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Environmental Related Disputes on Trade Issues in GATT and WTO from 1982-2002

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***Abstract*—** *The General Agreement on Tariff and Trade/World Organization (GATT/WTO) is perceived as one of the few multilateral institutions dealing with trade and environment issues that has the means to settle trade-related environmental disputes unlike, for example, United Nations Environmental Program, (UNEP), United Nations Conference on Trade and Development (UNCTAD) or the Commission on Sustainable Development. In the light of this, many perceive the GATT/WTO as the institution that will eventually deal with and resolve trade and environment issues. The paper took a bird's eye view of the WTO Dispute Settlement Mechanism (DSM) on the environmental issues. It seeks to evaluate how far GATT/WTO provisions aid in settlement of environmental related disputes on trade issues by highlights the efficacy and the benefits of the DSM and its importance as a tool for developing countries to defend their interests when nullified or impaired by other Members, in particular developed country Members, while identifying the difficulties faced. The fact that WTO cannot adequately provide an equal solution to environmental trade disputes, expectations from environmentalists may often be too high. The WTO Secretariat itself emphasizes "that the WTO is not fully environmental protection agency. This has raised contradiction under the organization which this paper intends to investigate. To achieve this objective and to deal with research problem, we undertook desk research in libraries, relevant documentation centers, and internet website which enable to review existing literature on the question. The findings reveal that even though some of the WTO provisions are competence for policy coordination in this area is limited to trade policies, and those trade-related aspects of environmental policies which may result in a significant effect on trade, but it is grossly lacking at the level of settlement of environmental related disputes on trade issues.*

I. INTRODUCTION

Environmental issues began to be systematically addressed in the WTO following the Decision on Trade and Environment taken towards the end of the Uruguay Round at Marrakesh in 1994. The Committee on Trade and Environment was established in the same year, with the explicit mandate to resolve environmental related dispute in the trading system**.** Some new agreements under the WTO also contained environmental provisions. In 2001 the environment was explicitly put on the negotiating agenda in the Doha Ministerial Declaration (DMD). Today the environment has been mainstreamed into the multilateral trading system, and has significant

implications for shaping future rules under the WTO regime.[1] This paper gives an overview of settlement of the environmental related disputes on trade issues within the confine of GATT/WTO provisions. Here, the question pose goes thus, when are restrictive trade measures on environmental grounds justifiable under the GATT Article XX exceptions and in particular, how has the GATT Article XX been interpreted in environmental trade disputes? To better answer this question it will be interesting to examine the following aspects. An Overview of the WTO Dispute Settlement Mechanism, A review of environmental disputes related to trade issues in GATT/ WTO, WTO Jurisprudence in Environmental Trade Disputes.

II. AN OVERVIEW OF THE WTO DISPUTE SETTLEMENT MECHANISM

A WTO Member having a reasonable complaint against another Member concerning the rights and obligations in the WTO Agreements can avail itself of the Dispute Settlement Process of the WTO. This is contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes. Dispute Settlement Understanding (DSU) is administered by the Dispute Settlement Body (DSB), which consists of the Members of the WTO. The DSB has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the findings of the panels as well as the results of an appeal. It monitors the implementation of the rulings and recommendations, and in accordance with the procedures set up in Article 2.2, it has the power to authorize retaliation when a country does not comply with a ruling.[2]

Dispute settlement in the WTO plays a crucial role in providing security and predictability to the WTO multilateral trading system, in particular for developing countries. The Dispute Settlement system is in many ways the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy. The new WTO system is at once stronger, more automatic and more credible than its GATT predecessor. This is reflected in the increased diversity of countries using it and in the tendency to resolve cases "out of court" before they get to the final decision.[3]

The effectiveness and dependability of dispute resolution is key to the effective functioning of the WTO and ensures a number of benefits that are of particular importance for the weaker trading partners. It provides the WTO with a rule-oriented system that favours mutually agreed solutions and one that intends to secure withdrawal of inconsistent measures. The application of Dispute Settlement (DS) in the WTO rests on the following three main principles:[4]

• multilateralism versus unilateralism;

• exclusive application of WTO rules on dispute settlement to disputes related to the WTO; and

• uniform application to all WTO Agreements

The function of the DS is to preserve the rights and obligations of WTO Members. Without a means of settling disputes, the rules-based system of the WTO would not be as efficient because there would be no way of enforcing the rules and the weaker trading partners would have no way of making sure that their interests are protected.

The system is based on clearly defined rules, with schedules for completing a case. In addition, the countries can settle their dispute bilaterally at any stage. At all stages, the WTO Director-General is available to offer his good offices, to mediate or to help achieve a conciliation. The main stages of dispute settlement in the WTO are described below.

1.1. Consultation Phase

- A Member which feels aggrieved by the action of another will propose to hold consultation with the other Party. The latter has to respond within 10 days and enter into consultation within 30 days.
- If the consultation takes place, the Members should try to reach a satisfactory solution of the issues involved.
- If any other Member feels that it has a substantial trade interest in the matter in dispute, it may request to join the consultation.
- If the dispute has not been settled in 60 days the aggrieved party may ask for the formulation of a panel.

