters. Multilateral environmental agreements are the agreements to address serious environmental concerns between sovereign states which include ozone depletion, climate change, trafficking of hazardous wastes or chemicals and endangered species of wild fauna and flora. UNCED has already reaffirmed the negotiation of MEAs as a preferred approach than unilateral measures, which carry a great risk of arbitrary discrimination and protectionist cover, having great potential to destroy multilateral trading system.²²⁶

According to UNEP and WTO documents, there are 238 “International Treaties and Other Agreements in the Field of the Environment” out of which 38 consist of trade provisions, or trade-related measures have been adopted by their Parties for the

²²⁵ Knox, 73

²²⁶ Timoshenko, 128.

furtherance of their respective objectives through the Conference of Parties. Some of the MEAs (that introduce trade measures to acquire their objectives) having strong trade effects include the Montréal Protocol, the Basal Convention, the Persistent Organic Pollutants (POPs) and Prior Informed Consent (PIC), Biosafety Protocol of the Convention on Biological Diversity (CBD) and CITES. Considerable number of MEAs has become in force and concerns regarding their trade measures have constantly been increasing.²²⁷

Trade measures incorporated in the MEAs generally take the form of trade restrictions and embargoes, import and export licenses and standardization of notification, packaging as well as labeling requirements. Environmental groups have emphasized upon the use of such measures as carrots or sticks to persuade or motivate countries to become signatories and abide by multilateral environmental agreements. In order to combat global environmental problems like climate change and ozone depletion, one of the most common and frequent problem is that of free-riders. However, this problem of free-riders can be countered by writing the trade provisions in the agreements like in Montréal Protocol (1987), for the reduction of CFCs use to slow down ozone depletion.²²⁸ Although the use of trade related provisions in Convention on International Trade in Endangered Species²²⁹ and Basel Convention (trade in hazardous wastes) have not been objected by the WTO members, future conflicts may well be anticipated in case

²²⁷ Ulrich Hoffmann, "Clear and Effective Trade Measures in Multilateral Environmental Agreements and their Compatibility with the Rules of the Multilateral Trading System," (Discussion paper, UNEP-UNCTAD Capacity Building Task Force Workshop, Singapore, 16 May, 2002) <www.unep-unctad.org/cbtf/events/singapore/discussionmeal.doc> (accessed January 28, 2014).

²²⁸ Anderson, 229.

²²⁹ Trade provisions regarding bans on trade in ivory, rhinoceros horn and tiger products.

of drafting trade provisions in more contentious MEAs for example an effort to impose a global carbon tax.²³⁰

Several concerns have also been raised with respect to the imposition of trade measures against non-parties of the MEAs. Although there has not been any such dispute till date at the WTO DSB, still the enforcement of MEAs on non-parties has been considered unlawful under WTO framework by critics.²³¹ That is why the discussion of the relationship between trade provisions and MEAs in WTO has prominently figured at the CTE negotiation agenda of the Doha Round, but before looking into it lets discuss some other relevant concerns.

The membership status of MEAs is also of crucial significance with regard to its imposition of trade related measures. Trade measures incorporated in an MEA having huge membership carry a universal or broad based support system through which the potential of such measures to come in direct clash with WTO rules becomes much lesser.²³² However, it is disappointing to know that several important WTO members have never acceded to certain older environmental agreements in addition to some recent MEAs as well. Basel Convention is one of the examples, where more than 20 WTO members are still non-Parties to it.²³³

²³⁰ Anderson, 229.

²³¹ Jagdish Bhagwati, "On Thinking Clearly About the Linkage Between Trade and the Environment," *The Economics of International Environmental Problems* No. 4, 5 (2000): 486.

²³² Hoffmann, 5.

²³³ Hoffmann, 6.

The concern of developing countries on adoption of an appropriate MEA definition has also increased in recent years in CTE. During clarifying the MEA-WTO relationship they have sought reassurance about MEAs being intergovernmental agreements targeting at certain criteria. Reiterating their stance, the developing countries emphasize MEAs to successfully meet both substantive as well as procedural criteria. Emerging as a platform of international consensus and broad participation, they must be represented by all countries. While contrarily the EU proposed definition offers a stark clash with their viewpoint, according to which any legally binding instrument between at least three countries should be considered as an MEA and which is open to all concerned countries.²³⁴ The regional agreements like fisheries organizations have also been included in EU proposed definition which happens to clash with the “broad international participation” and “adequate representation of all country groups”, according to developing countries’ criteria.²³⁵

Having considered the membership status of MEAs, another categorization of trade measures becomes possible due to which trade measures are divided into two groups: (1) trade measures incorporated in the Agreements of broad based membership which are multilateral in nature; and (2) trade measures introduced through a unilateral action by MEA party in pursuance of a certain MEA provision which may also be called as MEA-mandated provisions (e.g. stricter import/export measures on any species under

²³⁴ EU submission to the first special session of the CTE on MEAs. (Document TN/TE/W/1 of 21 March 2002)

²³⁵ According to Hoffmann, it is absolutely unlikely for a developing country to join a regional MEA, which is of little relevance to its specific region, in order to avoid undesirable trade restrictions alone, until reasonable balance, between rights and obligations (including costs); arising out of such MEA has been introduced.

CITES in some developed countries or measures relating to disposal of specific hazardous wastes under Basel Convention). In fact the trade measures from the second category are more susceptible to be considered inconsistent or most trade-restrictive by other WTO or MEA parties.²³⁶ Before proceeding on the issue of Party non-Party conflicts between MEAs and WTO members a closer look at their dispute settlement mechanisms is necessary.

4.6 Comparison between Dispute Settlement Procedures of MEAs and WTO

The use of methods like monitoring, reporting, and transparency reflects that MEAs are generally focused at avoiding disputes rather than settling them. Moreover their use of incentives, like financial assistance, technology access, capacity building and training workshops also enhances compliance.²³⁷ In case of emergence of a dispute, facilitative and co-operative methods are employed by the MEAs to motivate compliance, instead of coercive methods.²³⁸ Generally, MEA related disputes are limited to the issues of their interpretation and application disagreements which reflect the financial or technical incapacity to fulfill international legal obligation. In case of failure of conciliation procedure the conflict persists and the dispute is referred to compulsory dispute settlement. Depending upon the relevant MEA provisions it can be either International Court of Justice (ICJ) or some arbitrator nominated by the disputing parties.

²³⁶ Hoffmann, 6.

²³⁷ Massimiliano Montini, "Improving Compliance with Multilateral Environmental Agreements through Positive Measures: The Case of the Kyoto Protocol on Climate Change," in *Economic Globalization and Compliance with International Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 159.

²³⁸ Dunoff, 64.

Usually no binding adjudication procedure is enforced by MEAs rather preference is given to the compulsory conciliatory efforts on request of any disputing party to create a commission for the solution of the dispute. Unless otherwise agreed, the judgment of the commission is not generally binding.

As already mentioned, MEA disputes are related to the technical and financial incapacities to observe the MEA commitments and obligations; a specific system has been established for avoidance of such disputes which is called non-compliance provisions (NCPs) including conciliation, transfer of specialized advice, solutions and assistance to foster compliance and encouragement of dispute resolution approach rather than adoption of traditional dispute settlement procedures. Technical cooperation is meant to include all forms of assistance directed towards developing and least developing countries.²³⁹ However the NCPs procedures do not develop any exclusive authority in favor of respective MEAs members which means that compliance provisions can even be invoked by the non-complying MEA party or through some executive body or by any other MEA member state as well.

Conversely, the WTO framework consists of a compulsory dispute settlement mechanism providing exclusive jurisdiction for the WTO adjudicating bodies (panel, Appellate Body or arbitration²⁴⁰) and entitling only the governments of WTO members to launch the dispute settlement proceedings. So while, it makes the characteristic approach of NCPs as multilateral and facilitative the WTO dispute settlement mechanism can be

²³⁹ Montini, 166.

²⁴⁰ WTO's Adjudicating Bodies under Article 25 of the Dispute Settlement Understanding (DSU).

featured as bilateral and confrontational. MEA mechanism has been characterized as weaker in comparison with WTO dispute settlement procedure by some scholars mainly because of not having compulsory dispute settlement procedure resulting in binding judgments. As a counter argument to this criticism some critics hold that despite of having such highly judicialized international dispute settlement mechanism and having full command over treaty interpretative skills it is still unable to resolve strategically significant conflicts of trade environment inter-linkage.²⁴¹

So far as the mutual relationship between MEAs and WTO is concerned it is inherently technical and context oriented, thus making it hard to make generalizations. While analyzing the trade measures incorporated in various MEAs in detail, it becomes evident that MEA regime is meant to address the wide range of environmental contexts with multiple types of trade measures employed for various purposes. So theoretically it might become a challenging situation for a state to simultaneously meet both international commitments. So far no direct and formal dispute between MEA and WTO obligations has been brought at any international forum including WTO.

