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WTO Agreements and Environmental Issue A Developing Countries Perspective

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WTO Agreements and Environmental Issue A Developing Countries Perspective

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List of Acronyms

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
AIDCP	Agreement on the International Dolphin Conservation Program
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSD	Commission on Sustainable Development
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EEC	European Economic Communities
EFTA	European Free Trade Association
ETP	Eastern Tropical Pacific Ocean
EU	European Union
GATS	General agreement on trade on services
GATT	General Agreement on Tariffs and Trade
GEMIT	Group on Environmental Measures and International Trade
ISO	International Standard Organization
ITC	International Trade Centre
ITO	The International Trade Organization
LDC	Least Developed Countries
MEAs	Multi-lateral Environmental Agreements
MFN	Most Favoured Nation
MMPA	Marine Mammal Protection Act
NGOs	Non- Governmental Organizations
PPMs	Process and Production Methods
SCM	Subsidies on Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TED	Turtle Excluder Device
TREMs	Trade-related Environmental Measures
TRIPS	Trade- related Intellectual Property Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organizations

Abstract

The main purpose of this study is to give a comprehensive overview of literature and jurisprudence about how the trade related environmental measures restricts international trade to achieve environmental motive. Similarly, an outline on the relation between WTO agreements and environmental issues with respect to developing countries is also analysed in the present study. Moreover this study also aims to identify and illustrate their major concerns and constraints in the trade-environment linkage in the international trade. To evaluate these issues based on the cases filled to GATT/WTO dispute settlement unit a thorough analysis on the most important provision under GATT/WTO for environmental concern Article XX (b) and (g) and Technical Barriers to Trade (TBT) were done.

In the beginning this study gives a general introduction of the origin of the critical issues involved in the trade and environment debate with special focus on developing countries perspective. Then it examines the core principles and regulation of GATT/WTO relevant for the analysis of the trade-environmental issues and the dilemma they create to trade and development prospect of developing countries.

A general conclusion has been drawn from this study that unilateral trade measures imposed by developed nations for environmental goals must not be disguised protectionism and should be applied as last alternative. Along with that objectives of sustainable development could only be achieved by taking account of special developmental needs of developing countries. Lastly, developing countries, at the present moment cannot delink trade-environmental issues for a long time hence they need to move from reactive negotiation strategy to a proactive negotiation strategies to put their alternative agendas to solve their trade- environmental concerns.

Key Words: WTO, Environment, Trade, Developing Countries

CHAPTER ONE

1. Introduction

1.1 Research background and Problem definition

Expansion of world trade has raised the issues of the relationship between trade and the environment. Import and export of produced goods due to trade liberalization often have environmental effects. Not only the scope and severity of them attract the world wide attention, the complicated relation between international economy and environment protection has made trade and environment a hot topic. Many questions arise about the trade and its impact on environmental problem, for example will they affect exporting nation, the importing nation or the world as a whole? Whose responsibility is to respond to environmental problems associated with trade [1].Due to these reasons, contemporary international law faces challenges steaming from interactions between different areas of law and various stakeholders, e.g. tension between international trade law and environmental law and between developed and developing countries [2].The debate in the field of trade and environment is relatively recent phenomenon and takes different forms from the protection of endangered species to protection of climate since international community faces different environmental challenges which have major impact on world trade markets.

The attention to these environmental issues has been given when U.S. banned importing tuna from Mexico in 1991.The US blamed that fishing methods in Mexico killed large number of dolphins which was against the US Marine Mammalian Protection Act. According to the free trade principle of General Agreement on Tariffs and Trade (GATT), member countries cannot restrict imports except for the protection of health and safety of their citizen [1].Hence the GATT panel[1]declared that U.S. could not enforce its domestic legislation to protect dolphins out of its territorial limits. Even though this decision was never adopted by the contracting parties, it opened the major controversial issues on trade and environment. This was the first case which initiated the debate on trade related environmental measures. After this case more cases related to trade and environment was put forward to the jurisdictional body of World Trade Organisation (WTO) where Panels and Appellate body are requested to decide issues related to environment.

[1] United States- Restrictions on Imports of Tuna, Reports of Panel, DS 21/R- 39S/155, September 3 1991 (Tuna I).

For this study some of the most relevant cases concerning developing countries are analysed. For example, Tuna-Dolphin II (EEC)[2] US-Shrimp-Turtle[3], US-Standards for Reformulated and Conventional Gasoline[4] EC-Measures Affecting Asbestos and Asbestos –Containing Products [5] etc. Among these cases the US-Shrimp-Turtle is one of the landmark cases that provide an outstanding example of law making in favour of the environment. The U.S. used section 609 of its public law and prohibited import of shrimp and shrimp products from South Asian countries claiming they did not use the turtle excluder device (TED) which resulted in killing of endangered species of sea turtles. The US-Shrimp-Turtle cases represent a perfect example of the challenges faced developing countries in international law. The above mentioned environmental issues are analysed in the light of Article XX of GATT, which is mostly used to protect the environment.[6]

The major objective of WTO is to increase market access and promote non-discriminatory treatment of imports and vis-à-vis other import and domestic products [3]. As non-discrimination is the basic principle of GATT/WTO agreements, the notion of non-discrimination could be deduced in many ways for instance, the concept of discrimination in Article I (I) and Article III (4) of GATT needs a comparison on how like products are treated while the notion of non-discrimination in Article XX entails a comparisons of countries in which similar conditions prevails [2].

As mentioned before Article XX is applied for dealing trade related environment issues. In GATT case law Article XX is not a positive rule establishing obligation in itself but a list of general exceptions to obligations, otherwise assumed by WTO members[2]. Clauses of Article XX of GATT 1994 enabled countries to invoke its provision for environmental, animal, biological and ecological life protection.[7] Though these clauses are susceptible to be misused and might result in

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[2] United States ban on Tuna Imports from intermediate countries challenged by the European Union, 1994.
[3] Panel Report, Unites States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (May 15,1998)[herein after Shrimps I Panel Report]; Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (October 12, 1998)[Herein after Shrimps I AB Report].
[4]Appellate Body Report, United States- Standards for Reformulated and conventional Gasoline, WT/DS2/AB R (April,29, 1996); Appellate body Report, United States- Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (April 29, 1996).
[5]Panel Report, European Communities-Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/R (September 16, 2000); Appellate body Report, European Communities- Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (March 12, 2001).
[6]Appellate Body Report, United States- Standards for Reformulated and conventional Gasoline, WT/DS2/AB R (April, 29, 1996).
[7]Article XX Chapeau is as follows: ["Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of the measures."] http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX

introducing unilateralism.[8] Article XX of GATT Agreement and TBT permits each country the right to set level of environment protection it deems necessary without violating the principle of Article I i.e. Most Favoured Nation (MFN), Article III (national treatment) and by not creating barrier to trade.[9] Hence, WTO members have option to Article XX and adopt trade measures to attain their environmental objectives if conditions are met. However, arbitrary use and expansion of this Article has presented contradictory examples.[10]

From the developing country perspective, the most important case against U.S. by Pakistan, India, Malaysia and Thailand is the Shrimp-Turtle case in violation Article XIII, XI, I of GATT 1994, wherein nullification and impairment of benefits was alleged.[11] Use of domestic legislation of U.S. and requirement to follow such law of state seems a kind of restrictive measure to stop imports from developing countries. It could also be argued as interference of sovereignty of other states to formulate their environmental policy.[12]

Further environmental issues have remained controversial in WTO due to two reasons

1. Some developing countries fear that environmental measures may be used deliberately to create barriers to their exports; they also argue that they need economic growth to raise their own environmental standards.

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[8] "Article XX appears to be ambiguous and is open to different interpretations as this Article provides shelter to disguised protection and does not provide a scientific basis for distinguishing between genuine environmental concerns and arbitrary discrimination."(Kishore,2012)

[9] ["The Article permits use of prohibition or other restrictions not otherwise allowed under the GATT 1994 provisions provided they (I) are necessary to protect human, animal or plant life and health [Article XX (b)] and (II) relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption [Article XX (g)]. ["Such measures may be invoked only if, they do not constitute means of unjustifiable discrimination where the same conditions prevail (GATT principle of non-discrimination) and second, they are not a disguised restriction on trade."]
http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX

[10] ["U.S used Section 609 of its Endangered Species Act to prohibit import of Shrimps from countries of developing world"].["U.S contended while placing import embargo, that Section 609 and the related implementing measures were within the parameters of Article XX (b) and (g) of GATT 1994.The argument given by the U.S was that during the shrimp catching the endangered species of sea turtles are killed, which is of conservation and ecological importance. The drowning of Turtles was termed as human induced deaths of the sea turtles."]
http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

[11] ["The complainants alleged that the section 609 of U.S public law and the implementing measures were in contravention of Article XI (1) and Article XIII (1) of GATT 1994 and were not one of the exceptions provided under the Article XX (b) and (g) as claimed by the U.S."].["The obvious result of this unilateral measure of prohibiting the imports was resulting in nullifying or impairing the benefits accruing to India, Pakistan, Malaysia and Thailand."] (*Ibid*)

[12] See Supra note 3; Shrimp 1 Panel Report

2. The work in the WTO and its committee on trade and environment suggest the risk of conflict arising between provisions in multilateral environmental agreements that permit trade measure and WTO rules [4].

However this debate is still on since implication of decision of the above mentioned cases, could affect other environmental issues like ozone depletion, hazardous waste and global climate change. These issues are linked to international trade. Therefore it is important to think about the effect of environmental measures on market access, especially in relation to developing countries and environmental benefits of removing trade restriction and distortion.

Since developing countries faces a number of trade related environmental issues, like the responses to differing environmental standards across nations. Therefore this study majorly focus to the challenges posed by trade related environmental measures based on Process and Production Methods (PPMs), standards for trade and development scenario of developing countries. Along with that this study also analyse the developing countries resistance to linking trade and environment and the real issues and conflict they are facing in the present situation.

1.2 Research objectives

General objectives

To study the relation between WTO agreements and environmental issues with respect to developing countries.

Specific objectives

a) To study the impacts on the trade of developing countries due to environmental issues.
b) To analyse the relevant cases filed by developing countries against developed country concerning trade and environment.

1.3 Research Question

With the aim of accomplishing the proposed research objectives, the present study intends to answer following research questions.

a) What are the main arguments or concerns under GATT/WTO that have been taken into consideration for the connection between trade and environmental interest?
b) How a WTO member is allowed to take trade related environmental measures?
c) How are the exceptions under Article XX (b) and (g) of GATT applied? What are the criteria for its application? Could the unilateral measures enacted by the WTO members be justified under these exceptions?

d) What are the key cases concerning the applicability of Article XX (b) and (g) solved by the Panel and Appellate body?
e) How is Technical Barriers to Trade (TBT) agreement related to environmental issues? What are the key cases relating to technical barriers?
f) What are the major concerns of developing countries regarding trade-environment intersection? What are the challenges faced by developing countries related to trade-environment issues within the WTO regime?

1.4 Thesis Outline

This thesis report consists of 7 Chapters. The Chapter 1 introduces about information on the linkage on environment and international trade with major focus on its impact on developing countries to acquaint readers with the thesis subject matter. The author is of the opinion that to understand the complex relation between trade and environmental issues in the international arena basic knowledge on trade and environment debate and its origin is essential. Therefore Chapter 2 describes the historic linkage between trade and environment through GATT 1947 and GATT 1994 WTO, its objectives, Dispute settlement and Enforcement together with Developing countries perspectives on trade-environmental linkage and their involvement in the dispute settlement. Chapter 3 provides information on methodology applied in this study to answer the research questions, which consists of border literature search, data processing and analysis done in this study. The next Chapter 4 gives detail information on current WTO core principles/policies on trade-environmental matters its applicability, scope, its connection with Multi-lateral Environmental Agreement (MEAs) along with the analysis of relevant cases concerning developing countries. Following that Chapter 5 gives the overview of concerns and constraints of developing countries with regard to trade-environment interface. The discussion and conclusion part is presented in Chapter 6. The final Chapter 7 presents the recommendation by the author.

CHAPTER TWO

2. Literature Review

2.1 Origin of Trade and Environment Interface

In the past trade and environment were considered as distinct domains. The trade specialist and environmentalist did not perceive their realms as interacting. But the recent conflict between trade and environment has opened a new social trend around the world [5]. Additionally, the development of an international law of the environment in the past few decades has been premised on the globalization of environmental concerns. The globalization can be attributed to two important and interlinking factors like ecological and economic interdependence. Since more and more countries are entering the World Trade Organization (WTO), policy makers are now being conscious about the consequences of free trade, due to the increasing dissonance between environment/trade constituencies and among the developing and developed nations [6].