[1]Jha V. and R. Vossenaar, 2000. "Mainstreaming environment in the WTO: Possible implications for developing countries. Paper prepared for the UNCTAD/FIELD Project on Strengthening Research and Policy-Making Capacity on Trade and Environment in Developing Countries (Project INT/98/A61).

[2] Trade and Environment in the Multilateral Trading System Module 2, Train for trade 2000.

[3] Blackhurst, R. 1995. "Alternative Motivations for Including Trade Provisions in Multilateral Environmental Agreements". Schwizerische Zeitschrift fur Volkswirtschaft and Statistik. Vol. 131, No.3.

[4] Hudec, R. 1996. "The GATT/WTO Dispute Settlement Process: Can it Reconcile Trade Rules and Environmental Needs?" in R. Wolfrum. (ed.). Enforcing Environmental Standards: Economic Mechanisms as Viable Means? SpringerVerlag.

- In many instances, disputes have been resolved at the consultation stage, without further proceedings.

1.2. Panel and Appellate Body Review

- The DSB has to establish a Panel promptly.
- The DSB will prescribe the terms of reference of the panel. Usually standard terms of reference are used but in some cases and the special terms of reference are used in all cases. It calls for an examination of the issue raised by the complainant and the giving of findings to assist the DSB in making recommendations or in giving the rulings provided for in the relevant agreement.
- Normally a Panel consists of three members. Usually panel members are chosen from a list maintained for this purpose. The list consists of persons who have acquired direct experience in the field of GATT/WTO or have served as senior trade officials of Members or have taught or published on international trade law or policy. Nomination is initially proposed by the secretariat.

1.3. Adoption of the Report by the DSB

- Within 60 days of the sending of the panel report to the Members, the report must be adopted by the DSB unless one of the parties notifies its decision to go for appeal. In this case it will be considered by the Appellate Body which will give its decision normally within 60 days.
- The Appellate Body has seven members. Three members of this body serve on any one case.

1.4. Implementation

- It is expected that the Member to whom the recommendation for action has been addressed will implement the recommendation promptly. Within 30 days of the adoption of the Panel or Appellate Body report, the Member must inform the DSB about its intention in respect of the recommendations, including a time-table for implementation

1.5. Compensation and suspension of concessions

- If the recommendations have not been implemented within the time frame set for this purpose, the complaining party may either seek compensation or seek permission to withdraw or suspend concessions to the offending party.

III. A REVIEW OF ENVIRONMENTAL DISPUTES RELATED TO TRADE ISSUES IN GATT/WTO

Under the GATT six panel proceedings on cases involving environmental measures or human health-related measures under Article XX were completed. Out of the six reports, only three were adopted. Under the WTO Dispute Settlement Understanding (DSU), four trade-related environmental disputes have been completed. It is important to note, that dispute settlement rulings concerning trade-related environmental measures or human health-related measures under Article XX (b) or (g)[5] have evolved considerably from the "tuna-dolphin" panel decisions under GATT to the latest dispute settlement rulings under the WTO What is important in the WTO's rules is that measures taken to protect the environment must not be unfair. In short, they must not discriminate between domestic and foreign products nor can they discriminate between different trading partners. The real challenge is to prove that measures are taken for legitimate environmental purposes and that they meet the requirements of the Chapeau of Article XX in order for them to be considered legitimate.[6]

This section presents a factual overview of some of the most relevant environmental issues in trade-related environmental disputes in GATT/WTO which include Interpretation of the GATT Article XX in Environmental Trade Disputes, WTO Jurisprudence in Environmental Trade Disputes and Food Safety Trade Disputes under the WTO.

2.1. Interpretation of the GATT Article XX in Environmental Trade Disputes

GATT Article XX general exceptions to free trade contain the first environmental provisions of the multilateral trading system. The exceptions contained in paragraphs (b), (d) and (g) of the article have been invoked in trade disputes related to the protection of the health and environment. The Article XX states that so long as trade measures applied are not arbitrary or unjustifiably discriminatory between countries or a "disguised restriction on international trade", Members can adopt measures

(b) necessary to protect human, animal or plant life or health

[5] Article XX (b) and (g) are designed to allow WTO Members to adopt GATT-inconsistent policy measures if this is either "necessary" to protect human, animal or plant life or health, which together can be taken to mean "environment", or if the measures relate to the conservation of exhaustible natural resources.

[6] Eglin, R. 1995. "Trade and Environment in the World Trade Organisation." World Economy. Vol. 18, No. 6.

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement

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

In the pre-WTO regime, as already mention above six trade disputes involved environmental/ health-related measures under GATT Article XX exceptions. These disputes and the corresponding year of panel report adoption, include:(i) United State (US) –Taxes on Automobiles (1994, not adopted),(ii) US –Restrictions on Imports of Tuna from EEC also referred to as Tuna II (1994, but not adopted); (iii) US – Restrictions on Imports of Tuna from Mexico also referred to as Tuna I (1991, but not adopted)7, (iv) Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (1990), (v) Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (1988), and (vi) US – Prohibition of Imports of Tuna and Tuna Products from Canada (1982),

Under the WTO, rulings have been made on three environmental trade disputes under GATT Article XX (food safety disputes being now covered separately under the sanitary phytosanitary Agreement (SPSA). The three environmental disputes and the corresponding year of adoption of panel/ Appellate Body reports by the Dispute Settlement Board include*:*

(i) US – Standards for Reformulated and Conventional sGasoline also referred to as Reformulated Gasoline (1996); (ii) US – Import Prohibition of Certain Shrimp and Shrimp Products (1998) also referred to as Shrimp-Turtle; and (iii) EC – Measures Affecting Asbestos and Asbestos-Containing Products (2001).