However, concerns have been raised by WTO members regarding the issue of trade measures in MEAs for the countries having membership of WTO but being a non-Party to the MEA²⁴², provided that most of the trade restrictions in MEAs are particularly

²⁴¹ According to Dunoff, despite of WTO dispute resolution being the most fully judicialized international dispute system, it certainly has particular areas of competence. WTO panels are quite good at legal enterprise of treaty interpretation; however larger questions regarding the nature and functions of trade regime would undermine the system by overburdening the dispute resolution process.

²⁴² For instance, the trade provisions of the Basal Convention, the Montréal Protocol and the CITES (for those particular species in which managed trade is allowed) require parties to apply more restrictive trade provisions to non-parties than to parties.

aimed at non-parties of MEAs.²⁴³ So, a situation might emerge that where non-party to MEA cannot access the relevant MEA dispute settlement process, the WTO Member although not being a party to MEA might still ask for the setting up of a panel under WTO dispute settlement understanding (DSU).

Another situation might emerge in case of a dispute between two countries under a WTO agreement and a specific MEA where both countries decide to conduct negotiations under MEA dispute settlement mechanism, but one of the countries then decides to refer the issue to WTO dispute settlement body also, aiming at the institution of a panel. In this situation the process of WTO dispute settlement, being the latest and most judicialized system would be regarded superior to the dispute settlement under MEAs, according to WTO Dispute Settlement Understanding. According to some WTO members, the current principles of public international law are sufficient to define the legal interrelationship between WTO law and MEAs.²⁴⁴ In this respect, the Vienna Convention on the Law of Treaties and the principles of customary law could provide guidance on interaction of WTO rules with MEAs.²⁴⁵ The legal principles of “*lex specialis*”²⁴⁶ and “*lex posterior*”²⁴⁷ have been considered significant in defining their mutual relationship. While some WTO members reiterate the need for greater legal clarity. Whatsoever, there will be no conflict with respect of jurisdiction of both the dispute

²⁴³ Non-parties to the MEAs have represented the majority of potential challenge to the MEA related trade measures. This is so improbable for a country that has first voluntarily joined the MEA and agreed to the trade measures of that agreement to later challenge its terms at the WTO dispute settlement forum.

²⁴⁴ World Trade Organization, “The Relationship between MEAs and the WTO,” in *Trade and Environment at the WTO* <www.oas.org/.../The%20Relationship%20between%20MEAs%20and%20> (accessed January 28, 2014), 37.

²⁴⁵ Article 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331; 8 *International Legal Materials* 679.

²⁴⁶ The more specialized agreement prevails over the more general.

²⁴⁷ The agreement signed later in date prevails over the earlier one.

resolution procedures under MEAs and WTO; rather it would be the case of overlap of jurisdictions because WTO dispute resolution has jurisdiction over GATT inconsistencies.

Although there has never been a formal dispute in the WTO regarding the trade measures contained in an MEA, however, the Chile – Swordfish case²⁴⁸ has exemplified the risk of conflicting judgments from both forums, the WTO and the International Tribunal for the Law of Sea (ITLOS). In this case, it is likely that both adjudicating bodies would have examined whether Chile’s conservation measures were in accordance with the United Nations Convention on the Law of the Sea (UNCLOS).²⁴⁹ In order to employ swordfish conservation measures, Chile regulated and limited the level of fishing by refusing new catching permits. Furthermore, the utilization of Chilean ports for landing and service to the EU long-liners and factory ships that disregarded the minimum conservation standards was also restricted. The EC raised the case before WTO by challenging these measures as being inconsistent with its WTO rights under Article V²⁵⁰ of GATT. While Chile emphasized that WTO does not limit state sovereignty over its ports and demanded from EC to enact and employ conservation measures for its fishing operations in the high seas, in compliance with recommendations from the United Nations Division for Ocean Affairs and in accordance with the Law of the Sea Convention (LOSC). The WTO dispute settlement system and the International Tribunal for the Law of the Sea (ITLOS) could have reached different judgments on factual

²⁴⁸ Chile – Measures affecting the Transit and Importing of Swordfish, WTO, Dispute Settlement: Dispute DS193, <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm> (accessed January 28, 2014)

²⁴⁹ World Trade Organization, “The Relationship between MEAs and the WTO,” 37.

²⁵⁰ Article V of GATT relates to the free transit of goods along the territories of member states.

aspects or on the interpretation of the relevant provisions of the Convention. Chile further initiated the dispute settlement provisions of LOSC and invited the EC to ITLOS.²⁵¹ The EC finally agreed to settle the matter through formation of an arbitral tribunal according to the LOSC.²⁵²

Imposition of trade measures by MEAs which include quota restrictions, embargoes, bans and licensing policies upon import and export materials run extremely high risk of violating basic GATT/WTO principles of non-discrimination under Article I and III and prohibition of quantitative restrictions under Article XI of the GATT. Such trade measures could be challenged by non-parties to MEAs and held invalid under WTO framework. In the same manner an MEA could be used as a justification by WTO member to legalize the imposition of trade restriction for environmental objective under Article XX (b) and (g) of GATT 1994.

Although there has always been the probability of clash between MEA and WTO rights and legal responsibilities, some scholars do not anticipate such a conflict because Article XX (b) and (g) incorporate a wide range of environmentally motivated trade measures provided the imposition of these measures is not done through arbitrary and unjustifiable manner or as a disguised restriction on international trade.

²⁵¹ The WTO Dispute Settlement Body established a panel on the request of the EC in December 2000; however, in March 2001 the EC and Chile agreed to suspend the process for the constitution of the panel.

²⁵² Hoffman, 15. In the light of an amicable arrangement between the two parties, the ITLOS special Chamber has suspended proceedings in the Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South East Pacific Ocean until 1 January 2004.

4.7 Role of MEAs in Interpretation of WTO Law

Another stifling question is about the kind of role played by MEAs in the interpretative process of WTO rules during different cases. Answer of this query is not easy since each conflict is separate and carries different matters with respect to WTO rules and MEA provisions. The MEA-WTO relationship has been defined by the WTO dispute settlement system. The Appellate Body has acknowledged the legal inter-relationship between international trade law and the MEAs (public international law) in its decisions of U.S. – Reformulated Gasoline and U.S. – Shrimp Turtle²⁵³ cases.

According to Appellate Body, WTO law cannot “be interpreted in clinical isolation from public international law”, especially where relevant international environmental law could possibly be used as source of legitimate legal principles in order to apply and interpret WTO rules and regulations.²⁵⁴ However, the mutual interpretation of WTO principles and MEAs should be conducted through a complementary approach. For example, an evidence of international consensus on a relevant fact to a dispute could be presented through existence of particular MEA, like the role played by CITES²⁵⁵ in Shrimp-Turtle dispute on the issue whether a species is considered endangered and needs protection under Article XX (g). The role of MEAs can also be helpful in defining certain

²⁵³ During the decision in US – Shrimp/turtle case, the Appellate Body made several references to: the 1982 UN Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity, and the CITES. US – Shrimp/Turtle, paragraph 130.

²⁵⁴ Vicente Paolo, ‘Multilateral Environmental Agreements’ in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development 2007), 141.

²⁵⁵ CITES played the same role in Shrimp-Turtle case.

terms and conditions, not clearly defined, in the GATT or other WTO agreements related to the dispute.

So, the WTO has reached on this conclusion that conflicts between WTO laws and MEAs provisions should be best resolved through a mutual and continuous negotiation process by WTO Members and MEAs parties themselves.

4.8 Summary of Chapter 4

Environmentally motivated unilateral trade measures used by one state to enforce other states to change their national environmental policies in order to avoid environmental degradation are generally not allowed under international law. However, legitimate unilateral trade measures are also considered necessary in those extreme cases where other alternative solutions are either ineffective or nonexistent by some critics. Although the WTO Appellate Body decisions (case law of WTO) have contributed in justifying the legal reasoning behind these trade measures,²⁵⁶ it is still very difficult and unclear to determine the permitted scope of these unilateral trade measures for environmental purposes under the frame work of GATT/WTO law. Until the U.S. – Shrimp/Turtle I ruling issued by Appellate Body, the general approach of panels had been to interpret Article XX in a way which prohibited any use of unilateral measures. In this case, the Appellate Body strongly rejected the panel’s approach that, as a general principle, unilateral measures conditioning market access on the policies of the exporting countries are not justifiable under the exceptional clauses of Article XX.²⁵⁷ However, simultaneously the WTO jurisprudence does not allow the use of unilateral trade

²⁵⁶ Chazournes, 183.

²⁵⁷ U.S. – Shrimp/Turtle I AB report, paragraph 121, Osterwalder et al, 83.

measures in all circumstances; rather it spells out certain parameters under which these measures are permitted.