In the past decades, many multilateral environmental agreements have been created and governmental and nongovernmental environmental organisations have spread all around the world. Correspondingly, environmentally conscious consumers also keep on growing specifically in developed countries. Along with that global environmental problems being more observable for e.g. Ozone depletion, Climate change etc. Thus, issues regarding the environment are taken with keen interest in the world trade in the recent time. The debates in the trade-environment field range around specific issues, including the responses to divergent environmental standards across nations; the relationship between Multilateral Environmental Agreements (MEAs) and the WTO etc. A number of differing arguments are given by both trade specialists and environmentalists as described below.

2.1.1 Arguments in trade and environment debate

- Arguments by environmentalists
  - Liberalization of trade causes serious threat to world environmental quality and protection.
  - Promoting economic growth without environment safe guard may cause environmental harm and depletion of natural resources.
  - Pollution industries can move from countries with tough environmental standards to countries with lax environmental standards to reduce the cost of pollution abatement; increasing total amount of pollution around the world.

- Countries with lax environmental standard have a competitive advantage in global market and put pressure on countries with higher environmental standards to reduce the rigor of their environmental requirements or feel reluctant to develop new environmental policies.
- Further, trade restriction should be available as control to promote environment protection globally and reinforce international agreements which have limited by trade rules and multilateral trade systems.

▪ Arguments by trade specialists

- International trade helps to specialize the production of goods and services and maximize economy hence promote the efficient use of natural resources due to international competition.
- International trade promotes economic growth and generates the political demand and capacity for environmental protection especially for developing countries.
- Increased commercial transactions between countries also stimulate the dissemination of environmental friendly technology and public consciousness [7, 8].

2.2 Historic linkage between trade and environment through GATT/WTO

2.2.1 Genesis of GATT/WTO

In the quest to prevent catastrophic events, such us the World War II[13], and bearing in mind the decisive role the uncontrolled trade protectionism, a group of countries sought to create an international organization assured to furthering economic development and prevent the introduction of restrictive measures among themselves [9].The International Trade Organization (ITO) was conceived as a multinational organization that would regulate national practices affecting international trade and in order to get stability and world peace [10]. In 1946, a Preparatory Committee was set up under the support of the United Nations Economic and Social Council to draft a charter for ITO. Simultaneously, negotiations on different tariff concession and free trade principles were taking place. As a result in 1947 the General Agreement on Tariffs and Trade (GATT), one of the most important multilateral treaties for commerce was signed in Geneva. In the meantime, the Havana Conference on trade and employment was opened; the structure for the ITO was the topic for elaborations during the conference. But the ITO charter never entered into force due to resistance from the congress of United States. Due to this fact GATT became the central organisation, though handicapped device for the trade negotiations at

[13]For a comprehensive analysis of the history of the World Trade Organization [WTO] see John H. Jackson & William J. Davey, "Legal Problems of International Economic Relations" 293 (3d ed. 2000).

the international level a role which it was not intended to perform [11]. Since GATT 1947 did not necessitate parliamentary approval it remained in effect from January 1948 to January 1995[12].Thus, GATT was adopted as an adhoc agreement in an attempt to liberalise tariffs and trade, although it was originally intended to be a component of a larger agreement establishing an International trade organisation. It was a temporary solution to trade related issues lasted until the Havana Charter and ITO came into being [13]. The main objective of GATT was economic growth, to be achieved by providing trade rules and trade liberalisation by setting equal treatment of all trading partners as the norm and it also recognises the necessity to make exceptions for e.g. the most important exceptions can be found in Article XX. This topic will be discussed further in later sections of this study.

Despite the troubled history, GATT continued to pursue its objective of regulating trade between national government until it was incorporated into and strengthened by the Uruguay Round (1986-1994). Following the Uruguay Round of trade negotiations, the WTO was established by the WTO Agreement. Hereafter, WTO became the legal and institutional framework for the international trading system, which provided a platform for implementing, negotiating trade agreements as well as solving trade disputes [14]. Further the original GATT (1947) was incorporated as an annex in the WTO agreement by means of GATT 1994 and continues to put on issues not covered by more specific agreements negotiated during Uruguay round.[14] The WTO Agreement also includes specific agreements on trade related environmental issues like Technical Barriers to Trade (TBT), Sanitary and Phytosanitary Measures (SPS) and Trade- related Intellectual Property Rights (TRIPS).

Regardless of the current recognition, the initial rounds under GATT 1947 did not focus on environmental concerns or it's sustainability, even though many environmental treaties were formulated at that time [15]. It also did not consider the effects on environment of its trade rules and rather environmental protection was considered as a Non-tariff trade barrier because environmentalism and sustainable development were a new concern at that time for national and international policy making.

Nevertheless, extensive concern for environment protection in 1971 enforced GATT to establish a Group on Environmental Measures and International Trade (GEMIT) aiming to discuss relationship between trade and environment issues at the intergovernmental level and publishes reports on it. This group would assemble on request of contracting parties. However, relation between

[14] WTO Agreement, Annex 1 A: "Multilateral Agreement on Trade in Goods."

economic growth and environmental protection was not recognised by following GATT negotiations until the Uruguay round [16].[15] During the Uruguay round negotiation once again trade and environmental issues were put forward. Resulting in modification on standard code and some environmental issues concerning General agreement on trade on services (GATS)[16], Sanitary and Phytosanitary Measures (SPS)[17], Subsidies on Countervailing Measures (SCM)[18] and TRIPS[19] were also addressed. Moreover, attention on linkage between trade and environment was heightened during the 1991 dispute between Mexico and U.S. when Mexico claimed the embargo was inconsistent with GATT rules and the Panel's ruling was heavily criticised by environmentalists. After this concern the members of the European Free Trade Association (EFTA[20]) requested for the activation of EMIT group to create a forum for addressing environmental issues. Although there was initial unwillingness of developing countries for discussing environmental issues in GATT, they eventually agreed to start a debate on this matter with the development of GATT and reactivation of EMIT group.

After the establishment of WTO in 1994, members formally established the Committee on Trade and Environment (CTE) to identify the relationship between trade and environment measures and make recommendations for modifications of rules of the multilateral trading system [16]. Yet, the performance of CTE has been disappointing and as result it is criticised by NGOs and environmentalists.

Even so WTO is an improvement over GATT and it recognises the need to preserve the environment[21] by increasing the participation of observer groups (NGOs) and giving access to documents via its website which were deemed confidential before [17].The environmental issues remained controversial basically for two main reason; first is developing countries fear that environmental measure might be used as protectionist tool to create barrier which hinder their exports because in their view they needed economic growth to raise their environmental

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[15]"GEMIT group had never met convened for its first meeting on 1991 with some suggestion that was done only as a procedural attempt to move issue of the agenda."(Duncan,2005)
[16]Negotiated during 1986-94 Uruguay round (http://www.wto.org/english/tratop_e/serv_e/serv_e.htm)
[17]Adopted during 1986-94 Uruguay round (http://www.wto.org/english/tratop_e/sps_e/sps_e.htm)
[18]"The agreement on non-agricultural products is designed to regulate use of subsides."
(http://www.wto.org/english/tratop_e/scm_e/scm_e.htm)
[19]"The WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) refers explicitly to the environment in section 5, deals with Patent."
(http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)
[20]"EFTA referred to the upcoming 1992 UNCED and said EFTA should contribute as there were few developments in both trade and environment in those 20 years."
(http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm)
[21]"The preamble to the Agreement establishing WTO clearly states the objective of sustainable development as well as to preserve and protect natural environment."(Cole, 2000)

standards and the second the work in WTO and CTE suggests the risk of conflict arising between provisions in MEAs and WTO rules. Despite this criticism, the 2001 Doha negotiations[22] began where members were encouraged to conduct environmental review at the national level. However, the Doha round of negotiation about environmental concerns in international trade has not been concluded.

2.3 The World Trade Organization

2.3.1 Structure

WTO is successor of General Agreement on Tariffs and Trade (GATT) of 1947. It started its operation from 1995. It is performs different roles at the same time.[23]It is a platform for negotiation on world trade, but it is also a system of law single undertaking.[24]The three main sphere of WTO; trade in goods, governed by GATT 1994 (incorporating GATT 1947 into the WTO), trade in services, governed by the General Agreement on Trade in Services (GATS)[25] and intellectual property rights, governed by the agreement on Trade Related Aspects of Intellectual property Rights (TRIPS).[26] The most important domain for this study is the trade in goods (GATT).The agreements between WTO members are legally binding. Moreover there is the Dispute Settlement Understanding (DSU) which provides adjudication process for conflict resolution this topic will be further discussed in detail [18].

2.3.2 Dispute Settlement and Enforcement

Besides, the major substantive agreements mentioned above, the WTO charter and the dispute settlement understanding (DSU), a document that established a new dispute settlement system[27] has in effect played an important role in the trade and environment issues. The most important

[22]Doha 2001, the outcome of Ministerial conference has widely differing views. ["Some believe it indicates WTO is turning a distributive organization while others argue Doha agreement is a disaster for developing countries as the agenda for future trade talks reflect the interest of industrial countries alone."]

[23] See generally: http://www.wto.org

[24]"It means that once accord has been reached on certain agreement, states have to accept the whole package or nothing at all, they cannot pick and choose."(Van der Meulen,2008)

[25]"GATS, created in Uruguay round, regulates a broad range of different service sectors like banking, tourism, insurance etc. GATS agreement is comparable to the GATT agreement, with counterpart provision to MFN, national treatment and general exception."
See more: http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

[26]"TRIPS provide a minimum framework for the protection of intellectual property in international trade (copyrights, patents, trademarks, design, and geographic indication)".
See more: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm. Analysis on GATS, TRIPS for environmental issues is beyond scope of this study

[27]"A procedure for settling dispute existed under old GATT but with no fixed timetables, rulings were easier to block and many cases dragged for long time. After Uruguay round, a more structured dispute settlement process was adopted with more clearly defined stages in the procedure, greater disciplined time line for case settlement."(Nottage,2009)

achievement of the establishment of WTO was the introduction of this binding dispute settlement system. Formation of dispute settlement has resulted in a paradigm shift from a system based on economic power and politics to one based on the rule of law [19]. This kind of changes has resulted in increased legality of the WTO and is considered to be beneficial for developing countries and least developed countries (LDC). Since it would give them necessary bargaining power vis-à-vis the larger powers[20] .

WTO law has more influence than many other branches of international law, as it is endowed with a potent conflict resolution mechanism [21].Dispute settlement is the central pillar of the multilateral trading system and the WTO's unique contribution to the stability of the global economy.[28]Dispute in the WTO arises when one country adopts a trade policy measures that one or more fellow WTO members consider to be infringements (e.g. unjustified trade barriers) of WTO agreements, if negotiations do not solve the issues. A third group of countries can declare that they have an interest in the case [21]. Settling dispute is the responsibility of the Dispute Settlement Body (DSB), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "Panels" of experts to adjudicate the case on the basis of WTO law. The Panel makes its finding and submits an interim report to the disputing parties and then to the DSB for final adoption. If party does not agree with the decision of Panel, it can take the case to the Appellate Body (AB) for review of issues of law.[29] It monitors the implementation of the rulings and recommendations, has the power to authorize retaliation when a country does not comply with a ruling [18].[30]

2.3.3 Dispute Settlement Process

As mentioned above disputes in WTO are settled by the Dispute Settlement Body (DSB). Under the DSU, when dispute appears, the disputing parties are first asked to enter into consultation, to seek a consensus. The following Figure 1 gives an overview of steps of dispute settlement process in WTO.