A comparison of the environmental trade disputes in the pre- and post-WTO regimes illustrates a significant change in the interpretation of GATT Article XX provisions. This subsection briefly discusses the two pre-WTO environmental disputes of Tuna I and Tuna II; and the two post-WTO environmental disputes of Reformulated Gasoline and Shrimp-Turtle. All four of these disputes concerned trade restrictions invoked under GATT Article XX exceptions for the protection of environment/ exhaustible natural resources.[8]

2.1.1.Tuna I:

The Tuna I dispute in 1991 between the United States and Mexico, for the first time turned the focus on the question of GATT-consistency of Member nations following sovereign environmental policies and imposing the same on a trading partner. The US had imposed an embargo on imports of yellow-fin tuna and tuna products from Mexico, Venezuela and Vanuatu and from the intermediary countries of Costa Rica, France, Italy, Japan and Panama based on its domestic regulation, the Marine Mammal Protection Act (MMPA) of 1972 as amended. The MMPA prohibited the incidental killing or seriously injuring any marine mammal (beyond the US standard set[9]) in connection with the harvesting of fish within the jurisdiction of the US. Moreover, Section 101(a)(2) of the Act provided for a ban on importation of commercial fish or products from fish caught with commercial fishing technology which resulted in the incidental killing or incidental serious injury of ocean mammals in excess of United States standards. Thus the Act effectively set a ceiling limit on dolphin catches for American fishing fleet and for countries exporting to the US.[10]

Mexico complained against the US embargo on the grounds that the embargo was inconsistent with the GATT rules, like: that the provision under MMPA was inconsistent with Article III (National Treatment of traded products), the embargo was also not "necessary" in the sense of Article XX, and that Article XX (b) referred to protection of the life and health of humans and animals within the territory of the contracting Party protecting them. On the other hand, the US argued that the GATT's National Treatment provision permitted the enforcement of dolphin protection standards set out in the MMPA, and the import embargo was justified under Article XX exception clauses to protect animal health or exhaustible natural resources.[11]

The Dispute Panel noted that the US embargo was not covered under GATT Article III, since the latter "covers only those measures that are applied to the product as such", and regulations on incidental killing/ injury to

[7] Unlike the system of decision making now contained in the Dispute Settlement Understanding of the WTO, in the GATT a panel report was not adopted if there was no consensus. Under the WTO, if the members do not by consensus reject a panel report after 60 days, it is automatically accepted or adopted.

[8] APARNA SAWHNEY, "WTO-related matters in trade and environment: relationship between WTO rules and MEAS" May 2004.

[9] On an average, the vessel of harvesting nations could not take (incidental killing/ injury) more than 15% of eastern spinner dolphin and not more than 2% of coastal spotted dolphin as a proportion of the total number of marine mammals taken by such vessels in a year. (GATT 1994a).

[10] Ibid.

[11] Ibid.

dolphin "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product" (GATT 1991). Under the principle of National Treatment, the US was obliged to treat Mexican tuna no less favourably than domestic tuna (the traded product), irrespective of the ways in which they may have been harvested since it did not impact tuna as a product. *This implied that non-product related process and production methods could not used as a basis of trade measures under the GATT.* The Panel ruling found that the US embargo was contrary to Article XI:1 (elimination of quantitative restrictions).

The Dispute Panel also ruled the import prohibition of Mexican tuna as unjustifiable under Article XX (b) or (g); and the import prohibition on "intermediary countries" unjustifiable under Article XX (b), (d) or (g). The Panel noted that while the provisions of the GATT did not restrain a contracting party in the implementation of domestic environmental policies, "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own" (emphasis added, GATT 1991). The Dispute Panel considered the Article XX exceptions to protect exhaustible natural resources (here dolphins) to be applicable only to natural resources lying within the jurisdiction of the government imposing the regulations.[12]

2.1.2.Tuna II

In 1992, the European Community (EC) and Netherlands complained that the US embargo against primary and intermediary countries, based on the MMPA, did not fall under Article III (National Treatment), was inconsistent with Article XI:1 (Elimination of Quantitative Restrictions) and was not covered by the exceptions of Article XX. The US argued that the intermediary nation embargo was consistent with GATT, covered by Article XX (b), (d) and (g), and that the primary nation embargo did not nullify or impair any benefits accruing to the EC or the Netherlands since it did not apply to these countries.[13]