As can be derived from the discussion on various aspects of environmental jurisprudence of WTO, the permissible scope of unilateral trade measures is not yet clearly obvious in both the GATT/WTO rules and in the WTO DSB as well. In order to remove this lack of clarity on the status of unilateral trade measures under the exceptional clauses of Article XX (b) and (g) of GATT, the position of WTO members on trade environment link needs to be examined thoroughly.

However to define the mutual relationship between WTO rules and different MEAs, the role of dispute settlement system of WTO has already been quite significant. Through its judgments in the U.S. – Reformulated Gasoline and U.S. – Shrimp/Turtle cases, sincere efforts for the recognition of legal interrelationship between trade and public international law can be witnessed.²⁵⁸ As it has been noted in this chapter the relationship between MEA-related trade measures and WTO principles is one of the agenda item in the Doha round of negotiations. In the next chapter the concerns of developing countries and the different proposals for the clarity of MEA-WTO relationship will be brought under discussion.

²⁵⁸ Paolo, 149.

CHAPTER 5

TRADE MEASURES IN DOHA NEGOTIATIONS AND RESPONSE OF DEVELOPING COUNTRIES; AN ANALYSIS OF LEGISLATIVE APPROACH OF WTO

The Committee on Trade and Environment (CTE) was set up by a Ministerial decision in 1995 with the objective to identify the interactive relationship between WTO principles and environmental policies taking the form of trade measures. In 1996, various proposals of WTO members were compiled under different agenda items by the CTE as the Singapore Report. CTE continued to work on the trade environment relationship in different perspectives and the clarification of status of unilateral trade measures for environmental objectives imposed by a WTO member against another has also been on the discussion agenda.

Doha Ministerial Declaration, adopted at the Fourth WTO Ministerial Meeting in 2001, agreed upon a framework for future negotiations regarding a new round of global trade liberalization for the clarification of interconnection between the trade measures incorporated in MEAs and GATT/WTO rules and regulations. Paragraph 31 of the declaration highlights the “mutual supportiveness of trade and environment” by calling for further negotiations regarding “the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements²⁵⁹.”

²⁵⁹ WTO, Ministerial Declaration, 4th Ministerial Conference of WTO, Doha, 9-14 November 2001, WT/MIN (01)/DEC/W/1.

Information exchange between different MEA Secretariats and concerning WTO committees and the specific criteria in order to qualify for the observer status have also been included on the same agenda list.²⁶⁰

“Specific” trade obligations (STOs) mentioned in Paragraph 31 of Doha declaration, refer to those trade measures which have been unequivocally agreed upon at a multilateral forum. They are clearly different and distinguished from unilaterally taken trade measures by individual parties according to their own national decision in pursuance of an MEA. Despite of having been authorized and incorporated by various MEAs, still the particular characteristics and rigidity of these measures has not been specifically mentioned in the MEA. Examples of STOs in an MEA include Article 1.1 of the Basel Convention permitting countries to designate wastes as hazardous, above the ones not clearly mentioned in the Convention as hazardous and bringing them under Convention’s trade measures and restrictions.

Article 14 of CITES is another example of STOs giving the option to importing and exporting parties to apply stringent trade restrictions on any species they might deem fit. These STOs might create certain trade differences for being too stringent and disproportionate by other parties as well.²⁶¹

²⁶⁰ Vicente Paola, “Multilateral Environmental Agreements,” in *Trade and Environment: A Resource Book* eds. Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (International Institute for Sustainable Development, 2007), 145.

²⁶¹ Hoffmann, 15

This trade and environment discussion is by no means new and has been studied for many decades but the clarification about the relationship of these two international regimes has proved to be an uphill task being far from clear. One of the main reasons behind this uncertainty is the diversity of their respective aims and objectives and partially it might be the confused characteristic dimension of their mutual relationship. Another problematic issue has been the use of language and different terminologies in trade and environment contexts which do not necessarily deal with the same terminology and also in many instances the clear definitions of the various terms have not been exactly worked out.²⁶²

In order to clarify the status and use of trade measures for environmental objectives, we have to sift through proposals of several WTO members presented in the CTE sessions in previous years, which have focused upon the connection between GATT/WTO rules and trade measures in MEAs. An analysis of these proposals might possibly provide a guideline about different WTO member's position on the issue of environmentally motivated trade measures whether they are unilaterally imposed by one WTO member against another or they originate from certain MEAs.

Keeping the scope and topic of research in sight, it was not possible to recapitulate the proposals of all WTO members over here; rather the discussion have focused upon views and proposals forwarded by various developing countries. Proposals made by some of the most powerful and developed economies, which were of significant

²⁶² Stephane Gueneau, Selim Louafi and Benoit Martimort, *Trade and Environment in the Architecture of International Governance* (Paris: IDDRI, 2005), 4. IDDRI stands for International Institute for Sustainable Development, which is a non-profit policy research institute based in Paris.

usefulness in the backdrop of Doha negotiating mandate have also been brought under discussion.

5.1 Classification of proposals on the clarification of environmental trade measures in MEA-WTO relationship

There have been a large number of proposals by researchers, WTO member states, policy experts and academicians focusing on the issues of trade measures for environmental objectives both from MEAs and WTO and their conformity with WTO principles. These proposals have been categorized into several groups depending upon their approaches and variations. According to Shaw and Schwartz four groups of proposals have been identified to resolve the dilemma of environmental trade measures in the pretext of MEA-WTO relationship. They include maintenance of the status quo, adoption of a waiver for measures taken under MEAs, interpretative decision or amendment of WTO rules (particularly, Article XX of GATT 1994) and the development of a voluntary consultative mechanism.

5.1.1 Maintenance of Status quo approach

The developing countries being the actual proponents of this approach have stressed that WTO system does not pose any threat against the trade measures taken in pursuance of the MEAs. This approach further confirms that the likelihood of such conflicts has now decreased even more as compared to the past. To date although only

one dispute concerning MEA related trade measures has been notified at the WTO²⁶³, no such dispute has reached the panel stage.²⁶⁴ So developing countries feel that there is no need to change existing WTO rules or elaborate new rules to deal with MEA-WTO hypothetical legal conflicts. In their proposals Brazil and India have clearly mentioned about absolutely no need for further clarification of MEA-WTO relationship. India's viewpoint regarding the trade measures in MEAs is that they should be formulated keeping WTO rules and obligations in mind and the current WTO provisions are sufficient to deal with the issues of trade measures pursuant to MEAs. The dispute settlement system of WTO is also an appropriate forum to tackle with MEA-related conflicts.

Brazil shares the similar concerns with India by questioning the need to continue MEA-WTO discussion which seems impractical to reach some consensus according to its view. It rather recommends constant information exchange within MEAs Secretariats and UNEP. Brazil has supported the idea about drafting of MEA related trade measures even more precisely and establishing a strong consultative mechanism therein. Mexico also joins the party of developing countries which do not find any clash between MEAs and WTO provisions. Venezuela has showed up its support for the need of greater dialog between UNEP, WTO and MEAs.²⁶⁵

²⁶³ The EC requested for consultation in 2000 in a dispute with Chile concerning Chile's prohibition on EC vessels unloading swordfish in Chilean ports. Chile argued that EU did not comply with its obligations in conservation of living resources of the high seas under the UNCLOS. However a settlement was made between the parties in 2001.

²⁶⁴ Gomula, 416

²⁶⁵ Hoffmann,

In case of insistence of other WTO members upon MEA definition, developing countries seem to favor a contrary²⁶⁶ and relatively narrow definition and coverage of MEAs so that trade measures taken in pursuance thereof would not form arbitrary and unjustifiable trade discrimination and also be less trade-restrictive. Moreover, these MEAs related negotiations should have been conducted under United Nations with an open participation offer to all WTO membership.²⁶⁷ Developing countries believe that existing WTO provisions are sufficient enough and clear to tackle the issue of unilateral trade measures for environmental objectives.

Observer reports of the CTE discussion have argued that some increasingly industrializing developing economies require WTO to play its appropriate role in case of unilaterally imposed trade measures in pursuance of an MEA. India, being the leading example of such countries considers that modifications in WTO trade regulations to accommodate MEA related trade measures would badly affect the trade opportunities of developing economies where most of their exports products are based upon natural resources.²⁶⁸

All the proposals incorporating status quo approach in them tend to reassure the sufficiently wide scope of environmental exceptions as provided in Article XX of the GATT 1994 and harmonization of sustainable development principle in overall WTO

²⁶⁶ Proponents of WTO-MEA negotiations like EC and Switzerland favor broader definition of MEAs, including regional agreements and treaties between three parties as well, having the main aim of protecting the environment.

²⁶⁷ Paolo, 151

²⁶⁸ M. K. Mehra, S. Banerjee, R. Bajaj and Fernandex, C., "India at the Doha Ministerial Meeting: An Analysis," *International Journal of Regulation and Governance* No.1, 2 (2001): 200.

framework. According to U.S. submissions in the CTE, it categorically emphasized upon the need of enhanced domestic cooperation between WTO and MEA professionals and policy makers by reinforcing that specific trade objective in the MEAs and implementation practices of their respective parties contribute to stronger relationship between trade and environment.