[28]Settling dispute: http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf

[29]["Difference between the current WTO dispute settlement system and the old GATT is the Panel and Appellate Body reports are automatically adopted unless the members decides by consensus against adoption, which is almost impossible in practice"]. ["This difference gives new WTO dispute settlement an advantage of effectiveness in handling large number of dispute."] Settling dispute: http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf

[30]["WTO does not have power to enforce decisions taken in this procedure. If the decision reached is not implemented by the party found at fault, it can condone the implementation of sanctions by the winning party; sanctions in the form of punitive imports in levies on goods from the state found at fault"]. ["If the levies are condoned by DSB (or AB) imposing them does not constitute an infringement of WTO obligations."](Van der Meulen, 2008)

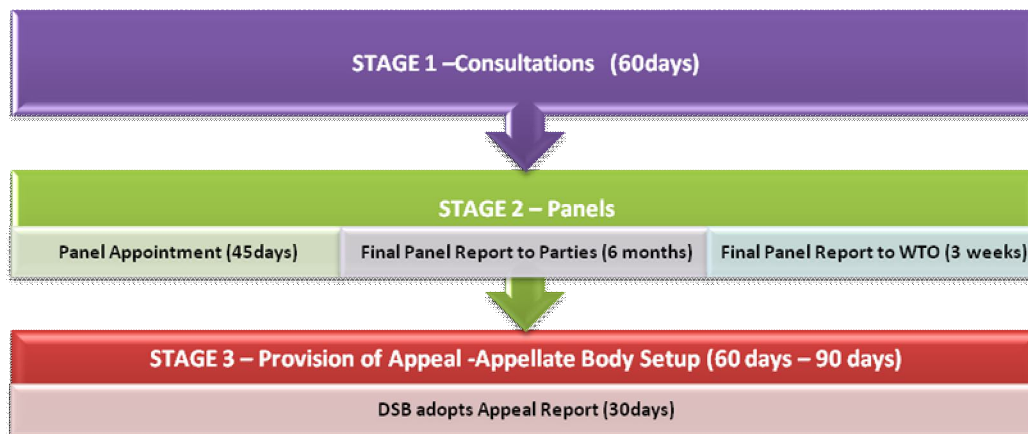

Figure 1 : The Dispute settlement Process. Time period for settling a dispute; 1 year without appeal and 1 year 3 months with appeal[31]

- **First stage:** Consultation (up to 60 days): In this stage the disputing countries are asked for consultation, if they can settle their difference themselves before taking any actions. If it fails then they can ask WTO director general for mediation or help in other forms.
- **Second stage: The Panel (up to 45 days for Panel appointment, 6 months for Panel to conclude):** However, if the consultation fails, the complaining country can ask for a Panel to be appointed. The country "in the dock" can block the creation of Panel once but if DSB meets second time it could not be blocked (unless there is consensus against appointing the Panel).[32]
- **Third stage: Provision of Appeal-Appellate Body[33] Setup (60-90 days):** Both sides are eligible to appeal a Panel's ruling, sometimes either side does so. Appeals must be based on points of law like legal interpretation of the text. However, they cannot re-examine existing evidence or examine new issues. The Appeal can support, modify or reverse the Panel's legal findings and conclusions. Appeals should not last more than 60 days and maximum of 90 days. The DSB has to accept or reject the Appeals report within 30 days; rejection possible by consensus.

[31] http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf

[32] "The panel helps the DSB for making rules or recommendations, but its report can only be rejected by consensus in DSB, its conclusions are difficult to overturn but its finding must be based on agreements cited. The panel's report should be given to disputing parties within 6 months. For urgency case (perishable goods) deadline is shortened to three months."
http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf

[33] "Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the DSB and broadly representing the range of WTO membership. Members of AB have 4 years terms; with individuals with recognized standing in the field of law and international trade, not affiliated with any government." http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

2.4 Developing countries Perspective Regarding Trade-environmental Issues in WTO

A number of developing countries believe in trade as a central part of their strategy for development and consider it increasingly important in shaping up their economic policy. On the other hand, much of the environmental damage in world is due to the increased scale of global economic activity [22]. While the economic globalization continue and global environmental problem become more evident, there is bound to be friction between the multilateral systems of law governing both hence a proper framework within the WTO mechanism itself is essential. Because there are some broad explicit and implicit objectives of GATT/WTO and imbalances in the negotiating positions of individual nations and groups of nations, which tend to work against environment and resource conservation[23-25].The argument of the critics of WTO[34] is that it is inadequate for the purposes of protecting the environment and alleged that its current process ignores the concomitant environmental consequences.

According to the southern perspective[35] major fear for the developing countries is that trade and environment linkages are sought for protectionist motive, particularly to keep out imports from countries with better competitive edge and comparative advantage.[36] Similar views have been expressed by other developing countries.[37][38] The vision of most developing countries is inspired by the thought that economic growth will be enhanced by free trade, which will help protect the environment [26, 27]. Generally, they believe that environmental problems require environmental solutions and not trade restrictions.[39]Thus, they stress on the principle of the Rio Declaration the right to development, the special needs and situation of developing countries and states common but differentiated responsibility in regard to promoting sustainable development and propose that trade-environment issues should be addressed in a systematic manner[28]. Besides they believe that environmental concerns are better dealt through alternate means and

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[34] "The main critics of the WTO are a vast array of environmental, conservation and public policy NGOs and organization such as Public citizen, Greenpeace, one world, World Wildlife Fund, Friends of the Earth etc."(Rajamani,2000)

[35] Southern perspective hereby represents the developing countries."

[36] "Statement made by Malaysian Minister of Environment at GATT Marrakech Ministerial Conference, after Uruguay round: Third world Resurgence", Third World Network Features May 1994.

[37] Statement by former Indian minister of Environment; "greater trading opportunities will enable developing countries to invest more in environmental protection and gives opportunity to correct historical imbalances, till then there should be a moratorium on linking trade and environment." (India for Delinking Trade and Ecology, Economic Times, 1994)

[38] Brazilian President, Fernando Henrique Cardoso; Echo same voices; "Brazil rejects trying trade talks to environment."Reuters1997 http://csf.colorado.edu/elan/sep97/0120.html>

[39] Statement by Vice Minister of international trade negotiations of Mexico Luis de la Calle presented in the Panel on the "Linkages between trade and environment policies" WTO Symposium on Trade and Environment.

alternate forum.[40]For example an Indian environmental organization, Centre for Science and Environment backed the Indian Government's protest against the U.S. Shrimp ban. However, it also accepted that Indian government had not done enough to protect turtle and condemned U.S. unilateral trade-move to discipline the environmentally errant nations and suggested that a compliant and penalty mechanism must be set up to enforce international environmental treaties.[41]

On the other hand, other Asian environmentalists opposed the U.S. move and recommended that trade restrictions be imposed according to rules of MEAs and paralleled by the affirmative moves that compensate the affected producers and provide technology transfer assisting them to shift to sustainable Process and Production Methods PPMs. In general, environmentalists in developing countries have recommended that trade-environment link be made in institutions and arrangements that developed out of Rio agreement for e.g. Commission on Sustainable Development (CSD) or United Nations Conference on Trade and Development UNCTAD [29]. Since these forum are more suitable for integrating these matters and provide a more transparent and democratic fora than the WTO [30] .

Moreover, developing countries argument is that such a body with openness and access to differing perspectives and expertise is more preferable than WTO. Because, WTO has a narrow trade focus, competence and capacity to handle these complex issues [31]. They point out WTO's non-transparent and non-participatory nature to content that the majority of developing countries are deprived of having their say in the decision and policies of the WTO.[42] This nature of WTO had been experienced by them in the Seattle Ministerial meeting which was considered as the major cause of its failure by the developing countries [30]. According to the review in the Economist, one of the key points of the failure of Seattle was the refusal of developing countries to be steamrollered [32].

In contrast, these countries opposed the participation of civil society (NGOs) directly or indirectly in negotiations or dispute settlement although they favour transparency. As they hypothesise, that essence of international affairs is relations between sovereign states, as such if international bodies are called upon to deal with other actors their decision process becomes shadowy and

[40]Anil Agarwal and Sunita Narain, "Green Warrior or Big Bully", Business Standard, September 23, 1997 arguing against US trade sanctions in the Shrimp-turtle case.
[41] Ibid.
[42] Martin Khor, Director, Third World Network, Statement presented in the Panel on "Synergies between Liberalization, Environment and Sustainable Development", WTO Symposium on Trade and Environment (March 16, 1999).

foundation for their legitimacy is uncertain [33]. Also lobbying by these groups with WTO leads to distorted policy outcomes, which is of greater concern for them.

Hence developing countries are worried that developmental inequality will be enhanced; if there will be involvement of NGOs in WTO.[43] But this kind of view is unworthy as it indicates their inability to deal with northern-centric interest driven NGOs. At the moment the participation of NGOs from both North[44] and South is equal and even the presence of NGOs from South is steadily growing in international environmental negotiations [34]. Further, NGOs from both developed and developing countries present independent concepts and standpoints [35].

2.4.1 Trade-Environmental Issues for developing countries in GATT/WTO

The debate surrounding environmental protection is complicated by the fact that the perspectives of developed and developing countries are often quite different. This difference in perspective relates not only to their differing circumstances and priorities but also to the potential for differential impacts of a given policy. Some issues of concern to developing countries are explored below in brief, these topics are discussed in detail further in Chapter 5.

a. Trade-related Environmental Measures (TREMS)

The use of trade measures on environmental issues has caused controversy among both developing countries and trade specialist who often suspect the use of these measures as protectionism, extra jurisdictional and unilateral. In most cases TREMS been used for trade bans, as tool pursuant to MEAs or Unilaterally by developed nations. A good example for this would be U.S. restriction on imports of Tuna or Shrimps.

b. Compliance cost

The costs of compliance with environmental measure specifically with the standards applied in export markets is an issue of concern for developing countries. Because, compliance costs may be higher for them than for developed countries, resulting them in competitive disadvantage. The costs of compliance with the standards applied in export markets shows the degree to which these standards differ from those that prevail in the supplier's market. Since developing countries usually apply less technical standards than developed countries, they will face higher compliance

[43]"As majority of NGO protest at Seattle were directed at WTO's supposed 'insensitivity' to labor standards and environmental protection, focusing developing countries because they constantly argued against including environment and labor clauses in trade, and fear it will adversely affect their trade interest."(Najam,2000)

[44] "Here by North represents the developed countries."

costs in meeting those higher standards, even when such standards are strictly non-discriminatory [36].

c. Products Standards and Eco-labelling

This topic is of great concern for developing countries trade as product standards could be also used as non-tariff barriers. An issue raised in the WTO is the extent to which trade restrictions be imposed against the method used to produce goods, called "unrelated" production and processing methods (PPMs) which is against PPMs that may generate negative production effects but that do not affect the quality of the final product [37].WTO allows countries to adopt trade measures regulating "product characteristics or their related Processes and Production Methods"[45]but PPMs that are unrelated to the final product are not clearly enclosed by the WTO Agreements. For example the “Tuna-dolphin” case and the “Shrimp-turtle” case where trade restriction was applied on the basis of fishing techniques which harmed the endangered species. Similarly, eco-labelling is another concern for developing countries. In this case special labels have been used in products by national governments or regional groups to indicate certain environmental standards for e.g. Japanese Eco-Mark, the Canadian Environmental Choice and the Nordic Swan, while others are operated by consumer groups, industry associations or other non-governmental groups. The issue here is, if such schemes incorporate unrelated PPMs and if they follow fully to the WTO principles of non-discrimination and transparency [38].

2.5 Developing countries and The Dispute Settlement System

To acquire the benefits of globalization developing countries need access to the foreign market and multilateral trade negotiations in which WTO plays an important role in enabling market access.[46] Moreover, trade liberalization promises considerable returns, but comes with risks, the most important among them for developing countries view is protectionism for e.g. a foreign government will succumb to lobbying by its own domestic producers and grant them protection. This can undermine a developing country’s interest in reallocating resources to the affected export sector, as poorest countries tend to have fewer alternative export markets, and fewer export goods. This kind of situation could lead to discourage developing countries hope to reform their trade[39].

Hence, WTO dispute settlement mechanism is thought to be the most important aspect of global trade which helps them to put forward the international legal analysis against the protectionist

[45] TBT Agreement, Annex 1, Paragraph 1.

[46] For example, “the largest developed countries have tended to reserve their deepest concessions on agriculture, a sector of central interest to many developing country exporters, for the multilateral forum, not bilateral trade agreements.”(Busch,2004)

practices of other trading partners. It is especially important for developing countries which generally lack the market size to exert much influence [39]. WTO dispute settlement system can help insure against this risk by maintaining market access once it is won, thereby encouraging developing countries to embark on an open trade growth strategy.

Irrespective of these perceived benefits, majority of developing countries in the WTO are almost completely disengaged from enforcement of their market access right through formal dispute settlement litigation. Due to technical and legal complexity, they never filed a WTO dispute despite having grounds to do so. This increases a concern that they are not benefiting fully from this system. On the other hand some advanced developing countries like Brazil, India, and Thailand etc. are the most frequent users of WTO dispute settlement, both in absolute and relative terms which prove the system's effectiveness[40].However, this does not portray the full picture of developing countries since the dispute settlement activity of developing countries is concentrated within a few main users.

A vast majority of developing countries are absent from the process. This case is even worse for LDC where Bangladesh being the only LDC WTO member to initiate consultation in a dispute [19]. Moreover, the past experience of the dispute settlement shows that more groups were not willing to work with these developing countries to invoke dispute settlement on their behalf. With a few exceptions, the likely candidate are groups of NGOs and private sector attorneys but they have not taken lead to provide proper legal assistance on their behalf [41].On the contrary, these groups had substantial role in WTO litigation for developed countries.