`On the jurisdictional issue of its action, the US argued that provisions under international environmental agreements allowed for import restrictions that did not necessarily restrict jurisdictional applicability. In particular, Article 3 of the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933, allowed for the prohibition of products from intermediary countries unless otherwise certified. The US argued that while the Convention applied to hunting and killing within the parties' respective territories, the restrictions on importation required application to *activities beyond the territorial jurisdiction of the importing party*, and were designed to protect resources outside the importing party's jurisdiction (emphasis added). Equally, Article IX of the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940) provided for each contracting government to take the necessary measures to control and regulate the importation, exportation and transit of protected fauna and flora through an export certification system or the "prohibition of the importation of any species of fauna or flora or any part thereof protected by the country of origin unless accompanied by a certificate of lawful exportation". Apart from these two Conventions the US also cited the provisions for import prohibitions under other MEAs: Article 3 of the International Convention for the Protection of Birds (1950); Article V of the Agreement on the Conservation of Polar Bears (1973); Article VIII:2 of the Convention on Conservation of North Pacific Fur Seals (1976); Article 3 of the Convention on the Prohibition of Fishing with Long Driftnets in the South Pacific (adopted 1989, but not yet in force). Two of these agreements, namely, the International Convention for the Protection of Birds and the Agreement on Conservation of Polar Bears, did not provide any jurisdictional limitation on the import and export prohibitions.[14]

In the light of Article 31 (general rule of interpretation) of the Vienna Convention on the Law of Treaties, the US interpreted that there was no jurisdictional limitation on the location of the resource or living thing in GATT Article XX (g) and (b). The Dispute Panel, however, pointed out that the Article 31 of the Vienna Convention refers to "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", while the international agreements cited in the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement. Thus these agreements did not apply to the interpretation of the General Agreement or the application of its provisions.[15]

[12] Mattoo, A. and P. Mavroidis. 1996. "Trade, Environment and the WTO: How Real Is the Conflict?" in E.-U. Petersmann. (ed.). International Trade Law and the GATT/WTO Dispute Settlement System. Kluwer.

[13] Esty, D. 1994. Greening the GATT: Trade, Environment and the Future. Institute for International Economics, Washington, D.C.

[14] Ibid.

[15] The Panel also observed that under the general rule of interpretation in the Vienna Convention account should be taken of "any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation." However, the Panel noted that practice under the bilateral and plurilateral treaties cited both the primary and intermediary nation embargoes on tuna were taken by the United States so as to force other countries to change their policies with

In determining the necessity of the US measure for conservation of dolphins, the Panel concluded that measures taken to force other countries to change their policies, and which were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b). Thus an essential condition of Article XX (b) had not been met.[16] The Panel found that the import prohibitions on tuna and tuna products maintained by the United States inconsistent with Article XI:1 and not justified by Article XX (b).

The Dispute Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, is recognized by the contracting parties to the General Agreement. The Panel did not question the validity of the environmental objectives of the US to protect and conserve dolphins, but examined whether, in the pursuit of its environmental objectives, the US could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction. The Panel ruled that the US import prohibitions (both the primary and the intermediary nation embargo) on tuna and tuna products under the MMPA "did not meet the requirements of the GATT Article III, were contrary to Article XI:1, and were not covered by the exceptions in Article XX (b), (g) or (d)".

2.1.3. Reformulated Gasoline:

In January 1995, Venezuela, followed by Brazil, complained against US discrimination in import of gasoline under the latter's Gasoline Rule. The complainants argued that the US restriction was inconsistent with GATT Article III (National Treatment) and not covered by GATT Article XX exceptions. The US Gasoline Rule (based on the 1990 Amendment of the Clean Air Act)[17], effective 1995, permitted only gasoline of a specified cleanliness (reformulated gasoline) to be sold to consumers in the most polluted areas of the country, while in the rest of the US, gasoline no dirtier than that sold in the base year of 1990 (conventional gasoline) could be sold.

The Dispute Panel ruled that the US Gasoline Rule was inconsistent with Article III since imported and domestic gasoline should be considered as "like products". Moreover, the US action was not justified under the GATT Article XX paragraphs (b), (d) or (g). The US appealed on the Panel's findings on Article XX (g), and subsequently the Appellate Body found that the baseline establishment rules (for both domestic gasoline and imported gasoline) in the Gasoline Rule fell within the terms of Article XX (g). However, the Appellate Body ruled that the US application of the baseline rules constituted "unjustifiable discrimination" and a "disguised restriction on international trade… and not entitled to the justifying protection afforded by Article XX as a whole" (WTO 1996b: 30). According to the Appellate Body, the US action failed to meet the requirements of the chapeau of Article XX, since the US could have used alternative means to implement its Clean Air Act by "imposition of statutory baselines without differentiation as between domestic and imported gasoline" (WTO 1996b: 26).

The Appellate Body used the principle of interpretation based on Article 31.1 of the Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (WTO 1996b: 17-24), and considered the objective of the Gasoline Rule (namely, to implement the US 1990 Clean Air Act) and GATT Article XX including its chapeau to interpret them. The Appellate Body, however, noted "two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines" (WTO 1996b: 30). Hence the US action was unjustifiable under Article XX.

Thus the first environmental trade dispute brought to the WTO affirmed that a Member (here the US) had the right to adopt the stringent environmental standards, provided the application of the regulation does not discriminate against foreign imports. "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement." (emphasis added, WTO 1996b: 32). Moreover, if the Member could demonstrate cooperation with other Members towards the implementation of the regulation, such unilateral environmental legislation may be found

respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the protection of the life or health of dolphins. (GATT 1994a)

[16] Ibid.