5.1.2 Adoption of a Waiver approach

The members adopting this approach have proposed the granting of a waiver provision of the WTO obligation in special circumstances provided this waiver gets approved by at least three quarters of WTO members.²⁶⁹ This approach mainly proposed by EU, asserts that MEA related environmental trade measures could be specially exempted from WTO obligations through either of waiver provisions which consist of Article IX of Marrakech Agreement and Article XXV (5) of GATT 1994.²⁷⁰ These waiver provisions are made available to the WTO members on a measured and case-by-case basis for environmental purposes.

While this approach might appear attractive, it has yet not been supported from either of the trade and environment professionals as an optimal solution due to a number of reasons. A waiver is always time-limited and needs to be renewed periodically. Granting a waiver to a legal obligation under WTO rules has only been permitted by two

²⁶⁹ Gary P. Sampson, "Effective Multilateral Environment Agreements and Why the WTO Needs Them," *The World Economy* No. 9, 24 (2001): 1123.

²⁷⁰ These waiver clauses permit the WTO Ministerial Conference to release any member from contractual obligations under exceptional circumstances through three quarters majority.

third majority which is practically quite difficult to achieve for every time a waiver is requested. Moreover, any trade measure applied in pursuance of a waiver could have been challenged in WTO Dispute Settlement Body on the basis of non-violation, impairment and nullification of WTO rights. The meanings of term “exceptional circumstances” in Article XXV have been quite unclear and there is no clue whether MEAs are to be treated as exceptions in this regard.²⁷¹

The proposals regarding modifications and alterations in waiver approach have been presented in CTE to make it more practical for environmental objectives. It has been recommended that a special “multi year” waiver for MEAs related trade measures would be introduced. The waiver could be extended annually till the date of its termination provided other WTO requirements are fulfilled and the “exceptional circumstances” would cover the specific trade measures incorporated in certain MEAs. Hence, these suggestions have not been actually implemented so waiver approach has not been regarded as satisfactory solution for further clarification of WTO-MEA relationship.

5.1.3 Amendment approach

The proponents of this approach including Switzerland and EU affirm that the issue of clarification of unilateral trade measures in the WTO needs a certain level of authenticity, which cannot be achieved through the waiver approach. So an amendment in Article XX of GATT 1994 is proposed to incorporate the application of MEA related

²⁷¹ Sampson, 1121.

trade measures where the amendment would amount to prescribing the criteria and specific conditions for the application of trade measures in pursuance of an MEA. This approach has won sufficient support from all WTO members while taking the form of a collective interpretation of the provisions of Article XX of the GATT 1994 in case of application of MEA related trade measures to its non-parties.²⁷²

According to some critics, the clarification of WTO-MEA relationship and acknowledgement of the legitimate use of MEA related trade measure would not only ensure the future acceptance of MEA based environmental measures under Article XX, but also hinder the way of unilateral measures in the multilateral trading set up. The EU has taken a step further by emphasizing that there does not exist any clinical isolation between WTO rules and other regimes of international law like MEAs. The role of MEAs has been considered as significantly relevant in the application and interpretation of WTO principles in case of a certain conflict, even if the conflict relates to the non-parties. Reference has been made to the WTO Appellate Body decision in U.S. – Shrimp/Turtle case where a number of MEAs were consulted and used for the clarification of term “exhaustible natural resources”, in order to reassure MEAs integral role for the justification of use of environmentally motivated trade measures.²⁷³

On the issue of implementation of Doha development agenda relating to MEAs, the EU clarified that during governmental proceedings for MEAs negotiations, due consideration should be paid to relevant WTO rules in order to strengthen mutually

²⁷² WTO, Submission by the European Community

²⁷³ Hoffmann,

cooperative relationship. Furthermore, MEAs and WTO must be treated on equal basis in international law. It also recommended WTO members to agree upon some principles, governing the MEA-WTO relationship and determine the limit up to which automatic conformity of specific trade obligations with WTO rules should be considered permissible.

A “coherence clause” was introduced as a further step by Switzerland suggesting the equal treatment of relevant provisions of MEAs and WTO principles in case of a dispute. Switzerland presented the concept of interpretative understanding through which the objectives, adequacy and necessity of trade measures would be prescribed by MEAs while WTO dispute settlement system would determine the status of a particular trade measure in terms of discrimination and protectionism.²⁷⁴

All of the above mentioned proposals and the approaches in these proposals except the status quo approach have become the target of criticism. It has been pointed out that they could upset the current balance of GATT 1994 rights and legal obligations. Members of WTO, which are not parties to MEAs, insist that provisions and judgment of parties to MEAs should not possess a higher status in order to surpass their WTO rights, in case trade measure in pursuance of MEA is challenged for being trade discriminatory under GATT 1994. In order to make these proposals work more efficiently, some critics suggest coming out of the competence of GATT 1994 and carrying out an assessment of environmental justification for the application of MEA related trade measures. Despite of

²⁷⁴ WTO, Submission by Switzerland, WTO documents WT/CTE/W/139, <<http://docsonline.wto.org>> (accessed January 28, 2014),

searching for the internationally applicable proposals, these critics strongly emphasize upon considering case to case approach as it comes up with its individual merits.

5.1.4 Voluntary consultative approach

In its proposal New Zealand has emphasized that in case of commitment of Parties to MEA to an MEA, international law does not provide any justification for those countries to object to the trade measures in pursuance of that MEA any further. On MEA-WTO conflict, New Zealand holds that such clashes are likely to arise when MEA provisions are not clear in their plan of action, be it among the parties to MEA or in case of non-parties.

However, these conflicts are limited and they must not be exaggerated. In case such a difficulty between MEA related trade measures and WTO rules arises, the use of voluntary consultative mechanism should be made on an ad hoc basis. This consultative mechanism would assess the extent of effectiveness of the disputed trade measure as an available instrument to tackle the environmental problem. This mechanism would facilitate a better understanding of different perspectives by maximizing the potential for an approved solution, minimizing the clashes between Parties on environment and trade related procedures and avoiding inefficient environmental and financial results.

Although this proposal is not so properly formulated however, before the Doha Ministerial it became popular in CTE because of its simplicity and its characteristic of not

proposing any change in the existing WTO rules and regulations. Besides New Zealand, Canada and Japan also joined their hands in favor of preparing “guidelines” or an “understanding” comprising of all WTO agreements. These guidelines were to be applied by WTO panels in determining the consistency of MEA related trade measures²⁷⁵. The applicability of these Understandings would also cover trade measures used against non-parties provided both the procedural and substantive criteria have been successfully met however; unilateral measures were not covered under these guidelines.²⁷⁶

5.2 Lack of harmony and consensus: reaction of developing countries

It has proved to be an uphill task to establish some common grounds among the above mentioned approaches. The reason for this lack of consensus is that each WTO member has focused upon its own proposal and opposed and criticized the negotiations by other WTO members regarding the agenda. The amendment approach has been criticized for setting a dangerous example for labor and human rights by allowing protectionism in the WTO.

In the waiver approach critics fail to see any certainty and guidelines for the MEAs.²⁷⁷ With regard to developing countries, which otherwise favor the preservation and protection policies of environment in conformity with their developmental needs were reluctant to accept the inclusion of the MEA-WTO clause particularly during Doha

²⁷⁵ WTO, Submission by New Zealand, The first proposal for drafting of an understanding was tabled by New Zealand in 1996, WTO documents WT//CTE/W20 <http://docsonline.wto.org> (accessed January 28, 2014),

²⁷⁶ Hoffmann,

²⁷⁷ Sampson,

negotiations. Specifically, they were concerned about the adjustment of unilateral trade measures in WTO against which they raised serious objection because they feared that powerful WTO members would unilaterally impose trade restrictions in pursuit of their protectionist and economic concerns. They have believed that existing WTO framework is sufficient to tackle with any dispute between MEA related trade measures and WTO principles, for that reason, alterations and elaboration of current WTO rules is not required in order to deal with hypothetical legal confrontations between MEAs and WTO. Rather, most of the developing countries have agreed upon the best-first solution for the fulfillment of MEAs objectives to be the additional financial resources and capacity building enhancement for them.²⁷⁸

The practical participation of developing countries on the clarification of status of unilateral trade measures in WTO has been in the form of a response and not as a firm and identical position.²⁷⁹ It has already been discussed in chapter two that developing countries have opposed to the environmental inclusion on WTO agenda from the very early stages. Like their objection to the convening of EMIT group and establishment of CTE were sufficient evidence of their fear that these institutions were used to justify the imposition of U.S. and European unilateral trade measures to affect developing countries exports. Same is true, when developed world recommended next round of global trade negotiations to be held in 2001 in Doha, developing countries conditioned their participation only if development was to become the focal point of those negotiations. For this reason this round is generally known as “Doha Development Round” (DDR).