From the institutional perspective an effective WTO dispute settlement system with public good characteristics is very much important. Along with that proper membership participation in the system can also generate positive externalities. The WTO dispute settlement system acts as a public good if it develops property rights for e.g. market access rights, thus each member country's ownership at stake in the system [42].Therefore active participation in dispute settlement activity by all WTO members can also have positive externalities if one country's litigation efforts contribute to the removal of a trade barriers that adversely affect market access of the other member [41]

All WTO members have a considerable concern for the enforcement of existing market access right which is of specific concern for developing countries. Since they are still not entirely integrated into the system and a failure of dispute settlement system to enforce existing commitments and market access obligation lead to a damaging feedback effect. If developing

countries believe they cannot enforce their market access rights through dispute settlement, they may be unwilling to follow their WTO commitments or to undertake new commitments. Thus, there is possible missing WTO dispute settlement activity related to developing country trading interest.

Consequently it is certain that the developing countries face substantial hurdles in using WTO dispute settlement [43]. The principal hurdle among these is their lack of market size with which to convincingly threaten retaliation for noncompliance. It entails developing countries even with a legal victory in hand may not be able to compel the defendant to liberalize, because its threat to retaliate lacks reliability which may discourage them from filing complaints in the first place[39]. Nevertheless, retaliation measures could equal export losses, so even for small markets can fully compensate the losses relating to trade obstacles imposed by other countries.

Looking at these obstacles it seems that developing countries benefit less from WTO dispute settlement mechanism but in contrast some developing countries had filed case and even won concessions from developed nations as well for example Sardine case (Peru V European Communities). Moreover, some developing countries such as Brazil and India, have started a number of disputes, whereas China is more active as third party in most dispute settlement which shows its eagerness to gain experience within the system [39].

Even though this is the case for some frequent users among the developing countries but others might still be reluctant to initiate dispute due to fear of reprisal outside of the WTO system for instance suspension of foreign aid or unilateral trade preferences etc. Together these factors may contribute to an unwillingness of developing countries to invoke the DSU against larger and richer trading partners. Additionally, developing countries also face problems like lack of legal capacity; financial constraints to fund external WTO lawyers, lack of domestic mechanisms to identify trade barriers etc. these constraints are discussed in detail further in this study.

CHAPTER THREE

3. Methodology

The methodology used in this study consists of literature reviews of already available information concerning trade and environmental matters with special focus on developing countries perspectives. The aim of this methodology is to obtain information on the GATT/WTO jurisprudence related to trade and environmental concerns from different sources. Moreover, this study also aims to analyse the relevant pieces of GATT/WTO core principles[47] (legislation) and exceptions, related to trade and environment.

3.1 Data for Desk Research

The data and information needed for this study were obtained from desk research. The information required for the analysis of the research problems of this study were obtained through systematic literature reviews and document search. The literature included scientific journals, books and official websites of the competent authority (WTO[48]) institutions and countries.

3.2 Data Processing

The data processing type used in this study is analytical[49] whereby the already available information from different sources was analysed to make a critical evaluation of the aforementioned laws.

3.3 Scheme of Research Framework

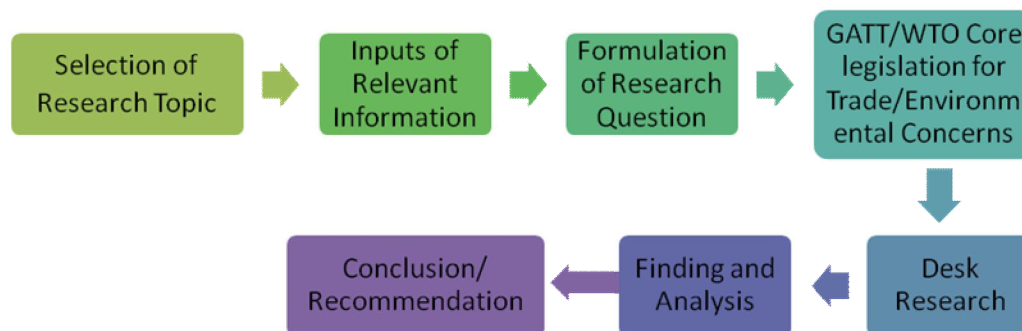

Figure 2 : Scheme of Research Framework

[47] "The three core principles and basis of GATT/WTO; Most favoured nation obligation (MFN) Article I, National treatment obligation Article III, Obligations relating to the elimination of quantitative restriction Article XI and Environmental Exceptions to GATT/WTO specifically Article XX (b) and (g)".

[48] http://www.wto.org/

[49] Research Methodology, Methods and Techniques by C.R. Kothari, pg3.

CHAPTER FOUR

4. The Current GATT/WTO Policies on Environment Protection

The core agreement of the WTO system is the General Agreement on Tariffs and Trade (GATT). The GATT/WTO agreement requires that WTO members do not discriminate between domestic and foreign goods, services and service providers that distort international trade[44]. If environmental measures do not discriminate between countries or between domestic and imported goods, they are less likely to violate the GATT.[50] In the WTO law, the concept of non-discrimination can be interpreted in different ways E.g. the notion of non-discrimination in Article I and Article III of GATT, requires a comparison of how like products are treated.

The WTO has no specific agreements dealing with environment. But it confirms government right to protect the environment, if certain conditions are met and a number of them include provisions dealing with environmental concerns.[51] There is a reference to sustainable development as one of the general objectives to be served by the WTO in the Marrakech Agreement which established the WTO [22]. Additionally, there are provisions on Agriculture and the General Agreement on the Trade in Services (GATS). But the most important provisions regarding environmental issues are Article XX of GATT (general exceptions) and the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT).

4.1 GATT Core Principles Relevant for Trade-Environment Issues

The three core principles which are the basis of GATT are most favoured nation obligation (MFN) of Article I, national treatment obligation of Article III and obligation concerning to elimination of quantitative restrictions of Article XI.

a) The Most Favoured Nation Obligation (MFN) - Article I

The MFN principles of Article I states any advantage, favour, privilege or immunity granted by any contracting party to any product of any other country applies equally to like products of all contracting parties. No country should discriminate against any other. This obligation guarantees equal treatment of trading partners and rapid reduction of trade barriers. See law text box 1.

[50] GATT Secretariat, “Expanding trade can help solve environmental problems, says report” Press Release, in GATT, *Trade and the Environment* (1992).
[51] http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm

Law Text box 1. Article I GATT on Most Favoured Nation Treatment Obligation

> Article I
>
> General Most-Favoured-Nation Treatment
>
> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

b) National Treatment - Article III

The national treatment principle of Article III provides equal treatment between domestic and imported products. Foreign products cannot be rendered any less favourable treatment than like domestic products where the aim is the protection of the latter.

Law Text box 2. Article III GATT on National Treatment

> Article III*
>
> National Treatment on Internal Taxation and Regulation
>
> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.
>
> Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

c) General Elimination of Quantitative Restrictions - Article XI

GATT rules prohibit the use of quantitative restrictions such as quotas and imports and export licenses. However Article XI allows for exceptions to these restrictions. Thus under Article XI countries can impose trade restrictions if they experience shortage of essential products or where it is necessary for trade in commodities or agriculture or fisheries products. See law text box 3.

Law Text box 3. Article XI GATT on General Elimination of Quantitative Restriction

Article XI*

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:
(*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
(*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
(*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:
(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
(ii) to remove a temporary surplus of the like domestic product ,or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Nevertheless, it is uncertain whether WTO members can use these exceptions on environmental grounds. WTO members can take measures for export restrictions for reasons like; protection of natural resources and endangered species, upgrading the quality of export products etc.[52] Hence

[52] http://www.oecd.org/trade

measures taken by countries to achieve the environmental objectives can violate the GATT Article XI.

A relevant example is the case of *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon.*[53] In this case the U.S. alleged Canada's prohibition on the export of unprocessed pink and sockeye salmon and herring which breached Article XI which was intended to protect domestic fish processors by preventing foreign competitors from gaining access to Canadian fish. In response, Canada claimed the measures were an integral and long standing component of its fisheries conservation and management rule, justified under Article XI paragraph 2(b) and Article XX (g). It was noteworthy that the export embargo did not limit the access to herring and salmon supplies in general as the purchase of unprocessed fish were limited for foreign purchaser and not for domestic processors and consumers. Thus, from the basis of this information Panel found, the prohibition applied to all unprocessed salmon and herring, the Canadian argument that prohibition was required to prevent the export of unprocessed salmon and herring not meeting its quality standards was not justified. Hence it could not be considered 'necessary to the application of standards within the denotation of Article XI 2(b) and nor it could be considered to consists of regulations for the marketing of goods in international law under Article XI 2(b).Therefore, countries which impose export restrictions while dealing with overexploitation of natural resources may violate their GATT obligation under Article XI.

4.1.1 Implications of GATT Core Principles for the Environment Protection

4.1.1.1 The Most Favoured Nation (Article 1) and National Treatment (Article III)

The MFN clause and the national treatment clause require a country to treat like products equally without any discrimination between trading countries. According to this principle countries should not differentiate between domestic and foreign producers by trade restrictions. The concept of ''like products'' could be linked to the requirement for the countries to qualify for equal treatment under Article I and III. The analysis of this expression is crucial to know the MFN and national treatment principle, and its consequence on the environment[45].The term "like products" has created much debate in relation to environment protection since debate arises on how the likeness of product is interpreted. Due to its importance it is reasonable to expect extensive analysis of the concept of "like products" in dispute-settlement proceedings of GATT/WTO. In general "like products" means products with similar physical characteristics, an interpretation established by the DSB. It is a product which is alike in all respect to product under

[53] GATT Doc. L/6268,B.I.S.D. 35S/98 (adopted 22 March 1988).

consideration. However, in absence of such product "like product" is one which resembles the character of the product under consideration and is determined on a case by case basis.[54]

Conferring the interpretation given by the WTO dispute settlement it refers to the nature of the product itself and not the PPM applied. As long as the physical characteristics are same the product cannot be treated differently, even if it is produced without taking consideration of the environment [14].Similarly, developing countries fear how the term "like product" is defined as they think PPM may be used as a protectionist measure against them by developed countries. A detail analysis on PPM will be found the subsequent chapter.

The GATT Article III restricts the taxes that give protection to domestic production. A country cannot provide subsidy for a product only because it is made on high environmental standards to make it more competitive nor it can favour imports from countries with good environmental regulation [14]. But environmentalist argue that if a method of processing cause environmental damage then an importer should be able to express preference for the product which doesn't not cause environmental damage. So, there is still a challenge in interpretation of this term from both developed and developing countries perspective [22].

An example of this limited interpretation of "like product" can be explained by the *Tuna-Dolphin* case of 1991. The Mexico challenged the Marine Mammal Protection Act (MMPA) of U.S. to the GATT for its restrictions on the import of tuna whose acquisition harmed dolphins. They argued that the measures under the MMPA were quantitative restrictions on importation that were forbidden under Article XI of GATT and also violated the National Treatment Obligation under Article III. Moreover, Mexico stated that Mexican tuna and the tuna available in the U.S. markets were alike hence its restrictions were discriminating against their products. The GATT Panel ruled that Article III as it dealt with national treatment principle covered only those measures that are applied to products as such. Since the physical characters of a product were the same, differential treatment on the basis of any other factor was held inconsistent with this principle.[55]Therefore the U.S. MMPA 1972 was alleged in violation of Article III as it treated Mexican products less favourably than domestic products of U.S. though there was incidental killing of dolphins but it didn't affected the final product. The Panel concluded, contracting party may not restrict imports of products only on the basis that product was originated in a country with different environmental policies than its own.

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[54] "Agreement on Implementation of Article VI of GATT" 1994, Article 2.6.

[55] Panel Report on United States - "Restrictions on Imports of Tuna", Final Version Transmitted to The Parties 16 August 1991. "The report was submitted to GATT member countries on September 3, 1991 and was made public on September 16, 1991". GATT Doc. DS21/R (Tuna-Dolphin I)

Hence, the non-discriminatory principle and its narrow scope do not allow countries to enact embargo only for environmental protection without violating GATT obligations. This has led to the countries to use the exceptions rules while adopting trade-related environmental issues.

4.2 Environmental Exceptions in GATT/WTO Regulation (Article XX)

The GATT provides a list of general exceptions to obligations otherwise assumed by the WTO members [46].All international agreements need exemptions clauses. These are the mechanisms that guarantee that the governments retain the capacity to perform essential function that might be eroded if the basic rules of the treaty are applied [22].The GATT exceptions set out in Article XX permit members very wide latitude to control trade to protect the environment. Even though GATT contains exceptions to its own requirements, these exceptions must comply with the principle of non-discrimination as it might be misused by the members for protectionism due to the ambiguous language of the chapeau [2].