[17] The 1990 US Clean Air Act Amendment established certain compositional and performance specifications for reformulated gasoline, in order to reduce the emissions of volatile organic compounds and toxic air pollutants. The Rule established baselines (1990) for domestic refiners, and related baselines for blenders and importers of gasoline.

justifiability under GATT Article XX. In its final conclusion, the Appellate Body recalled the preamble to the WTO Agreement as well as the Decision on Trade and Environment, to emphasize the importance of cooperation and "of coordinating policies on trade and the environment."[18]

2.1.4. Shrimp-Turtle:

An amazingly similar dispute to the Tuna I case was brought to the WTO against the US in 1996. The US had banned shrimp imports from countries where the shrimp was harvested without Turtle Excluder Devices (hence killing too many Olive Ridley Turtles in the process) as required under its domestic legislation, the 1989 Public Law 101-162, Section 609. Malaysia and Thailand, followed by Pakistan and then India, complained that the import prohibition was inconsistent under Article I:1 (Most Favoured Nation), Article XI:1 (Elimination of Quantitative Restrictions), and Article XIII:1 (Restrictions to Safeguard Balance of Payments). The US justified its measure under Article XX (b) and (g), arguing that the provision did not constrain jurisdictional limitations nor the location of the natural resources/ animals to be protected and conserved.[19]

In 1997, the Dispute Panel ruled in favour of the complainants, and found that the import ban in shrimp and shrimp products as applied by the United States was inconsistent with Article XI:1 of GATT 1994, and unjustifiable under Article XX of GATT. After the US appeal on the Panel's interpretation, in 1998 the Appellate Body also found the US unilateral action unjustified, but reversed the Panel's finding that the US measure at issue was not within the scope of measures permitted under the chapeau of Article XX of GATT 1994. The Appellate Body ruled that the US measure qualified for provisional justification under Article XX (g), but it failed to meet the requirements of the chapeau of Article XX since the measure was discriminatory, and therefore not justified under Article XX.[20]

The Appellate Body also clarified the meaning of exhaustible natural resources in Article XX to include renewable living resources, and indicated that the complainants had misinterpreted the term: "Textually, Article XX (g) is not limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be exhaustible natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities." (WTO 1998: paragraph 128).[21]

Moreover, the Appellate Body reiterated the Preamble of the WTO Agreement, which states that the optimal use of natural resources should be in accordance with sustainable development. The Appellate Body indicated that the language of the Preamble allowed for a wider interpretation of the WTO provisions and agreements, based on the "intentions" of the WTO negotiators to acknowledge the environmental dimensions into the multilateral trading system:

> *"(the) language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the ... preamble."*
>
> (WTO 1998, paragraph 153)

The Appellate Body Report noted the intent of the international community to protect environmental resources and made several references to international conventions. More significantly, the Appellate Body observed that the WTO agreements should not be viewed in "clinical isolation" from other rules of international law, including treaties.[22] In particular, the Olive Ridley sea turtle was listed under species threatened with extinction in Appendix 1 of the CITES, and also as a migratory species in Annex I of the Convention on the Conservation of Migratory Species of Wild Animals. The references were made to illustrate that the sea turtle should be considered

[18] GATT. 1994. The Results of the Uruguay Round of Multilateral Trade Negotiations. GATT Secretariat, Geneva.

[19] Ibid.

[20] Report of the Appellate Body, "US- Import Prohibition of Certain Shrimp and Shrimp Products" (AB1998-4), WT/DS58/AB/R, dated 12 October 1998: pages 75-76.

[21] Ibid.

[22] This approach was evident in the ruling of the US – Gasoline (1996) dispute too. As will be seen later in Section 4, this has been quoted by the EC in its submission on current negotiations on trade measures pursuant to MEAs to highlight the true interpretation of WTO rules.

as "exhaustible natural resources", as well as the international community's efforts to conserve this resource. In this dispute, however, the traded product was shrimp (not an endangered species) and not the endangered turtles, thus the CITES (ratified by both India and the US) did not apply.[23]

The final ruling by the Appellate Body upheld the principle of cooperation to protect global environmental resources as contained in the Multilateral Environmental Agreements (MEAs) like the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals; as well as the Rio principle of the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives (WTO 1998, paragraph 154). The Appellate Body also recalled Article 3.2 of the WTO Dispute Settlement Understanding, under which the WTO agreements are to be interpreted in accordance with "customary rules of interpretation of public international law". Since MEAs are international treaties, they form part of the international law, and bear on the settlement of environmental trade disputes under the WTO.[24]

The environmental provisions under the GATT/WTO were interpreted with reference to "sustainable development" in the Preamble and in a wider context of the "intentions of negotiators of the WTO Agreement"[25]. The US unilateral ban on shrimp was found unjustifiable for much the same reason as in the Gasoline dispute – lack of cooperative efforts before resorting to trade measures to protect the environment. In this case, the US had failed to engage in any concerted bilateral or multilateral effort to conserve the sea turtles:

> "Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members"
>
> (WTO 1998: paragraph 166)

This suggested that in case the US engaged in bilateral or multilateral environmental agreements to protect the sea turtle in question, the unilateral measure would be justified.