²⁷⁸ Paolo, 151

²⁷⁹ Cameron, 8.

During this development round several proposals were rejected by developing countries because such proposals were considered to further restrict their policy space²⁸⁰ for the application of various developmental policies.²⁸¹

While discussing the reactions of developing countries on the issue of unilateral trade measures it must always be kept in mind that neither are they a new concept nor is the debate over their adequacy and effectiveness. In fact the sanctioning aspect and inflictive nature of these measures cause the negative implications largely for the target of the measures and specially the developing economies which raise the issue of unequal balance of power. In the words of Boisson De Chazournes, the abusive use of unilateral measures in the overall context of international economic relations has been and remains a very sensitive issue for developing states, particularly when the legitimacy of these highly individualistic measures is challenged by them.²⁸²

With respect to the influx of proposals presented before and during the Doha negotiations round, criticism from both the developed and the developing countries has surfaced that this incorporation of environmental concerns in the WTO framework might lead to newer forms of protectionism. The concern of the most developing countries is that work agenda of WTO which is already overloaded would become even worse with the incorporation of new environmental issues. One reason for this criticism might be that

²⁸⁰ The term 'policy space' is more often referred as space that allows developing countries a relatively larger role in economic development policy than is permitted by developed countries. So to a certain extent 'policy space' can be interchangeably used with 'development sovereignty'.

²⁸¹ Kevin P. Gallagher, "Understanding Developing Countries Resistance to the Doha Round," *Review of International Political Economy* No. 1, 15 (2008), ISSN 0969 print/ISSN 1466-4526, Taylor and Francis, <<http://www.tandf.co.uk>> (accessed January 28, 2014).

²⁸² Chazournes, 182.

developing countries lack in the professional and environmental expertise to clearly negotiate on new issues and items on the Doha agenda.²⁸³

Another concern of developing countries related to unilateral trade measures for environmental protection is their probable use as non-tariff barriers. Therefore, they insist on limited WTO scope primarily dealing with trade issues, which must be best suited and designed to benefit the majority of the WTO membership, namely the developing countries. They are apprehended that 1990's economic and financial crisis has resulted into newer forms of protectionism and unilateral restrictions, particularly measures imposed under the guise of environmental preservation policies. Thus developing countries seem to emphasize, that proposals from developed economies for unequivocal recognition of environmentally motivated trade measures in the WTO might have obnoxious financial and economic objectives hidden in them.²⁸⁴

The issue of protectionism is more serious among those member countries who do not accept the greening of WTO as an alternative because it is not an appropriate environmental forum to deal expertly with all sorts of environmental problems. Despite the fact that some MEAs incorporate positive measures such as financial and technical assistance, technology transfer and capacity enhancement on favorable conditions for the developing countries, they still consider the implementation of such measures

²⁸³ Dato Azmi Khalid, Statement, (International Conference on Financing for Development , Mexico, 22 March 2002), United Nations <<http://www.un.org/ffd/statements/malaysiaE.htm>> (accessed January 28, 2014)

²⁸⁴ Rubens Ricupero, "Trade and Environment: Strengthening Complementarities and Reducing Conflicts," in *Trade, Environment and the Millennium*, eds. Gary P. Sampson and W. Brandee Chambers (Tokyo: United Nations University Press, 2001), 25.

insufficiently slow. So they hold a firm belief that, environmental requirements even if they are included in the MEAs, could only serve as non-tariff barriers by the stronger economies only, in the form of disguised restrictions on international trading system.

As it can be gathered from the previous discussion in this chapter, in order to clarify and interpret the mutual principles in MEA-WTO relationship multiple approaches have been proposed during Doha development round. However it is beyond the scope of this research to comprehensively elaborate and discuss different characteristics and criticism related with each proposal and the positions of its respective country. But in order to understand the treatment of unilateral measures in WTO, a limited critical analysis of these proposals is necessary with the perspective of this research, i.e. the permissible scope and status of unilaterally imposed trade measures for environmental purposes in WTO framework.

5.3 Critical analysis of different proposals and their conformity with WTO framework

Most of the proposals presented during Doha negotiations are quite limited in their scope as they concentrate upon MEA related trade measures only. This has in fact narrowed down the environment trade discussion to a specific point where legality of unilateral trade measures arising only from MEAs has been included in the Doha negotiating agenda. It is also interesting to note that even within the MEA related trade measures, further discussion and negotiations have been restricted to those, imposed upon

MEA parties. Since the issues of trade measures related to non-parties to MEAs have raised several problems in the WTO dispute settlement body during hearing of the disputes, thus they have been dropped out of the post-Doha negotiations and proceedings. The status of the trade measures imposed by a WTO member unilaterally (not in accordance with any MEA) and issues of party-non-party relationship in MEA related trade measures have remained as issues unresolved. Owing to their uncertain and ambiguous character both these situations have also been excluded from the Doha mandate.²⁸⁵

As it has been specified in the mandate, the party non-party nexus is not included in the Doha negotiations, so, the issues of MEA obligations requiring MEA parties to apply trade restrictions against non-parties to MEAs and the relationship of these measures within WTO framework is destined to remain ambiguous. This situation is quite similar with the practice of previous GATT panels which categorically refused to consider CITES in number of disputes²⁸⁶ on the justification that GATT contracting parties had not joined that particular MEA. However WTO environmental jurisprudence has adopted a totally new and positive approach in recent environmental disputes. During Shrimp-Turtle cases not only the existence of several MEAs²⁸⁷ was acknowledged rather particular attention was given to them for the interpretation of Article XX, exceptional clauses of GATT 1994 in cases involving non-parties to the MEAs.

²⁸⁵ Paolo, 151.

²⁸⁶ Tuna Dolphin II case,

²⁸⁷ CITES and CBD

Proposals by EC²⁸⁸ (MEAs being the central component of this proposal) and the entire framework of Doha development mandate have exclusively concentrated upon MEA related trade measures and the interrelation of MEA and WTO principles. Where it is generally considered that MEA related trade measures carry a potential of dispute, on the other hand different countries argue about their extensive self-sufficient mechanisms to accommodate the application of trade measures in conformity with WTO rules and regulations. It is also important to realize that all the environmentally motivated measures challenged so far before WTO DSB have been imposed unilaterally (entirely based upon country's own criteria according to its domestic legislation) rather than prescribed by an MEA.²⁸⁹

In this regard the differentiation between the procedures, approaches and scope of both Doha negotiations and WTO Dispute Settlement Bodies to deal with the permissible scope of unilateral trade measures (applied by/against the non-parties to MEAs) becomes quite obvious. While the debates and discussions in CTE are restricted to certain prescribed limits the Dispute Settlement Bodies have a long historical background to deal with the disputes regarding unilaterally imposed environmental trade measures and to decide upon them in a much wider context. So, it can be rightly said that DSB has assumed the role of a legislator as well, while surpassing the role of an adjudicator, initially assigned by the WTO Understanding on Dispute Settlement. Many scholars tend to confirm this surprising observation. Ernst-Ulrich Petersmann also made this observation that the trading system was adjudicating more environmental disputes than

²⁸⁸ At the first Special Session of the CTE in 2002, document TN/TE/W/1 was presented by EC on the Doha development agenda concerning MEAs.

²⁸⁹ Hoffmann, 13.

the environmental regime.²⁹⁰ This may not be exactly true but WTO continues to decide the conflicts having environmental and health implications which means that probability of WTO trade disputes involving MEA related trade measures exists.²⁹¹ Thus the dispute settlement bodies could be expected to continue their crucial responsibility in defining the WTO-MEA relationship in future as well. It has been further proposed that up to certain required limits, concerned environmental organizations like MEA secretariats and environmental NGOs should also be allowed to submit *amicus curiae* briefs, provided the guidelines by Appellate Body have been followed in respect therewith.²⁹²

With respect to the status quo approach, the WTO environmental jurisprudence has clearly indicated that unilateral trade measures cannot receive positive response in WTO system any more. Rejection of U.S. measures in Shrimp-Turtle and Tuna-Dolphin cases by GATT panels and Appellate Body and recognition and reference to different MEAs for the justification of unilateral measures clarify this fact that free use of such trade measures would not be tolerated and exempted under Article XX GATT 1994.

Although EC proposal is founded on MEA related approach for the clarification of environment trade conflicts and some of the MEAs with huge membership might reflect their internationally agreed character, still it seems quite difficult that all WTO members would agree to accept them as the justification for legitimacy of trade measures

²⁹⁰ This observation was made during 2001, the year in which Shrimp/turtle and Asbestos cases were decided.

²⁹¹ Steve Charnovitz, 'WTO Dispute Settlement' in Alexander Kiss and Dinah Shelton (eds), *Economic Globalization and Compliance with International Environmental Agreements* (Kluwer Law International 2003) 248.