4.2.1 Applicability of Article XX (b) and (g) of GATT 1994

Article XX was the main provision that allowed members to impose environmental measures even before WTO came into force. Article XX of GATT offers general exceptions to its obligation including the three most substantive ones: most favoured nation's clause, the national treatment obligation and prohibition on quantitative restriction.[56] Under Article XX of GATT, there are many exceptions, but the exceptions on paragraph b and g are directly concerned with environmental goals. Though the word *environment* is not used in paragraph b and g of Article XX it provides member states chances to justify their environmentally inspired measures such as the protection of human, animal and plant life or health and conservation of natural resources that collide with international trade. Such exceptions may be appealed to justify GATT inconsistent measures.

The relevant text of Article XX of GATT 1994 states as given in the following law text box 4

[56] *See* "General Agreement on Tariffs and Trade 1947", as Amended, Article I, Article III, and Article XI, at 17-18, 20-21, and 28-29.

Law text box 4. GATT Article XX General Exceptions

Article XX General Exceptions: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting party of measures: ..... (b) necessary to protect human, animal or plant life or health; ..... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

A party must satisfy the following requirements for the application of above mentioned measures

I) The measure should not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

II) They must be necessary i.e. exhausting all less trade restrictive alternatives.

III) They must not be a disguised restriction on international trade.

A specific method has been established by the Panel and Appellate Body (AB) to address a defence of GATT inconsistent measures. The justification of GATT inconsistent measures involves matters such as burden of proof, sequence of steps for the application of Article XX, the policy choice and fulfilment of the requirements of paragraphs in Article XX as well as its introductory clauses (*Chapeau*) [47].

The rule for the burden of proof is that the party who declares the affirmative of a particular claim or defence has to prove it. Hence for the applicability of Article XX, the party appealing such exceptions bears the burden of proof that the GATT inconsistent measures must fulfil the requirements contained in Article XX provision.[57] Besides the party appealing for exception under

[57][“The US-gasoline case the AB found that burden of showing that a measure complies with requirement of introductory clause of Article XX falls on the defending party even after that party has established that the measures qualifies under one of the exceptions of Article XX.Hence a party invoking an exception under Article XX has to prove i) that the inconsistent measure comes within scope of one exception and ii) that the measure complies with Article XX. Additionally the AB stated that “the burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of

Article XX must first prove that the inconsistent measure comes within the scope of one of the prescribed exceptions and also that the measure complies with the Chapeau of Article XX.[58]

As mentioned above, the sequence of steps was not satisfying between Panel and the Appellate Body (AB). The understanding of a Panel was an a priori, and reverses, i.e. first it analyses the Chapeau. It seemingly did not notice the necessity to establish the sequence of steps and it claimed that all conditions contained in the introductory clause apply to any exceptions in the Article XX. But the AB opposed with the Panel and reasoned that the sequence of steps in applying Article XX is to

i) Verify whether the GATT inconsistent measures fall within one of the exceptions under Article XX and
ii) Prove whether the measure also meets the requirements of the Chapeau.

The approach used by AB reasoning is essential to prevent the misuse of the exceptions in Article XX and even if a GATT inconsistent measure falls within one of the exceptions of Article XX it does not automatically fulfil the requirements of the Chapeau of Article XX.[59] This sequence of step approach is necessary since the role of Chapeau is to analyse the application of measures and not whether the measure themselves are as such justified under some paragraph of Article XX.

Article XX does not in its application, constitute abuse of such exception under the chapeau, rest on the party invoking the exception. That is of necessity a heavier task than that involved in showing that an exception [....] encompasses the measures at issues."] (Note by Secretariat of WTO, identified as WT/CTE/203, 8 March 2002)
http://docsonline.wto.org/

[58]["The defending party must demonstrate that the measure first fall under at least one of the ten exceptions listed under Article XX (a) to (J) and second it must satisfies the requirements of the preamble which states no arbitrary or unjustifiable discrimination between countries where same conditions prevails and is not a disguised restriction on international trade."]
["In the US-Gasoline case the AB presented a two tiered test under Article XX. In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one of the exceptions paragraphs (a) to (j) of Article XX. It must also satisfy the requirements imposed by the opening clause of Article XX."]
http://www.wto.org/ english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20C

[59]["In the US-Shrimp turtle case, the AB disagreed the Panel's decision which analyzed the case with Chapeau of Article XX and reasoned that ...since the conditions in the introductory provisions apply to any of the paragraphs of Article XX; it seems equally to first analyze the introductory clause of Article XX."] ["In contrast, AB argued that sequence of step (e.g. In US-gasoline) in the analysis of claim of justification under Article XX reflects, not inadvertence or random choice but rather the fundamental structure and logic of Article XX. While Panel suggest that although indirectly, the following the sequence of steps or the inverse thereof doesn't make any difference. The task of interpreting the Chapeau so as to prevent the abuse of specific exceptions provided for the Article XX is rendered quite difficult, if indeed it remains possible at all where the interpreter (Panel in this case) has not first examined the specific exception threatened with abuse. Since standard in the Chapeau are broad in scope reach....Thus when applied in a specific case the actual contours and content of these standards differ due to kind of measure under examination...So if a measure falls within the terms of Article XX (g) it might not always comply with the requirement of the Chapeau.."]
http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

However at the recent time the harmonization of this sequence of steps for the applicability of Article XX between Panel and Appellate Body do occurred in EC-Asbestos case.[60]

In order for a GATT inconsistent measure to fall under one of the exceptions in paragraph (b) or (g) of Article XX it is essential to meet the requirements contained in those provisions. Similarly for the justification of GATT inconsistent measures involving policy choices and fulfilment of the requirements of paragraphs (b) and (g) of Article XX following conditions should be met.

a) Article XX (b) for GATT inconsistent measures to be justified, it must be shown that the
   - Policy with respect to the measure is designed for protection of human, animal or plant life or health.
   - GATT inconsistent measure is essential to achieve the policy objective.
   - GATT inconsistent measure was applied in conformity with the requirements of the Article XX Chapeau.
b) Article XX (g) for GATT inconsistency measures follow
   - The measure is concerned with the conservation of exhaustible natural resources.
   - The measure must be related to conservation of exhaustible natural resources.
   - The measure must be effective in conjunction with restrictions on domestic products or consumption. Further, it must always be in conformity with the obligation of the introductory clause.

Hence the applicability of Article XX needs that policy goals must be identified within the policies described in GATT 1994 and the requirements of Article XX b and g must be satisfied.[61]

4.2.2 Article XX (b) Protection of Human, Animal and Plant Life or Health

The Article XX (b) allows WTO members to give priority to trade related environmental measures if necessary to protect human, animal or plant life or health. These measures are necessary to achieve the goals within the meaning of Article XX (b). Even so, the use and the interpretation of

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[60][“The Sequence of step is now a part of both Panel and AB practice. In EC-Asbestos case the Panel observed “ In accordance with the approach noted by the Panel in US-Gasoline and the AB in US-Import Prohibition of Certain Shrimp and Shrimp Products “We will first examine whether the measure falls within the scope of paragraph (b) of Article XX the provision invoked by European Communities. If we decide that it does we will consider whether in its application, the decree it satisfies the condition of the introductory clauses of Article XX.”]
http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds135sum_e.pdf

[61][“For the application of Article XX exceptions first is to identify whether the policy pursued through the measures falls within the range of policies designed either to protect human, animal or plant life or health to secure compliance with the law which are not inconsistence with GATT 1994 or to conserve natural resources and second determining whether the specific requirements under Article XX (b) or (g) are met”]. [“This examination comprises either the elements necessary for paragraphs (b) and (d) or of relating to and in conjunction with for paragraphs (g).”] http://docsonline.wto.org/

Article XX (b) have also raised many debates among trade and environment experts. Important decisions had been reached by the Panel and Appellate Body of GATT/WTO in cases brought before them for e.g. US-Gasoline, Thailand Cigarettes, EC-Asbestos and Brazil-Retreated tyres cases have established the concepts and interpretation and application of Article XX (b) which brings about the "necessity test".

4.2.2.1 Necessity test under Article XX (b)

The necessity test is an approach established to determine if a GATT-inconsistent measure may still be justified under the exception given in Article XX (b).This method allows identifying the necessity of the measures which are otherwise inconsistent with GATT 1994 provisions. But two conditions must be met;

1. The policy objective followed by GATT-inconsistent measure must be for the protection of plant, animal, human life or health.
2. The measure must be necessary to accomplish those policies objectives [48].

Some examples concerning the policy objectives followed by the measures recognized as dealing with Article XX (b) i.e. measures fulfilled the first element of "necessity test". Such as to protect dolphin life and health, policies against consumption of cigarettes or to reduce the risk posed by asbestos etc.

The necessity requirement for the measure for which the exception is being appealed has been controversial. Although the WTO members are allowed to determine their own environmental policies objectives[62] and legislation they still need to respect the requirements of the GATT.[63]

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[62]Environmental policies covered by Article XX ["WTO member's autonomy to determine their own environmental objectives has been affirmed on number of occasion (e.g. US-Gasoline, Brazil-Retreated Tyres)]. ["The AB also noted that in US-Shrimp case that conditioning market access on whether exporting member complies with a policy unilaterally prescribed by the importing country was a common aspect of measure falling within the scope of one or other exceptions of Article XX"]. ["In past cases, a number of policies have been found to fall within the realm of these two exceptions, policies aimed at reducing cigarette consumption, protection of Dolphins etc (under Article XX b) and policies aimed at conservation of tuna, salmon, herring, turtle."]
http:// www.wto.org/english/english/tratop_e/envir_e/envt_rules_exceptions_e.htm

[63][In US-Gasoline case the AB stated, "it is of some importance that AB points out what this does not mean. It does not mean that the ability of any WTO member to take measure to control air pollution or protect environment is at issue. That would be to ignore the fact that Article XX of GATT contains provisions designed to permit important state interest like protection of health and conservation of exhaustible natural resources"]. ["The provision of Article XX was not changed by Uruguay round of multilateral trade negotiation. In deed in preamble to the WTO agreement and decision on trade and environment there is acknowledgement to be found about the importance of coordinating the policies on trade and environment. WTO member have autonomy to determine their own policies, objectives and legislation on environment they enact and implement but they need to respect the requirements of the general agreements and other covered agreements."](Note by Secretariat of WTO, identified as WT/CTE/203,8 March 2002)

Thus applicability of necessity test do not take concern of policy objectives as such, nevertheless the necessity of the measure to achieve those objectives [4]. Hence the conditions in Article XX (b) have no question on environmental policies embraced by the members but it must be justifiable with GATT provision.[64] To pass the necessity test a country must show that they have exhausted the alternatives of GATT-consistent or less inconsistent options and that the measure in question involves the least degree of inconsistency with GATT provisions. It suggests that as long as there are reasonable alternative measures, that are not inconsistent with GATT are accessible they are expected to use them, meaning that there does not exist an alternative measure reasonably available being "less trade restrictive". Such that a country cannot adopt a measure and justify its adoption as "necessary"[14]. Thus, a GATT inconsistent measure is considered necessary or indispensable and may be justified only if there are no alternative measures consistent with the GATT or being less trade restrictive and reasonably available.

An example of how the necessity test was being applied is explained by the Tuna-Dolphin Case (1991). A Panel was set to examine the U.S. prohibition on imports of certain tuna and tuna products from Mexico.[65]

Mexico challenged the Marine Mammal Protection Act (1972) (MMPA) to the GATT, arguing that the measures under the MMPA were quantitative restrictions on importation that were forbidden under Article XI of GATT and also violated the National Treatment Obligation under Article III. The U.S. argued that the measures were necessary to protect dolphin life and health and no measure other than trade sanctions was reasonably available to achieve this objective.

After analysis that the MMPA was in violation of Article III and Article XI and the restriction under MMPA was based on the harvesting of tuna rather than the imported tuna as a product itself.[66]The Panel concluded the United States failed to justify the MMPA with Article XX:

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[64]["None of the AB and Panel reports questioned the environment and health policy choices made by governments, In the US-Tuna case the Panel noted it was the measure and not the policy goal that had to meet the requirement under Article XX"]. ["In US-Gasoline case the Panel noted that it was its task to examine the necessity of environmental objectives of clean air act or Gasoline rule. Its examination was confined to those aspects of Gasoline rule that has risen compliant under the specific provisions of the General agreement"].["Under the general agreement members have choice to choose their environmental objectives but they are bound implement these objectives through measures consistent with its provisions notably to those on relative treatment domestic and imported products"](*Ibid*)

[65] *See* United States –Restrictions on Imports of Tuna, Report of the Panel, DS21/R – 39S/155, September 3, 1991 [hereinafter Tuna 1].