Not surprisingly, in the 2001 dispute on the Compliance panel report, after Malaysia took recourse to Article 21.5 (Understanding of Rules and Procedures Governing the Settlement of Dispute) of the DSU and appealed on the grounds of dissatisfaction with US action, the US was found to be justified in its action. By this time, the US had demonstrated good faith efforts by negotiating a Memorandum of Understanding with certain countries in the Indian Ocean and South-East Asia region (the South-East Asian MOU) that took effect on 1 September 2001" (WTO 2001: 50). The 2001 ruling clearly established that a WTO Member with demonstrable cooperative efforts to protect the environment with its trade partners is justified in unilateral trade restrictions under GATT Article XX. Thus Barfield (2001) observed that the Shrimp-Turtle dispute set forth an "evolutionary interpretation of unilateralism".

2.1.5. Food Safety Trade Disputes under the WTO

Four food safety-related trade disputes have been settled under the WTO including: (i) Australia – Measures Affecting Importation of Salmon (1998); (ii) EC – Measures Concerning Meat and Meat Products (Hormones) (1998); (iii) EC – Measures Affecting Livestock and Meat (Hormones) (1998); (iv) Japan – Measures Affecting Agricultural Products (1999).[26] All the health and safety-related trade disputes settled under the WTO have involved developed countries. The issue at stake in all the disputes was the use of restrictive sanitary measures based on precaution without appropriate risk assessment and/or scientific evidence.

In the first dispute of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation, in 1995 Canada alleged that the prohibition was inconsistent with GATT and the Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement). The Dispute Panel found that Australia' s measures were inconsistent with certain provisions of the SPS Agreement. After Australia's appeal on the Panel's interpretation, the Appellate Body ruled that the Australian prohibition was inconsistent with Articles 5.1 (risk assessment), 5.5 (non-discrimination), 2.2 (scientific evidence) and 2.3 (non trade-restrictive) of the SPS Agreement. Moreover, the Appellate Body reversed the Panel' s finding that Australia

[23] Ibid.

[24] Anderson, K. 1995. The Multilateral Trading System and Sustainable Development. Policy discussion paper 95/08, Centre for International Economic Studies, University of Adelaide, Adelaide.

[25] Ibid.

[26] Anderson, K. and A. Strutt. 1994. On Measuring the Environmental Impacts of Agricultural Trade Liberalization. Seminar Paper 94-06, Centre for International Economic Studies, University of Adelaide, Adelaide.

had acted inconsistently with Article 5.6 of the SPS Agreement, since factual evidence was insufficient to support such a conclusion.[27]

In the case of Japanese restrictions on agricultural products, the US alleged violations under provisions of the SPS Agreement, GATT 1994, and the Agreement on Agriculture. The Dispute Panel found that Japan acted inconsistently with Articles 2.2 and 5.6 of the SPS Agreement, and Annex B and, consequently, Article 7 (transparency) of the SPS Agreement. Following Japan's appeal on the Panel's interpretation of certain law, the Appellate Body upheld the basic finding that Japan' s varietal testing of apples, cherries, nectarines and walnuts is inconsistent with the requirements of the SPS Agreement.

The two disputes on the use of hormones are especially relevant in relation to a recent multilateral environmental agreement, the Cartagena Protocol on Biosafety, considering hormone fed cattle as Living Modified Organisms (LMOs). In the first meat hormone dispute in 1996, the US complained that the measures taken by the EC under the "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action" to restrict imports of meat and meat products were inconsistent with provisions under GATT 1994, SPS Agreement, TBT Agreement and the Agreement on Agriculture. Similarly, in the second meat-hormones dispute, Canada complained that the EC ban on importation of livestock and meat from livestock treated with certain substances having a hormonal action violated provisions under the SPS; GATT; TBT; and Agreement on Agriculture.[28]

The final dispute ruling for the two cases found that the EC import prohibition on beef from cattle raised on growth hormone was inconsistent with Articles 3.3 (scientific justification for more stringent standards) and 5.1 (risk assessment) of the SPS Agreement.[29] The Appellate Body noted that studies on the specific hormones in question failed to show how their use in growth promotion would result in hormone residue in beef and the associated health risks. Moreover, the Appellate Body (as well as Panel) noted that the hormone ban was inconsistent with the Europeans Communities (EC) practice of permitting the use of two known carcinogenic additives in feed for piglets.[30]

At the heart of the EC-hormone disputes was the issue of risk associated with the introduction and consumption of genetically or living modified organisms in an importing country. The Transboundary Movement of LMOs is now covered by the Catagena Protocol on Biosafety (in force since September 2003), which has been ratified by the EC, but not the US or Canada. Under the Protocol, a Party may choose not to import even if scientific information is insufficient (emphasis added, Article 11.8).[31]

Food Safety Trade Disputes under the WTO. The provision in the Cartagena Protocol allowing import restriction with insufficient scientific information is potentially in conflict with the science-based provision in the SPS Agreement. Article 5.7 of the SPS Agreement allows a Member to apply a measure only on a provisional basis in case of insufficient scientific information, and a Member is expected to review such measures "within a reasonable period of time". Considering the long-standing difference between the United State (US) and EC on the issue of living/genetically modified organisms, the interpretative decision pursuant to the negotiations under Dutch Muscular Dystrophy (DMD) Para 31 (i) will have a major bearing on trade disputes of this nature. It should be noted, however, that the Doha Declaration contains a condition, stating negotiations on the clarification of relationship between trade measures in MEAs and WTO rules should not disturb the rights of the WTO Members especially under the Agreement on Application of Sanitary and Phytosanitary Measures. In other words, Article 11.8 of the Cartagena Protocol should not disturb the rights of a WTO Member like the US (non- Party to the Protocol), as per Article 5.7 of the Agreement on Application of Sanitary and Phytosanitary Measures. The clause in the DMD safeguards the US commercial interests against the provisions of the Catagena Protocol, since the US remains the foremost proponent of research and practice of genetically modified crops and livestock.