²⁹² Paolo,

applied by other WTO members. One of the reasons may be that some of the stronger economies and super powers in WTO (like U.S.) have still not joined many MEAs. In order to consider the amendment or an understanding on the MEA-WTO relationship, an entirely complicated set of issues would have to be discussed including the definition of an MEA, criteria for specific trade obligations in the MEA and legal relationship or hierarchical issues between WTO and MEAs. Besides these complicated issues, an amendment requires a two third majority of WTO membership to be introduced, but developing countries constituting the majority in WTO do not seem to support this approach. In their view EU proposal for introducing an amendment for the exemptions to MEA related trade measures would hamper their products access to the markets of developed countries.²⁹³

It can be inferred from the prevailing stagnant phase of Doha negotiations and discussions on trade measures in the WTO that neither it's the impropriety of attaching environmental purposes with trade policies (as it has been contested by developing countries), nor it's the altruistic environmental objectives as contended by the U.S. rather the prime reason for this inactive state is the added economic costs involved in the compliance with prescribed environmental standards. Developed countries with large markets like U.S. and EC always remain worried about competitive impacts arising from lower environmental and labor standards in the developing countries and want to

²⁹³ Sabrina Shaw and Risa Schwartz, "Trade and Environment in the WTO State of Play" *Journal of World Trade* 36 (2002): 145.

decrease the cost differentials by escalating the environmental standardization policies with respect to their exports.²⁹⁴

It has also been emphasized that a complete understanding of the economic and developmental implications of imposition of trade measures is significant in order to ensure their legality and effectiveness. However the proposals presented so far do not assess the economic capacities of member states to deal with environmental challenges in the form of trade measures. Resultantly, the protectionist aspect of these unilateral measures has become a recognized justification according to the developing countries. Imposition of trade measures as a unilateral action as proposed by U.S. has substantially contributed in making these trade measures susceptible to disguised means of economic protection as in Tuna-Dolphin case several countries made submissions strictly criticizing the U.S. unilateral trade measures.²⁹⁵ The U.S. ban on Mexican tuna imports that, U.S. authorities considered to have been caught by dolphin-unfriendly nets became that much infamous because in case of implementation alone, the U.S. regulation regarding the use of dolphin-unfriendly nets on U.S. fishing vessels would have enhanced Mexican competitiveness in tuna fishing. However the subsequent imposition of ban reduced it altogether.²⁹⁶

In fact that developing countries main dependence upon their agricultural exports has rendered them quite vulnerable and inefficient to serve environmental disruptions as

²⁹⁴ CIESIN, *Trade and the Environment: Conflicts and Opportunities* <<file:///D:/C-Data%202-1-2013/Downloads/Documents/chpt3.html>> (accessed January 28, 2014)

²⁹⁵ CIESIN

²⁹⁶ Anderson, 323.

compared to industrialized countries, which always have the option to switch to other agricultural suppliers much easily. Developing countries comprising of most of the rest of the world do possess quite limited resources to counter with serious environmental problems; further the level of commitment, seriousness and interest also differ from each other. Most of the developing countries governments prefer to prioritize the well-being and health of their citizens to be improved by economic development rather than the efforts for environmental protection.

Hence it becomes the collective responsibility of industrialized world to sincerely contribute to improve the trading positions of developing countries and particularly where the trade measures taken in the name of environmental protection tend to hamper their export supplies. In case of developed countries of the North, increasing market access for the South's products would certainly facilitate the South to initiate more investments for environmental preservation. The removal of certain North-South trade barriers (such as barriers relating to agricultural products) would not only strengthen them economically but the environmental policy objectives would also be served in a better way.²⁹⁷

Thus, in spite of several proposals and serious debates and negotiations undertaken since the setting up of CTE and the launch of Doha agenda, still no specific criteria for the clarification of the issues of environmentally motivated unilateral trade measures has been formulated by the members of WTO. It is the differentiation in outlook on unilateral trade measures, variations in the objectives and content of the

²⁹⁷ CIESIN,

proposals addressing the issue and serious arguments on other agenda items during trade environment discussions that indicate the realization of the Doha development round is unlikely to happen in near future.²⁹⁸

5.4 Positive measures and the development of developing countries

It has been established by the Appellate Body decisions in many cases that the test of the effectiveness of unilateral trade measures is its use as a last resort after all other available measures have proved useless. This test calls for the certain criteria under Article XX to be fulfilled. The first requirement is that a country should select the most effective tool to pursue the environmental objective out of all available options. The second condition is the least trade restrictive character of the particular instrument.

In order to examine the effectiveness of unilateral trade measures among all available alternatives, the role of positive measures becomes quite obvious. It is the backdrop of trade environment discussion that MEA instruments have been divided into two main categories, trade measures and supportive or enabling measures also commonly known as positive measures. These positive trade measures hold a significant place in complementing or substituting for unilateral trade measures for acquiring their environmental purposes.²⁹⁹ They are designed to particularly support developing

²⁹⁸Von Moltke, 2.

²⁹⁹ Hoffmann, 11.

countries in order to fulfill MEAs objectives while considering the differences in their levels of developmental stages, trade preferences and technological and financial capacities.³⁰⁰

Developing countries have faced serious environmental challenges and managing those challenges effectively requires complete institutional and human capacity-building and international support. Developed countries must setup ambitious targets by strengthening the mitigation and adaptation capacity of least developing countries in particular.³⁰¹ Technical assistance, financial support, awareness creation and capacity building are some of the positive measures through which MEAs can possibly achieve their international environmental goals as they have been classified by the Commission on Sustainable Development.³⁰² So it is generally the combined package of trade measures along with supportive measures that ensures the close interaction of governmental policies with aims and objectives of MEAs so that objectives of environmentally sustainable development can be achieved. Positive measures consist of mechanisms and measures for promoting complete participation and conformity on behalf of all parties to MEAs and are also known as enabling and supportive measures.

The use of unilateral trade measures if combined with such positive alternatives would become more effective and efficient in terms of achieving the environmental purposes. In this regard, positive measures such as the availability of financial support

³⁰⁰ Veena Jha, and Ulrich Hoffmann, eds., *Achieving Objectives of Multilateral Environmental Agreements: A Package of Trade Measures and Positive Measures* UNCTAD/ITCD/TED/6, Geneva, 2000, 11.

³⁰¹ Khor, 15.

³⁰² Jha and Hoffmann, 11.

and technology transfer on favorable and fair conditions were found to have been the actual driving force behind India's accession to Montréal Protocol.³⁰³ India and China also played quite instrumental role in establishment of its Multilateral Fund³⁰⁴ so that needs of larger producer countries could have been accommodated.³⁰⁵ Thus, incorporation of positive measures in MEAs seems to have been the only possible way to accommodate environmental policies with the freedom to participate in international trade without any fears of green protectionism and discrimination against developing countries.³⁰⁶ In order to avoid worse trade and competitiveness related impacts on exports of developing and LEDCs countries, the developed economies introducing increasingly stringent standards as their environment and health policies framework must encourage the use of positive measures which might include:³⁰⁷

- At initial stages of designing new environmental requirements, exporters and producers from developing countries must also be allowed to participate so as to provide them room for adjustment for the new standards

³⁰³ Montreal Protocol is one of those MEAs where the positive measures have been most successfully and widely used.

³⁰⁴ Multilateral Fund of MP was expected to neutralize the economic burden of participation in the Montréal Protocol. This fund has distributed more than US \$ 1 billion to some 120 developing countries.

³⁰⁵ It was only after the amount of allocated funds was increased significantly when India joined the Montreal Protocol. It indicates the significance of funding in India's decision to participate in the MEA. Jha and Hoffmann, 43.

³⁰⁶ Hoffmann, 11.

³⁰⁷ Hoffmann, 12.

- Information dissemination mechanism³⁰⁸ must be accessible by the developed and developing countries industries at the same time to ensure the latest updates about environmental policies
- Impact assessment for the domestic competition effects of emerging environmental regulations currently introduced in developed economies should be extended to include potential effects on trading partners of main developing countries.
- Transfer of environmentally sound technologies (EST)³⁰⁹ encourage the private sector in developing countries to venture new industry partnerships with industry associations in developed countries in order to access new ESTs and to improve already acquired ESTs, based on innovative abilities in developing countries.

It has been already discussed that developing countries are seriously concerned about the ongoing WTO negotiations on environmental standards and international market access including other issues like notifications, special and differential treatment, technical assistance and technology transfer. The main objective of WTO in this regard is to safeguard and secure market access and developing countries are worried about their imports in particular. Although developing countries are provided with frequent access to notifications relating to the products of key export

³⁰⁸ In case of India, the information and awareness creation efforts have reasonably influenced most of the phaseout decisions taken by Indian industries.