[66] See Tuna1 Supra note 65 Para 5.9-15

a) The exceptions under Article XX should not be applied to measures that protect human, animal, and plant life or health or conserve natural resources outside the jurisdiction of the contracting party taking the measure.

b) A limitation on trade based on such unpredictable conditions as linked to the actual taking rate for United States fishermen during a particular period could not be regarded as necessary to protect the health or life of animals under Article XX (b).

c) A limitation on trade based on unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins and could not be considered as "related to the conservation of exhaustible natural resources" under Article XX (g).[67]

Hence, the Panel found no evidence that U.S. had exhausted all options available to it to pursue its dolphin protection objectives, specifically the negotiation of international cooperative arrangements which would have been consistent with the GATT, before resorting to trade measures. This option would seem desirable in the view of the fact that dolphins inhabit the waters of many states and the high sea.[68]Here the term "necessary" was interpreted as no trade measure was available.

Again the MMPA was challenged by European Union in 1994[69] as U.S. imposed ban in intermediary third countries from selling tuna to U.S. Market .The EU confronted that U.S. ban violated Article III and XI of GATT. The U.S. again argued that the ban was necessary to protect dolphins and justified under Article XX (b). While examining the application of Article XX (b) the Panel also considered the term "necessary" whether U.S. actions were required to protect dolphins. Here, the Panel again concluded that ordinary meaning of the term "necessary" meant no alternative existed. This interpretation was done in Article XX (d) by Panel in the US-section 337 of the Tariff Act of 1930 case.[70] The Panel studied the term "necessary" in Article XX (d) and concluded that:

"A contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which could reasonably be expected to employ and which is not inconsistent if other GATT measures is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably

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[67] See Tuna 1, supra note 65, para.5.22-34.

[68]Panel report on Prohibition of Imports of Tuna Fish and Tuna Products from Canada, GATT BISD 29 Supp,91 (1983) at paragraph 5.28

[69]United States – Restrictions on Imports of Tuna, Report of the Panel, DS29/R, June 16, 1994

[70]United states-Section 337 of the Tariff Act of 1930, November 7,1989, GATT BISD (36 Supp) 345, paragraph 5.26 (1990)

available, a contracting party is bound to use, among the measures reasonably available to it, which entails the least degree of inconsistency with other GATT provisions."[71]

Thus to satisfy the requirement of "necessity" in invoking Article XX (b) a country must ensure that the adopted measure establish a reasonable proportionate relationship to public health policy. The GATT Council (1989) had laid down guidelines on the application of Article XX (b);

"*A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer than necessary to protect the human, animal or plant life or health involved, as provided in Art XX(b)*"[49].

This proportionality requirement was also referred to the Tuna-Dolphin case, where the Panel held that the method of calculating the maximum incidental dolphin taking rate was too unpredictable for trade measures to be regarded as necessary to protect the health and life of dolphins. Yet, the "necessary" obligation has shown to be barrier to the justification of reasonable environmental protection measures. This requirement gives WTO the authority to regulate sensitive relative terms like proportionality and less inconsistent alternative, regardless of the need and urgency of a situation[14]. Even if the necessity obligation stresses that a country use the measure that involves the least degree of inconsistency with GATT it has no specific guidelines for determination of the least degree of inconsistency with other GATT provisions [50].

As mentioned above the "least restrictive" interpretation of the necessary requirement in Article XX (b) has been criticised by both environment and trade group. They argued the interpretation of least trade restrictive measure does not parallel with the ordinary meaning of "necessary" in Article XX (b) which stresses on the need for measures to achieve the goal of environmental protection and not on its effect on international trade [8].

4.2.3 Article XX (g) Protection of Exhaustible Natural Resources

The purpose of Article XX (g) is to allow WTO members restriction on international trade if it is necessary to conserve the exhaustible natural resources that falls within any of its requirements. A reliable scheme of applicability of Article XX (g) was developed by the Appellate Body in the US-Gasoline and the Shrimp turtle case. As mentioned above, three conditions[72] need to be satisfied

[71]Report of the Panel on United States - Section 337 of the Tariff Act of 1930, November 7, 1989, GATT BISD (36 Supp) 345, paragraph 5.26 (1990).

[72]"Trade measure must be "primarily aimed at" the conservation of exhaustible natural resources, it must "relate to" conservation of exhaustible natural resources and made effective in "conjunction with the restrictions on domestic production or consumption."(WTO,2004)

to determine if the GATT inconsistent measure falls under Article XX (g) exception with the aim of protecting exhaustible natural resources.

However, only satisfying these conditions are not enough, for the validity of that measure a fourth condition is needed that is measure must comply with the Chapeau of Article XX. Since, a measure could be justified under the exception of Para. (g) of Article XX but it might not meet the obligation of the introductory clause of Article XX [51].

4.2.3.1 "Conservation of Exhaustible Natural Resources"

To satisfy first condition of Article XX (g) a GATT inconsistent measure must contain the conservation of natural resources. Some examples of the cases in which that Panel and AB recognized these measures are conservation of Tuna stocks[73], Salmon and herring stocks, Sea turtle[74] etc. The meaning of the term exhaustible natural resources "involves non-living, living renewable and non-renewable resources. The reason behind including living natural resources despite of their capacity to reproduce is due to the fact that they can become exhaustible". Hence if living natural resources sought to be conserved by GATT inconsistent measure are "exhaustible" that should be justified under Article XX (g). Similarly, the living natural resources do not need to be rare, almost all living and non-living natural resources can be protected under Article XX (g)specifically those related to multilateral treaty [52]. So the term "exhaustible natural resources" mentioned in Article XX(g) must be understood with respect to conservation and protection of environment. The term is not static in its content but rather evolutionary according to its definition.[75]

[73]["In the US-Canadian Tuna case the Panel noted both parties considered Tuna stocks to be exhaustible natural resources in need of conservation management"]. ["In the Salmon and herring case, the Panel agreed with the parties that Salmon and herring stocks are exhaustible natural resources, where as in US-Tuna (EEC) case the parties disagreed as whether dolphins should be considered as exhaustible natural resources, In the latter case the Panel noting that dolphins stocks could be potentially exhausted, and the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resources."] http://docsonline.wto.org/

[74]["In the US-Shrimp case the parties disagreed as to whether sea turtle could be considered exhaustible natural resources within the meaning of Para. (g)"].["The AB noted that contrary to what complainants had argued the text of Article XX (g) was not limited to the conservation of mineral or non-living natural resources which are in principle renewable are in certain circumstances indeed susceptible to depletion , exhaustion and extinction, frequently due to human activities."] www.wto.org/english/tratop_e/envir_e/edis08_e.htm

[75] http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20

4.2.3.2 "Primarily Aimed At"

The second requirement of Article XX (g) is that a trade measure must be "primarily aimed at" and relating to the conservation of exhaustible natural resources. That relies in the relationship between the GATT –inconsistent measures and the policy goal it anticipates to serve. The application of the "relating to" clause was made for the first time in Canada-Salmon and Herring case. Here the panel examined the meaning of "relating to" in the context in which Article XX (g) appears in the GATT along with its purpose.

Article XX (g) does not state, how GATT-inconsistent measure must be related to the conservation of exhaustible natural resources. Thus, it is doubtful that if any relationship with conservation is enough for a trade related GATT-inconsistent measure to meet the requirements of Article XX (g) or if a particular relationship is needed [48]. [76]

Despite of the definitive interpretation of "primarily aimed at" it remains uncertain whether Article XX (g) has the obligation to secure the implementation of the conservation of natural resources. Moreover, including Article XX (g) under GATT has not yet widened its scope for trade policy purpose but it only ensures the commitment under GATT do not impede the policies for natural resource conservation [48]. Bernasconi et al, 2006 mentioned that a measure does not have to be necessary or essential to the conservation of an exhaustible natural resources it has to be "primary aimed at" the conservation of an exhaustible natural resources to be considered as "relating to" conservation within the meaning of Article XX(g)[53].Thus a GATT inconsistent

[76]["The Panel in the Canada-Herring and Salmon case observed that Article XX (g) does not state how the trade measures are to be related to conservation. This raises the question of if any relationship with conservation is sufficient in a trade measure to fall under Article XX (g) or whether a particular relationship is required. The Panel noted some sub paragraphs of Article XX states that the measure must be "necessary" or essential" for the achievement of policy purpose set out in subparagraphs a, b, d, j but subparagraph (g) refers only to the measures "relating to" the conservation of exhaustible natural resources"]. ["This suggests that Article XX (g) does not only cover measure that is necessary or essential for the conservation of exhaustible natural resources but a wider range of measures"]. ["However the preamble of Article XX indicates, the purpose of including Article XX (g) in GATT has not widened the scope for measures serving trade policy purpose but merely to ensure that the requirements under the general agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources"]. "[The Panel concluded for these reasons that while a trade measure did not have to be necessary or essential to the conservation of exhaustible natural resources it had to be primarily aimed at conservation of exhaustible natural resources to be considered, related to conservation within the meaning of Article XX (g) [...] AB in US-Gasoline case. All participants and third parties in this appeal accepted the propriety and applicability of the view of the Panel of Herring and Salmon case, that a measure must be primarily aimed at the conservation of exhaustible natural resources to fall within the scope of Article XX(g)."]
Canada-Measures Affecting Exports of Unprocessed herring and Salmon, GATT BISD 35S 98(1984).

measure must therefore be "primarily aimed at " the conservation of exhaustible natural resources falling within Article XX (g).

The interpretation of "primarily aimed "was gradually accompanied by new basics to determine if a measure was "related to" the conservation of exhaustible natural resources for e.g. In US-Tuna I (Mexico), US-Tuna II (EEC), US-Gasoline and US-Shrimp cases. In the US-Tuna (EEC) II the Panel found that, the U.S. trade measures was not primarily aimed at the conservation, as it was based on "unpredictable conditions" like the incidental taking, rate of U.S. vessels, which was not to any objective standard of dolphin deaths.[77]

A measure which does not endorse the objectives of conservation of exhaustible natural resources cannot be considered as "primarily aimed at". A measure considered to be related to the conservation of natural resources must prove a "substantial relationship" with it as it is insufficient to merely incidentally or inadvertently aimed at the conservation of natural resources. Thus a GATT inconsistent measure can be justified under it [48]. The "substantial relationship" interpretation was further reaffirmed by the AB in the Shrimp-Turtle case. The AB found that the means and end relationship between Section 609 and the U.S. 'policy of conserving the sea turtles was close and real one and that the relationship was as substantial as that between the baseline establishment rules and conservation of clean air in the Reformulated Gasoline case.[78]

An important point to be noted is that even if the meaning of "relating to" is interpreted as "primarily aimed at" it has still created doubts since these terms are not synonymous and that "primarily aimed at" was not in itself treaty language[54]. Moreover, the WTO members find difficult time to figure out that a GATT inconsistent measure is directly linked with the policy of conservation of exhaustible natural resources[51].

4.2.3.3 "In Conjunction with": the requirement of "even-handedness"

The third condition of Article XX (g) is 'if such measures are made effective in conjunction with restrictions on domestic production or consumption'. The interpretation and the ordinary meaning of this clause were not addressed until the Reformulated Gasoline case. Here Panel didn't deal with this issues specifically with respect to the base line establishment rules since it had failed earlier to the pass test of "relating to" but it did make a general finding that a trade measure could only be considered to be made effective "in conjunction with" domestic production restrictions if it was

[77] US- Restriction on Import of Tuna [Tuna-Dolphin II],1994 GATT Doc DS29/R Geneva.

[78] US-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, para.141, October 12. 1998 [herein after Shrimp 1].

primarily aimed at rendering these restrictions.[79]But this finding gave no light on this issue as the term "primarily aimed at" was in itself not a treaty language and need further interpretation. Opposing to the Panel's confusing if not misleading understanding of "in conjunction with" the AB gave a thorough, clear and precise interpretation on this issue. The AB stated "made effective" means that the act or regulation which limits the trade to protect the exhaustible natural resources must be "in force" and that " made effective in conjunction with" restrictions on domestic production or consumption which means, the act must be in force in conjunction with restriction not just in respect to imported products but also to domestic ones [48].