IV. WTO JURISPRUDENCE IN ENVIRONMENTAL TRADE DISPUTES

The GATT Article XX exceptions on environmental grounds have so far provided ample room for departures from free trade, and its interpretation over

[27] Charnovitz S. 1999. "Improving the Agreement on Sanitary and Phytosanitary Standards", in Gary P. Sampson and Bradnee W. Chambers, editors, Trade, Environment and the Millennium, United Nations University Press.

[28] Consumer Unity and Trust Society (CUTS). 1997. Non-Tariff Barriers or Disguised Protectionism. Briefing paper No. 2. Calcutta.

[29] Update of WTO Dispute Settlement Cases (WT/DS/OV/160), dated 17 October 2003: page 60-61.

[30] This differential treatment, according to the US and Canada demonstrated the protectionist nature of the ban, to take care of the condition of the EU market for meats. (Kelly 2003).

[31] See section 3.1 for a brief description of the Catagena Protocol on Biosafety.

the last decade has expanded considerably (comparing the Tuna I analysis with that of the Shrimp Turtle). Several changes are significant.

First, in the pre-WTO regime, process and production methods unrelated to the product (e.g. incidental kill of dolphin during tuna harvest) was a matter of consideration, however, in the post-WTO Shrimp-Turtle dispute, the distinction between product- related or non-product-related production process was of no consequence. This probably reflected the cognizance of the total environmental impact of a product from cradle to grave – i.e. the aggregate environmental resource cost, irrespective of the fact whether it affects the final product characteristics or not.

Second, and more importantly, the extra-jurisdictional aspect of a Member country imposing domestic environmental regulation on its trading partner did not arise in the post WTO environmental disputes. In the Tuna I case, the Dispute Panel had categorically noted that *a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own*, and Article XX exceptions were interpreted to apply only to environmental resources *within the Member country's jurisdiction*. In the Appellate Body rulings of the Gasoline and Shrimp-Turtle1[32] disputes, however, the extra-jurisdictional aspect of similar unilateral action was not an issue, and the focus was on the depletable/ exhaustible nature of the environmental resources in question, namely, air and turtles respectively. While this new jurisprudence is appropriate from the ecological perspective, there is a risk of the same logic being extended to differential environmental regulations for local pollutants in future disputes, since Members have autonomy to a large degree in determining their own environmental policies.

Both in the Gasoline and the Shrimp-Turtle disputes, the issue of extra jurisdictional imposition of environmental standards/ regulations was disregarded, and the focus was turned on whether the US had engaged in any cooperative efforts before resorting to the unilateral trade sanction. In the Gasoline case, the Appellate Body also noted that the cost of compliance with the American standards by foreign countries had been neglected. Thus both rulings provided a clear avenue for *justifiable* unilateral trade sanctions in case the US could demonstrate its good faith efforts in environmental protection cooperatively with the trading Member prior to the unilateral action. Since the 2001 Shrimp-Turtle Compliance dispute was ruled in favour of the US in recognition of such good faith effort, it is likely that a trade restriction pursuant to a MEA is likely to survive a potential WTO-challenge. After all an MEA is a *good faith* multilateral effort, and multilateral actions are generally preferred to unilateral action under the WTO system.[33]

Third, in the post-WTO disputes, the environmental provisions under the GATT/WTO system have been "interpreted in good faith" and "in the light of its object and purpose" (Article 31.1, Vienna Convention on the Law of Treaties). In future the GATT Article XX exceptions will continue to be interpreted in the wider context since "context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes… any agreement… or instrument" among the parties (Article 31.2, Vienna Convention), and not in the narrow context used in the Tuna I dispute. The Appellate Body analysis of the recent disputes recognized the "intentions of negotiators of the WTO Agreement", and gave due regard to the international community's efforts to conserve the environment, including MEAs. This suggests that even if no new environmental provisions are negotiated under the WTO, the existing commitment to support "sustainable development" and "protect and preserve the environment", as stated in the Preamble, is sufficient for the multilateral trading system to acknowledge and support contemporary environmental initiatives of the international community.[34]

This argument could be even extended to suggest that the WTO would acknowledge and support new MEAs even if not all of its Members are party to the new treaty. While a new treaty cannot create rights and obligations for a third party without its consent (Article 34, Vienna Convention), there is provision for rules in a treaty to become binding on a third party through international custom ("as a customary rule of international law, recognized as such") under Article 38 of the Vienna Convention.

Also, the jurisprudence in the interpretation of GATT Article XX in the environmental trade disputes under the WTO is significant since it comes under the

[32] In the Shrimp-Turtle dispute, the Appellate Body noted that: "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." (WTO 1998: paragraph 133).