³⁰⁹ According to Agenda 21, transfer of EST is defined as the typical example of positive measures. “Environmentally sound technologies are not just individual technologies, but total systems, which include know-how, procedures, goods and services, and equipment as well as organizational and managerial procedures.”

interest for them by ISONET³¹⁰, however they have recommended an adequate time frame to be given to them for the adjustment of new requirements. Time period of six months has been agreed to be granted by WTO members between the notification of a measure to WTO and the time to enforce the concerned measure.³¹¹

5.5 A Practical option for achieving the negotiating mandate regarding paragraph 31 in the Doha Ministerial Declaration – A way forward

As on one side, it has been realized that with regard to the usage of trade measures in different MEAs, different levels of clarity and flexibility do exist, same has become true in the case of positive and supportive measures of the MEAs which are effectively implemented. While at the same time, for the clarification of status of unilateral trade measures, constant emphasis has been given on the need for and the forms of modifications in the concerned WTO rules by different countries through their proposals and suggestions before and during Doha ministerial meetings and for which no multilateral consensus has been reached so far. So, in this uncertain situation, a middle approach must be adopted by narrowly focusing upon the most relevant and comparative basis clarity (effectiveness and efficiency) of trade measures along with the relevant

³¹⁰ ISONET stands for International Organization for Standardization information Network. This facility focuses on voluntary standards promulgated by ISO and the IEC, where developing countries have to submit a list of export products of key significance. So far only a few developing countries have facilitated themselves with this provision.

³¹¹ Developing countries had proposed for time period of one year.

positive measures in MEAs. This approach would help identify and highlight those particular trade measures and MEAs that appear to be unclear and lacking in effectiveness and efficiency. Through this procedure the ongoing and unending general discussions upon the relationship of STOs in the MEAs and the WTO rules would be narrowed down and consequently restricted to very small number of trade measures in MEAs, which actually are or might be capable of being potential source of conflict.

In order to conduct such comparative analysis the CTE can make recommendations to the concerned MEAs to undertake informal mechanisms for discussion and dialogue on trade and environment issues with UNEP, NGOs, WTO, MEAs secretariats, industry and other concerned stakeholders. For example, CTE could review the particular MEA by actually relying upon and implementing the generic criteria that was actually developed by the OECD Joint Session of Trade and Environment experts, comprising on the in-depth analysis of the efficiency and effectiveness of the trade measures in CITES, the Basel Convention and the Montréal Protocol during the years from 1997-1999.³¹² The main findings of the three case studies were combined in the form of a synthesis report that contains the criteria. Although this paper was intended as an analytical exercise however, it got significantly revised on various occasions through the practical and political comments made by secretariats of concerned MEAs (particularly by CITES and the Basel Convention) and different OECD delegations, predominantly from European Union. This synthesis paper is the best example of a “de

³¹² OECD, Trade measures in Multilateral Environmental Agreement: Synthesis report of three case studies (Basel Convention, Montréal Protocol and CITES), COM/ENV/TD (98)127/FINAL, Paris 1999.

facto” negotiated document, having the evaluation criteria sufficiently clear and endorsing the seal of approval of the EU countries.³¹³

Having relied upon such OECD-developed criteria, the CTE can further encourage the relevant MEAs to carry on consultations with trade, industry and environment experts discussing newer ways of improving the flexibility of concerned trade measures through the use of positive measures. CTE could further commission similar reviews on other selected MEAs so that combination of new reports along with already prepared by OECD would then set the basis of CTE debate for the identification of more specific trade measures which are a source of conflict with WTO rules. Having identified these much specified trade measures would lead to very to the pointed discussion in the CTE. This approach has close affinity with the proposal of New Zealand³¹⁴ in the CTE concerning informal consultative method as has been discussed earlier. This suggestion has already been welcomed by a large number of developed and developing countries.

Moreover, for making the criteria particularly significant and relevant for developing countries, their developmental implications and social effects along with the role and effectiveness of supportive measures for them should be made the integral part of the analysis.³¹⁵ With the help of such approach only real areas of tension would be identified rather than other perceived or just hypothetical ones.

³¹³ Hoffmann, 12.

³¹⁴ Proposal by New Zealand, document no. WT/CTE/W20

³¹⁵ For example the OECD-developed criteria was based on an analysis paying due attention to the adjustment problems of various groups of developing countries in implementing MEAs trade provisions.

With the help of this approach ongoing deadlock in Doha negotiations can be done away with particularly in given respects. Firstly, it would avoid too general nature of trade and environment discussion in the CTE. Secondly it would streamline and focus the annual consultation between MEA secretariats and CTE, where normally the formal information exchange takes place and areas of potential conflict are ignored. And lastly the MEAs consisting of most contentious trade provisions would be facilitated with the proper consultation or advice from trade professionals and other stake holders.

5.6 Summary of Chapter 5

From the study of various proposals in the fifth chapter it becomes obvious that the responses of WTO members upon the legalized and permissible scope of unilateral measures in WTO framework are highly diversified. It was also demonstrated that the understanding of WTO members is directly proportional to respective anticipated effects of these measures which are not uniform in any way. These effects depend upon different developmental stages, technological capacities, trade sectors and the impact and intensity of that sector in the economy of the countries likely to be effected by the imposition of unilateral trade measures.³¹⁶ These are the reasons that WTO members have not formulated any specific criteria for the clarification of use of unilateral trade measures so

³¹⁶ Hoffmann, 12.

far. Their adverse affects upon developing countries' exports and trade sectors have also been the strongest source of conflict between the developed and developing countries due to which realization of Doha ministerial agenda seems improbable in near future.

The role of positive measures has been considered as alternative policy instrument during the discussion sessions in the CTE which can possibly decrease the demand for environmental trade measures.³¹⁷ However, where the need of unilateral trade measures is urgent and essential, the complementary use of positive measures, wholly or partly, mitigates their undesirable effects by considering different interests of the parties.

³¹⁷ Hoffmann, 13.

CHAPTER 6

CONCLUSION

The principal purpose of this thesis has been to determine the justification and legitimization of environmental trade measures in the legal framework of GATT/WTO. The main research question asked in this thesis was about the extent and scope of environmental trade measures to which they can be considered justified and legal with in the exceptional clauses of Article XX (b) and (g) of GATT 1994. The next research question was related to the recognition and acceptance of unilateral trade measures in the WTO framework and third and the last research question asked in this thesis was about the negative and adverse implications of these unilateral trade measures for the developing countries and how to possibly minimize them in order to improve the overall situation.

As the first research question inquired about the extent of legality of environmental trade measures in the WTO framework, exceptions contained in Article XX (b) and (g) of GATT 1994 allow WTO members, under specific conditions, to give priority to environmental objectives over export-oriented approach of trade liberalization. Article (b) and (g) are grounds for justification for environmentally motivated measures that are otherwise inconsistent with GATT 1994 provisions. The legality and extent of permissibility of these trade measures has largely depended upon the fulfillment of certain conditions established by the WTO panels and the Appellate Body for application

of Article XX in a number of disputes.³¹⁸ These conditions include issues such as burden of proof, the sequential order of steps for application of Article XX, the preference of policy and the fulfillment of the requirements of paragraphs in Article XX along with its introductory clause known as chapeau.

So the answer of the first question about the extent of justified and legitimate use of environmental trade measures, as has been constantly reinforced by the WTO dispute settlement panels through the most stringent test of their legitimacy, is the prevention of their misuse for protectionist ambitions. The unilateral trade measures like unilaterally imposed increase in tariffs and other quantitative restraints, for not being consistent with basic WTO provisions, are generally prohibited because these measures come in direct clash with various provisions of WTO Agreement including Article I, II, XI and Article XIII³¹⁹. The question of recognition of these trade measures has been dealt in detail in Tuna/dolphin and Shrimp/turtle cases by the GATT/WTO dispute settlement bodies. Although these cases have not formally set any precedent, they have significantly developed the criteria and limits for the countries following unilateral trade measures. Although due consideration has been paid by WTO dispute panels to avoid the power imbalances which lead to arbitrary and protectionist trade policies, still developing countries have many apprehensions about the discrimination and misuse of trade measures.

³¹⁸ See Section 2.8 for a detailed discussion of requirements of Article XX that a WTO member employing a trade measure needs to fulfill.

³¹⁹ Article I relates to the principle of Most Favored Nation (MFN), Article II relates to Schedules of Concessions, Article XI relates to the rule of General Elimination of Quantitative Restrictions while Article XIII is about Non-Discriminatory Administration of Quantitative Restrictions.

The second research question regarding a clear and mutual understanding on the permissible scope of unilateral trade measures in the framework of WTO has been addressed from two different approaches. As a first approach, the WTO dispute settlement system being the most active and influential today at the international level has clearly indicated the direction towards the development of interpretation of WTO agreements in conformity with the goals of MEAs (towards protection and preservation of environmental objectives). It has been confirmed in the Shrimp/turtle case that principles of international law require trade and environmental agreements to be interpreted in a mutually consistent manner.³²⁰ The environmental jurisprudence of WTO became so successful so as to make this surprising observation that the trading system has adjudicated more environmental disputes than the environmental regime itself.³²¹ So far as the unilateral aspect of trade measures is concerned, environmental jurisprudence of WTO has reiterated the principle 12 of the Rio Declaration which prohibits the use of unilateral actions outside the jurisdictional limits of importing countries.