In addition the AB made special emphasis on the understanding the requirement of "even-handedness" first there was no textual basis for requiring identical treatment of the domestic products and imported products and second because of the difficulty in determining causation in both domestic and international law and the substantial period of time that have to elapse before the effect of the measure can be observed. The measure in force government act or regulation must impose restriction on imported or domestic products in such a manner that they are treated in even-handedness.

Thus the third condition of Article XX (g) talks about even-handedness. If this requirement is not met, the measure cannot be accepted as primarily or even substantially for implementing conservation goals. A good example of this clause is the Canadian Tuna dispute, the U.S. compliant against a Canadian ban on the export of unprocessed herring and salmon. The Panel's conclusion was to rely on Article XX (g) exception, a measure had to be primarily aimed at the conservation of natural resources. As Canada's export ban on foreign processors and consumers was not considered to be primarily aimed at conservation since the domestic production and consumption of unprocessed herring and salmon was permitted. Thus Canada's favour of the domestic processor meant it failed the "in conjunction with" test which required that Canada should employ the measure against domestic production and consumption at the same time. Also this restriction did not demand that every kind of tuna should be barred from Canada.[80]

4.2.4 The Chapeau (Introductory Paragraphs) to Article XX

The Chapeau is an introductory clause for the exceptions described under Article XX. It states that trade measure must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. The Chapeau examines the manner in which the measure is applied but not the measure itself. The

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[79] United States-Standards for Reformulated and Conventional Gasoline, Report of the Panel, WT/DS2/R, para.6.39, January 29, 1996.
[80] Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, GATT BISD, 35 Supp 98 (1984).

major objective of the Chapeau of Article XX is to avoid the misuse of the exception listed under it.[81] The nature and the quality of the "discrimination" at the issue in the Chapeau of Article XX is different from the discrimination avoided by Article I,III or XI (substantive obligation) of GATT. These conclusion were made by the AB in US-gasoline case and reaffirmed in Shrimp-turtle case and Brazil-retreated tyres case[48].The conditions in the Chapeau do not mention the same standards of substantive obligations to conclude if a measure is valid under the GATT. There are three basic requirements mentioned by the AB in US-Shrimp turtle case that must be satisfied under Article XX if the measures are adopted by a member with environmental purpose:

I. To identify if a measure results in an arbitrary discrimination between countries and
II. To determine if the measure is a means of unjustifiable discrimination where same condition prevail or
III. To examine whether the measure is disguised restriction on international trade.

So, the interpretation and application of the Chapeau must be made by taking into account the right of the a WTO member to appeal an exception under Article XX and the responsibility of the same member to respect the right of the other member as well [48]. The usual meaning of discrimination involves treating similar situations differently whereas the Chapeau prohibits it. To identify if the application of a measure result in an arbitrary or unjustifiable discrimination between countries where same conditions prevail, it is necessary to meet the three conditions mentioned above[51].

The Chapeau of the Article XX does not in itself prohibit discrimination but rather "arbitrary" and "unjustified" discrimination therefore a measure may discriminate but not in arbitrary or unjustified manner. For example, in the US-Shrimp turtle case the Panel and the AB examined thoroughly the conditions for a measure to represent a means of arbitrary or unjustified discrimination between the countries with same situation. The Panel first observed that U.S. measure at issue discriminated between those countries that had been certified to export the shrimp to U.S. and those non-certified countries which were subject to an import ban. Later, the AB decided that U.S. measure served a justifiable environmental objective under Article XX (g) but that its discriminatory application caused an arbitrary and unjustifiable discrimination. Hence it was incompatible with the requirement of the Chapeau of Article XX.[82]

An important point to consider here is if the application of the measure results in arbitrary or unjustifiable discrimination on international trade. All criteria to determine, the existence of

[81] http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm.
[82] http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm.

arbitrary or unjustifiable discrimination may be taken into account e.g. negotiation effort, flexibility criteria etc. Similarly, the analysis of the structure of the challenged measure may reveal that a measure previously justified under Article XX is actually disguised restriction. Since a measure previously justified under Article XX might still constitute disguised restriction in international trade, if it's the design, architecture and structure shows that it does not pursue the legitimate policy objective but result in protectionist objective.[83] Overall if an environmental measures results in protectionism, it can be a disguised restriction in international trade but cannot be justified under the Chapeau of Article XX.[84]

Correspondingly, to determine if the application of a measure is "arbitrary" two aspects are relevant to the meaning of Chapeau "rigidity" and flexibility and the imposed measure does not take concern of the appropriateness for the conditions prevailing in the exporting countries. For example, in the US-Shrimp turtle case, the measures imposed were arbitrary due to their informality, lack of transparency and absence of procedural protection like the absence of appeal or review rights. Also the U.S. failed to show that the measures were not arbitrary or unjustified discrimination between countries where same conditions prevail. First the U.S. rules forced the importing countries to adopt the U.S. policy without flexibility of the approach rather than authorising comparable measures[55].

As the discrimination not only occurs when same conditions prevail being differently treated but also when the measure is applied in a rigid manner without taking concern of different conditions between trading partners. Hence discrimination between the countries with similar conditions

[83]["(...) the AB in the US-Shrimp and by the Panel of EC-Asbestos case]. ["In EC-Asbestos, after finding that the measure at issue met the publicity criterion, the Panel examined as an additional requirement the design, architecture and revealing structure of the measure as it had already been introduced in Japan alcoholic beverages case in order to discern the protective application of measure. However as the AB acknowledged in Japan alcoholic Beverages the aim of a measure may not be easily ascertained. Nevertheless it can be noticed that in same case the AB suggested that the protective application of a measure can most often be discerned form its design, architecture and relevant structure .The Panel then concluded that as far as the design, architecture and relevant structure of the decree are concerned, we find nothing that might lead us to conclude that the decree has protectionist objective"]. ["In US-Shrimp case (Article 21.5) the Panel demonstrated that the measure at issue did not constitute a disguised restriction on international trade by examining the design, architecture and revealing structure."] (Note by Secretariat of WTO, WT/CTE/203, 8 March 2002.

[84] ["An environmental measure may not constitute a "disguised restriction on international trade", i.e. may not result in protectionism"]. ["In past cases, it was found that the protective application of a measure could most often be discerned from its "design, architecture and revealing structure". For instance, in US — Shrimp (Article 21.5), the fact that the revised measure allowed exporting countries to apply programmes not based on the mandatory use of TEDs, and offered technical assistance to develop the use of TEDs in third countries, showed that the measure was not applied so as to constitute a disguised restriction on international trade."]
http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm

not only include between exporting but also between importing and exporting countries where same conditions prevail [48, 51]. Thus a member must take into account of different conditions that may occur in the territory of the other member [12].[85] Consequently to avoid discrimination a member must also use negotiation strategies before imposing any environmental measures which might affect the international trade. However, if the country does not enter into negotiation with affected members it would also provide grounds for discriminatory behaviour [48].[86]Even if all these measures have been taken an unjustifiable discrimination under the Chapeau of Article XX could still occur if a member does not make a serious effort in good faith to negotiate a multilateral solution before resorting to unilateral measures. Although a measure has an obligation to negotiate in good faith at international agreement but it is not obligatory to reach an agreement [12].Under the Chapeau of Article XX unilateral measure is considered illegal as interpreted by the Panel in Shrimp-Turtle case.[87]But the AB declared that a unilateral action can be justified under the Chapeau when multilateral approach fails to produce desirable results although GATT/WTO gives preference to multilateral solutions[88] than unilateral measures. For this reason intergovernmental cooperation is important for multilateral agreements via the process of negotiation, which reduces the risk of protectionism.

[85]"In the Shrimp-turtle case, AB concluded that US measure were an unjustifiable discrimination because they imposed on an exporting WTO country member the adoption of identical regulatory regulation to those of U.S. that establish a "rigid" stand. Thus U.S. measure failed to take into account "different conditions" that may occur in the territory of the other state member of WTO."(Louka, 2006)

[86]["In the Shrimp-turtle case, The AB report Para 169: Clearly U.S. negotiated seriously with some but not with other members (including the appellees) that export of shrimp to U.S. The effect is plainly discriminatory and unjustifiable. The unjustifiable nature of this discrimination emerges clearly when considering the cumulative effect of the failure of the U.S. to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved"].[" Also in the US—Shrimp case, the fact that the United States had "treated WTO members differently" by adopting a cooperative approach regarding the protection of sea turtles with some members but not with others also showed that the measure was applied in a manner that discriminated among WTO members in an unjustifiable manner"]. ["At the compliance stage, in US—Shrimp (Article 21.5), the AB found that, in view of serious, good faith efforts made by the United States to negotiate an international agreement on the protection of sea turtles, including with the complainant, the measure was now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination."]
http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm

[87]["The Panel in the US-Shrimp turtle I ruled (unilateral trade embargo) which undermines the WTO multilateral trading system must be regarded as not within the scope of measures permitted under the Chapeau of Article XX, a formulation similar to that used on tuna Panel"]. ["It noted the interpretation of the Chapeau should not be governed by the narrow goal of maintaining multilateral trading system, emphasizing the importance of the idea of sustainable development in that context."](Richardson and Woods, 2006)

[88]"The AB (US-Shrimp turtle case) acknowledges that as far as possible a multilateral approach is strongly preferred over a unilateral approach. But it added that although the concentration of multilateral agreement was preferable it was not a prerequisite to benefit from the justification in Article XX to enforce environmental measures."
http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm

4.2.4.1 Extra-Territoriality Scope of Article XX (b) and (g)

Article XX of the GATT (1994) does not explicitly address the subjects of jurisdiction or extraterritoriality. But question arises if there is an implied jurisdictional limitation that prohibits a WTO member form invoking the general exceptions outside its territorial jurisdiction. For example should the protection of human, animal or plant life or health under Article XX (b) or the policies relating to the protection of exhaustible natural resources under Article XX (g) be limited within the territory of the country invoking Article XX [53]. These questions first appeared in both Tuna-dolphin cases, but the doubt still remains due to the plain language of Article XX and also due to unclear theories about the jurisdiction in international law.

The Tuna-Dolphin I (1991) case first time involved the discussion on the validation of unilateral measures taken by a member to protect resources outside its authority. It was decided by the old GATT Panel (GATT 1947) [51]. The main point of Tuna –Dolphin I case was the U.S. prohibition on the importation of yellow tuna fish caught by fishing technique which incidentally killed dolphins based on the grounds of U.S. Marine Mammalian Protection Act (MMPA). Similarly the Tuna-Dolphin (EEC) II case involved the restriction of the tuna products from the countries which processed tuna caught by the offending countries. In both cases, the GATT Panel analysed if the embargo could be justified under Article XX (b) and (g).

The ban imposed by the U.S. failed the necessary test of Article XX (b) as there were other alternative measures that U.S. could use to pursue their environmental protection objectives before using unilateral measures to force the exporting countries to change their environmental policies. The Panels concluded that according to Article XX (g) the unilateral measures forcing other countries to change conservation policies was not "related to" or "in conjunction with" with the standard of this article. Hence, the GATT Panels rejected the ban to the importation of tuna as it was not allowed to prohibit the importation of products justifying the process used by exporting country was not compatible with that preferred by the exporting country[51].

The Panel of Tuna-Dolphin I decided that any measures taken to control the production and consumption of exhaustible natural resources can be effective to the extent that the production or consumption is under its territorial jurisdiction.[89] This decision created much protest by environmentalist since it narrowed the scope of environmental policies and undermined the principles of environmental law. The Tuna-Dolphin II Panel decided that government could enforce an Article XX (g) prohibition but only against their own nationals and vessels.[90]This

[89] Tuna-Dolphin I GATT Panel Report GATT Doc. DS21/R: GATT, 30 ILM 1594 (1991).

[90] Tuna-Dolphin II, GATT Doc DS 29/R, Geneva: GATT 1994; 33 ILM 839, paragraph 5-29 (1994).

decision was also challenged by the environmentalist as the Panel did not think about the differences between areas of national jurisdiction and areas in global commons [55].

In contrast, the US-Shrimp Turtle case gave the extra-territorial scope to the Article XX (g) since approach made by the AB was completely different[91] than the earlier interpretation of GATT Panels. The AB refused to address the question whether or not there is an implied jurisdictional limitation in Article XX. But the U.S. measures were proved to be unjustifiable and arbitrary discrimination under the Chapeau of Article XX hence the measure was not kept under Article XX. Thus due to this decision of AB , a country can endorse a measure to protect migratory species in its territory independently of extra territorial jurisdiction but doubts still remain [53].Although it is still not allow under GATT/WTO jurisprudence to ratify the domestic environmental laws of a WTO member that may have impacts outside its jurisdictional limits unless the aim of that measure is legitimate and must be justified under Article XX (b) and (g).