[33] Brack D. 1999. "Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System", in Gary P. Sampson and Bradnee W. Chambers, editors, Trade, Environment and the Millennium, United Nations University Press.

[34] Ibid.

category of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3 b, Vienna Convention), and has in effect established the meaning of exceptions under Article XX (b), (d), and (g). It is interesting to note that the two major WTO Members, namely the US and the EC, support and approve of the current jurisprudence of the WTO. In particular, the US has been and continues to be a proponent of a robust dispute settlement system in the WTO. Indeed the establishment of the WTO dispute settlement system, considered to be "one of the most significant changes adopted as a part of the Uruguay Round" was sought by the US Congress in the negotiations since it considered the GATT dispute settlement to be "ineffective".[35] In 2002, the US Secretary of Commerce noted that an "effective dispute settlement system advantages the United States not only through the ability to secure the benefits negotiated under the agreements, but also by *encouraging the rule of law among nations*".[36] The US had anticipated in its negotiations that the application of the DSU would "improve its ability to contest foreign trade remedy actions against U.S. exporters". The US Secretary of Commerce's assessment of the WTO dispute settlement system is that, overall the system has worked to the benefit of the U.S., providing a means to enforce U.S. rights and contributing to greater compliance by WTO Members. The United States has been able to successfully use (in several disputes where the US was the complainant) the WTO dispute settlement "to open markets for U.S. business; to preserve and create U.S. jobs; to eliminate trade distorting practices from the global marketplace; and to defend successfully U.S. laws and policies."

Given these benefits accrued through the WTO dispute settlement system, the US will continue to support and actively use the system to enforce its domestic environmental standards unilaterally through the multilateral trading system, rather than be party to a multilateral environmental initiative. Indeed, whenever, domestic commercial interests are threatened, the US has refrained from being a party to a MEA. For instance, the US is not a party to the Basel Convention, nor the Cartagena Protocol on Biosafety, since it is one of the largest exporters of hazardous wastes (covered under the Basel) and genetically modified products (covered under the Cartagena Protocol).

At the same time, the EC has been encouraged by the new jurisprudence in the environmental trade disputes under the WTO, since the approach adopted in resolving such cases "strongly suggests that the conclusion of an MEA could well be a key element to determine the justification of certain measures under Article XX of the GATT" (WTO 2002a). The EC particularly favours the Appellate Body observation (in the Gasoline dispute) that WTO rules should not be considered in "clinical isolation" of other international law and that Article XX must be interpreted "in light of contemporary concerns of the community of nations about the protection and conservation of the environment" has sanctified the acceptance of MEAs within the WTO system. Thus, while the EC is opposed to unilateralism (which US is prone to adopt), and remains a forceful proponent of multilateral consensus in using trade measures on environmental grounds, the wider interpretation of GATT Article XX exceptions in the recent disputes has appeal for both the trading giants.

V. CONCLUSION

Even though some of the WTO provisions stand for settlement of the environmental related disputes on trade issues, something is still lacking as WTO is not an environmental protection agency, WTO Secretariat notes that "in addressing the link between trade and environment, [therefore] WTO Members do not operate on the assumption that the WTO itself has the answer to environmental problems. However, they believe that trade and environmental policies can complement each other. Environmental protection preserves the natural resource base on which economic growth is premised, and trade liberalization leads to the economic growth needed for adequate environmental protection. To address this complementary, the WTO's role is to continue to liberalize trade, as well as to ensure that environmental policies do not act as obstacles to trade, and that trade rules do not stand in the way of adequate domestic environmental protection". Clear international trade rules are needed for the protection, particularly for the economically weaker trading partners, against the unnecessary trade effects of environmental policies of trading partners. Without strong trade rules, protectionist measures may be applied under the guise of environmental protection policies.

Modifications in WTO rules that might make environment-related trade restrictions easier to the developing countries are needed. However, there is also a

[35] US Secretary of Commerce (2002). "The WTO Dispute Settlement Understanding achieved the objectives set out by the Congress by effecting important changes in the GATT 1947 dispute settlement process, including time limits for each stage of the dispute settlement process; appellate review; automatic adoption of panel or Appellate Body reports in the absence of a consensus to reject the report; and procedures to suspend trade concessions with any Member failing to implement Dispute Settlement Body (DSB) recommendations and rulings."

[36] Emphasis added, ibid.

danger that if international trade rules are perceived to get in the way of increased environmental protection at the national and international levels, environmental policies will be adopted without regard for trade. For developing countries, the maximum safeguard is provided by a rule-based multilateral trading system which takes account of environmental concerns, rather than being exposed to the risk of unilateral trade measures. There is a need to carefully examine whether certain adjustments in the trade rules need to be made to better accommodate environmental policies while at the same time providing safeguards against unnecessary trade restrictions. The Committee on Trade and Environment is needed to make 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. It did not make any such recommendation in its first report to the WTO Ministerial Conference in Singapore. It is worth noting that coordination between trade officials and environmental officials at the national level is of crucial importance in ensuring that the linkages and complementarities that exist between trade and environment policies are taken into consideration and are adequately addressed. How can we substantiate the fact that international trade has led to globalization of the economic system?

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