The second approach to clarify and understand the unilateral trade measures is through the legislative or executive system of WTO. That unfortunately and unlike the judicial system of WTO has been quite disappointing.³²² The Doha Round of negotiations that began in 2001 was expected to perform a serious legislative function for the trade and environment linkage. Since its inception, WTO members have met several times in the CTE in Special Session to address the negotiating mandate. Several proposals have

³²⁰ Gueneau and Selim, 5.

³²¹ Charnovitz, 248.

³²² Charnovitz, (2003), 250.

been presented to clarify the MEA-WTO relationship. However, little progress has continued so far.³²³

With regard to the third research question concerning adverse impacts and other negative implications of imposition of unilateral trade measures upon developing economies it becomes evident that imposition of unilateral trade measures might take another form of disguised protectionism, potentially discouraging the exports of developing countries and particularly the LEDCs, when they are required to adopt stringent, expansive and technically advanced environmental standards or, import embargoes are introduced on shipment of certain products for developed countries. Such strict application of unilateral standards might defeat the actual purpose of the measure in case of developing countries. For example, proposed ban on imports of tropical hardwoods into developed countries so as to discourage the process of deforestation would have potentially reduced the export of sawn timber from developing countries, still well endowed with hardwood forests.³²⁴ According to developing countries, the incorporation of environmental agenda at WTO would hamper their developmental prospects along with the distraction from other significant issues such as agricultural liberalization. So due to their perspective, unilateral and extraterritorial trade measures for environmental objectives should not have been allowed in the WTO framework.

The threat of unilateral increase in tariffs might have direct implications on developing countries' trade by impairing the benefits available to them under WTO

³²³ Charnovitz, 249.

³²⁴ Anderson, 322.

agreements.³²⁵ So in cases of developing countries specifically, unilateral trade measures should be honestly coupled with positive measures to help alleviate their effectiveness for their respective objectives. The worse position of developing countries in this case might be improved with the rigorous application of a positive measure in the form of differential treatment principle to the developing economies, suffering from weak market position to make use of these trade measures on their own.

It must also be remembered that the relative economic strength of the importing (mostly the developed) and exporting (the developing) countries has always been a significant deciding factor of the effectiveness of unilateral trade measures. Theoretically these measures are available to the entire WTO Membership (including developing economies and LEDCs) without any distinction; however with respect to the practical implications they have been executed only by the developed countries with substantial markets. In this regard it can be said that only the developed and strong countries have the potential to execute their environmental preferences (in form of unilateral imposition of trade measures) and that also at the economic cost of smaller economies. As generally the most controversial dimension of unilateral trade measures is their effectiveness in acquiring their supposed objective, to achieve international environmental protection. As an environmental policy tool unilateral trade measures are inefficient on their own for being measures of sanctioning or creating a threat to sanction since they seem to imperil the development of LEDCs.

³²⁵ Japan Ministry of Trade and Industry, 230.

The other dimension of the picture should also be borne in mind that because of the objectives pursued and depending on the specific circumstances and the field of concern, unilateral trade measures can possibly be effective policy tool for the prohibition of negative environmental practices. This holds true with respect to developing countries, where the lack of resources and not the lack of will, becomes the fundamental reason for environmental degeneration like most of African countries having immense biodiversity resources have direct interest in environmental preservation and more likely in unilateral trade measures for environmental protection as well. However their legitimacy should be guaranteed by international law either by the application of substantive norms or through possible resort to WTO system of checks and balances for their legality in order to avoid their use as a protectionist device.³²⁶

In the end it can be said that although developing countries have over the years realized the significance of environmental protection as a crucial policy objective, integral for their developmental enhancements, yet they are no more ready to tolerate the hidden protectionist approach in the shape of arbitrary and unjustified environmental provisions. Resort to unilateral measures runs the risk of arbitrary discrimination and disguised protectionism which could disturb the multilateral trading setup in favor of developing countries. This study has emphasized upon the fact that multilateral solutions to transboundary environmental problems, whether in form of regional or global, are reasonable, better and preferable to unilateral solutions.³²⁷ The WTO dispute settlement decisions have also demonstrated a shift over time towards more favorable consideration

³²⁶ Chazournes, (2003), 191.

³²⁷ World Trade Organization, "The Relationship between MEAs and the WTO," 35.

for behaving in “multilateral” manner.³²⁸The approach in this study has endorsed the Appellate Body³²⁹ approach that condemned unilateral trade measures citing Agenda 21 of the Rio Conference, according to which “unilateral action to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus”³³⁰.

So far as environment trade debate is concerned, for the developing economies, the improvements in international market access and avoidance from eco-protectionism have been identified as most critical issues. The focus of the WTO, according to them, is to guarantee market access and the prevention of offensive trade protectionism. These constraints are however likely to prevail along the journey of clarity of WTO-MEA relationship.

6.1 Recommendations

Three major recommendations have been made based on the findings of the research.

The first recommendation is about the responsibility of WTO dispute settlement mechanism regarding unilateral trade measures, which are likely to prevail and be practiced even more frequently, particularly where the environmental problem is

³²⁸ Chazournes, 190. In Shrimp-turtle II, the Appellate Body favors the interpretation when negotiations are conducted in good faith as essential for behaving in a multilateral manner.

³²⁹ Shrimp – turtle II case, Appellate Body report, paragraph 185.

³³⁰ United Nations, Agenda 21: The United Nations Programme of Action from Rio. Chapter 2.

perceived to be urgent, actual and capable of causing potential effects on individual states. It becomes obligatory for WTO to accommodate unilateral trade measures while acknowledging legitimate, non-trade policies of its members along with safeguarding its own objectives of free trade. In this regard the greatest concern of prevention of protectionist use of unilateral trade measures might be ensured by stricter application of the preambular requirements of Article XX of GATT 1994 by dispute settlement bodies that trade measures must not be “arbitrary or unjustifiable discrimination” or “disguised restriction on trade”. Criteria for application of these requirements must be enacted in the form of official “judicial understanding” ratified by the majority of WTO membership.

Such an understanding would clarify and disentangle certain complexities regarding justification of unilateral measures. This understanding would ensure the environment of competition between developed and developing countries to be fair and reasonable. Simultaneously, the clarity on the specific criteria for unilateral measures to be held legal and permissible would prove to be a powerful guarantee against their arbitrary imposition particularly in case of developing countries.

Secondly, as the international character of environmental problems and their relative integration with the trading policies has become a major challenge for developing countries. In order to work out a particular set of principles which should manage the design of trade policies and trade related environmental policies for ensuring equitable and sustainable development in WTO, developing countries should take up negotiations

regarding the list of such principles with industrial countries at every possible forum, which would definitely diffuse some of the key concerns raised by environmental groups. Lessons must also be learnt from the experience of Regional arrangements like Association of Southeast Asian Nations (ASEAN)³³¹, MERCOSUR,³³² Common Market for Eastern and Southern Africa (COMESA)³³³ and Asia-Pacific Economic Cooperation (APEC), which although, having diverse rather smaller membership might serve as appropriate forums for such discussions. Through regional economic integration, the objectives of environmental protection might be achieved by transforming a clearly domestic and highly localized problem into a significant international and global issue.³³⁴

In order to further strengthen this second suggestion and to achieve the objectives of global co-operation WTO should also work in coordination³³⁵ with UNCTAD, UNEP, OECD, ILO, WHO, World Bank and other multilateral institutions in order to get benefited from a broader range of ideas and consultative dialogue. Coordination between WTO and other initiatives based upon partnerships like NAFTA, Global Compact and Forest Stewardship Council could also be helpful where negotiations and implementation are extended on a larger scale.

³³¹ In ASEAN, along with efforts to achieve transformation from co-operation to economic integration, environmental co-operation has also been strengthened.

³³² In MERCOSUR, environmental protection is one of the goals that must be achieved in process of economic integration.

³³³ Although environmental protection is rather weak in framework of COMESA, environmental co-operation is however underway in Africa.

³³⁴ Ruosi Zhang, "Can Regional Economic Integration be Reconciled with Environmental Protection in Developing Countries?" in *Economic Globalization and Compliance with International Environmental Agreements*, eds. Alexandre Kiss and Dinah Shelton (Kluwer Law International, 2003), 118.

³³⁵ It must be remembered that there are various coordination problems inside the multilateral institutions themselves which need to be overcome on urgent basis.

The third major recommendation is that in order to reduce the maximum negative implication and adverse effects of unilateral trade measures (in cases where their use is considered significantly essential), full utilization of positive or facilitating measures must be made which have been incorporated in MEAs, having considered the compliance and cost problems, specifically for developing countries. For that, developing countries must be fully aware of their resource endowments, preferences and capacities before hand while negotiating the terms and conditions of their participation in MEAs and agreeing to the use of trade measures for environmental protection.

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