Therefore, the drafters of the GATT were anxious about the far-reaching implication of the unilateral trade measures. Because if each country is allowed to determine unilaterally its environmental conditions beyond its jurisdiction would result in interference with the sovereignty of nations states and cause chaos and retaliation[14]. From the perspective of a developing country, the extra-jurisdictional trade measure would give developed countries the economic leverage to enforce their national socioeconomic policies upon the developing countries by forcing them to change their policies which will affect the international trade to a power-based system. Hence the GATT rules have restricted member powers to combat of trans-boundary environmental problems in areas which lie out of legal jurisdiction of any particular country. Besides, there is an absence of an international institution that mandates sounds environmental policies, the limitation of the extra-territorial scope of Article XX has left countries without essential mechanisms to tackle global environmental problems.

4.2.5 The connection between the MEAs and WTO Regime

Multilateral environmental agreements (MEAs) are voluntary commitments of sovereign states intended to address the effects and consequences of global and regional environmental problems. It has been recognized by both trade specialist and environmentalist that multilateral solutions to trans-boundary environmental problems are preferable to unilateral solutions. Since

[91] "In the US-Shrimp turtle case the AB accepted as a policy covered by the Article XX (g) one that applied not only to turtles within U.S. water but also to those living beyond its national boundaries. The AB found sufficient nexus between the migratory and endangered marine population involved and the U.S. for the purpose of Article XX (g)."
http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm

options of unilateral measures can cause arbitrary discrimination and disguised protectionism, which could impair the multilateral trading systems [47].

Environmental measures which address trans-border or global environmental problems should be based on international consensus. United Nations Conference on Environment and Development (UNCED) has strongly ratified the negotiation of MEAs for addressing global environmental problems. Agenda 21 of the Rio Conference states that measures should be taken to "avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country [47].[92]

MEAs helps to address measures to regulate trade among parties and non- parties of the product that is considered major contributor to the environmental degradation. It prohibits or limits the trade in target product or substance, establish a regulatory framework through which to regulate trade in target product or substance of the MEAs and limits markets of goods that contribute to environmental problems [22]. The major concern here is the effect of trade provisions in MEAs on those states that are member of the GATT/WTO but are not parties of the MEAs. As the non-parties to the MEAs may act as "free riders " poses different problems for the parties to the agreement and derive environmental benefits of MEAs without paying off any costs. The relationship between MEAs and WTO rules is addressed in Marrakesh Declaration in the items 1 and 5 and in Doha Declaration paragraph 31 (I) and (II), see law text box 5. The main trade measures embodied in the MEAs are trade ban, export/import licenses, notifications requirements and packaging as well as labelling requirements etc. [47].

Law text box 5. Marrakesh Declaration on Trade and Environment and Doha Declaration

Marrakesh Declaration on Trade and Environment (14 April 1994)

Item 1: The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements(MEAs).

Item 5: The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs.

Doha Declaration (14November 2001 - Paragraph 31)

i. The relationship between existing WTO rules and specific trade obligations set out in MEAs. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.
ii. Procedures for regular information exchange between MEA Secretariat and the relevant WTO committees and the criteria for the granting of observer status.

[92] United Nations, Agenda 21: "The United Nations Programme of Action" from Rio. Chapter 2.

The WTO has permitted MEAs to solve the conflict on extra-territorial measures for e.g. In the Shrimp-Turtle case, decision by the AB clearly upholds the right of WTO members to legislate for the protection of the natural resources beyond national boundaries provided that they do so pursuant to MEAs [51]. They endorsed MEAs as it is considered the most effective way for governments to implement environmental policies with consequences beyond its territories or when global issues are concerned. Therefore MEAs focus is to avoid disputes rather than dispute settlement by using methods like reporting, monitoring, on site visits and transparency. It also uses incentive like financial assistance, training programs and access to technology to encourage compliance. If a dispute arises it relies on co-operative and facilitative methods than coercive methods to motivate compliance[56]. Disputes are limits to disagreement on the interpretation and application of the MEAs and reflect technical and economical incapacity to fulfil MEAs.

Hence majority of MEAs do not impose a binding adjudication process on the parties while WTO regime refers to a compulsory dispute settlement and provides exclusive jurisdiction for the WTO adjudicating bodies and only government of WTO members are allowed to initiate dispute settlement proceedings [51].

4.2.6 The Possible Conflict between MEAs and the GATT/WTO Regime

To date the actions of a GATT/WTO members acting in compliance with the trade measures of the MEAs have never been challenged by other members. Hence a GATT/WTO dispute settlement Panel has never ruled for the consistency of the trade provisions of the MEAs with the obligations of the GATT/WTO systems but in a few occasions the member states have attempted to invoke[93] international obligations to justify GATT inconsistent trade measures with little success for e.g. Canada measures affecting exports of Unprocessed Herring and Salmon.[94] Thus, the potential for conflict has been realised by the members of WTO and independent observers [47].

A possible conflict between trade restrictions in MEAs and WTO rules could be the violations by the MEAs of the Most favoured National principle, the National treatment principle (Article I and III of GATT) the two non-discriminatory principles and the Prohibition on quantitative restriction (Article XI) pursing prohibitions of quotas, restrictions and licensing schemes on imported/ exported products [47].

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[93]["The Chile – Swordfish case, which was suspended before the composition of the Panel, has illustrated the risk of conflicting judgments"].[" In this case, it is likely that both adjudicating bodies would have examined whether Chile's measures were in compliance with the United Nations Convention on the Law of the Sea (UNCLOS).The WTO dispute settlement system and the International Tribunal for the Law of the Sea (ITLOS) could have reached different conclusions on factual aspects or on the interpretation of the provisions of the Convention."] (WTO, 2004).

[94] GATT Doc. L/6268, GATT BISD (35S/ 98 (adopted 22 March1988).

However, trade restriction in MEAs can take into consideration PPM and extra-territorial application to enforce trade restriction and be subjected to challenge by the non-parties to MEAs and could be held invalid under WTO regime. Additionally, a WTO member can invoke a MEA to justify trade restriction with environmental goals under Article XX (b) or (g) of GATT 1994. But there are various opinions by experts, independent observers on the probable conflicts between MEAs and WTO rights and obligations. The major concern is what kind of role MEAs should have for the interpretation of WTO rules in specific cases but generally WTO rules and MEAs should be interpreted in a complementary manner. For instance, MEAs could provide evidence of a wide range of international consensus on a fact relevant to a dispute, such as if a species is endangered and requires protection under Article XX (g)[95] here a MEA could provide definition of terms limited but undefined in the GATT Agreement or other WTO treaties[96] or assist the Panel interpreting requirements described in some treaty at issues[57].

Thus, the WTO has suggested a solution to conflict between WTO law and MEAs requirements being that WTO members and parties of MEA should resolve the issues through negotiations by themselves.

4.2.7 Scope and development of Article XX

The above review of Article XX depicts that although it was shaped to cover environmental exceptions, its scope has been narrowed by the addition of different conditions and distorting interpretations. The narrow interpretations of the basic meaning of the exceptions may eventually make them big hurdles to environment protection. The cases which have been required to interpret the Article XX (b) and Article XX (g) exceptions have shown that very few trade restrictions which violate GATT will be defended on the grounds that they were set in place to protect the environment [45]. Nevertheless, these exceptions do not refer the word environment in general hence there is still disagreement on whether the legislators wanted to apply these exceptions to a broad or narrow field of environmental issues. But now it has been acknowledged by the legislator that they should take account of environmental protection as well within the framework of Article XX because they are aware of existing international conventions relating to environmental protection.

So far they did not make an explicit exception in favour of environment as they assumed that paragraph b and g would suffice to achieve their goal[58]. From the developing countries point of view there are three characteristics of Article XX which could impact export to other countries.

[95] "The CITES played such a role in the Shrimp/Turtle case." (Trebilcock and Howse,2005)
[96] "Exhaustible resources Article XX(g) in the Shrimp-Turtle case."(*Ibid,* 2005)

a) The Chapeau is ambiguous as it includes both MFN clause and the national treatment clause so it is not easy to translate its exact meaning.

b) Measures taken in accordance with Article XX need not be accompanied by notices.

c) The paragraphs under the Chapeau are too general that leaves the judicial organs with too much liberty to interpret this article.

Therefore, main problem with paragraphs b and g of Article XX is the possibility that measures taken to protect the environment could be perceived as protectionist with respect to the domestic market. It is difficult to identify whether a measure constitutes a disguised restriction on international trade, because it is often the application of a measure that leads to protectionism [2].

In contrast, with the growth and development of international environmental law and a worldwide concern of environment, the attitude of the GATT/WTO is evolving. The language of Article XX is now been read in the light of the contemporary concerns of the community of nations about the protection and conservation of the environment, a good example of this development has been the "Shrimp-Turtle" case.

Thus, from the Tuna-Dolphin to Shrimp-Turtle case it is not hard to find that the DSB, recalling the clear recognition by the WTO Members of the objectives of sustainable development, is making efforts towards a more flexible interpretation of Article XX and more environment friendly attitude of the whole multilateral trade regime of WTO. Hence a unilateral trade-related environmental measure is no longer unacceptable under WTO. By now the jurisdictional justification of the measure is not much of a question. Currently the most important focus under the Article XX has shifted form whether the measure itself falls within the provision of Article XX (b) or (g) to whether the implementation of the measure can be justified by the Chapeau. Overall, it seems that WTO has moved significantly towards a great goal and offered chances for the trade related environmental issues to be justified under Article XX, which has opened a new era in the trade-environment debate.

4.3 Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Measures

After the Uruguay round a number of side agreements were created. The agreement on the Technical barriers to Trade (TBT) and the application of Sanitary and Phytosanitary (SPS) measures, are two side agreements that have direct environmental implication. These agreements regulate the application of technical regulations and standards including measures

taken for the health reasons and they are mutually exclusive. The SPS Agreement is very similar to the TBT Agreement, but covers a narrower range of measures, (law text box 6)while the TBT applies to all other product standards.

Law Text box 6. SPS Agreement Annex A (1) Definitions

> **Sanitary or Phytosanitary** - Any measures applied(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Both agreements promote the use of harmonized international standard among members while allows a certain degree of freedom to set their own standards. For e.g. Environmental measures related to the characteristics of product itself including regulation of pesticide residues in food, taxes on lead content of fuel, standard for sanitary conditions in slaughter houses etc. For this study we focus basically on the TBT agreement and disputes related to it in GATT/WTO in the next sections.

4.3.1 Technical Barriers to Trade (TBT) and Related Disputes

The TBT agreement was negotiated in the Uruguay round, replacing the Standards Code.[97] It was intended to reduce the scope for countries to use technical standards as disguised barriers to trade. It obliges members to confirm that national treatment and non-discrimination principle apply when technical standards are adopted as mandatory regulations, law text box 7.

Law text box 7. TBT Agreement Article 2.1 on Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

> TBT Agreement
>
> With respect to their central governmental bodies:
>
> **Article 2.1**
>
> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

These technical standards with restrictive trade effects are allowed for four legitimate purposes; standards developed for the protection of environment, for national security requirements, for the prevention of deceptive practices and for the protection of human health and safety, animal and plant health and life provided that effect is not more trade restrictive than necessary [22]. In evaluating the risk, the agreement specifies in Article 2.2 the relevant elements of consideration, see law text box 8.

Law text box 8. TBT Agreement 2.2 on Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

> TBT Agreement
>
> **Article 2.2**
>
> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information related processing technology or intended end-uses of products.

The members are needed to base their standards developed by international bodies which are presumed to be incompliance with the agreement (law text box 9)while in other cases where measures have a significant impact on trade they are obliged to notify the measure and provide opportunities to other members to comment.

Law text box 9. TBT Agreement 2.4 on Preparation, Adoption and Application of Technical Regulations by

> TBT Agreement
>
> **Article 2.4**
>
> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Similarly, the preamble, of this agreement recognizes the right of countries to adopt such measures at the level which they consider appropriate. Members can apply higher product

standards as long as they are necessary to fulfil a justified purpose, such as the protection of environment and are not applied in a manner which constitute unjustifiable discrimination or disguised restriction on international trade. Hence, the requirement for an exception here is less strict than SPS measures as members can have their own standards without the international standard as a basis as long as the international standard are ineffective or unsuitable for the execution of the legitimate objectives.

Law text box 10. Preamble of TBT Agreement

Preamble of TBT Agreement

..no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.

Thus, TBT agreement calls for non-discrimination in the preparation, adoption and application of product specifications and conformity assessment procedures. It also encourages members to harmonize these specifications and procedures with international standards. The transparency of specifications and assessment procedures, through their notification to the WTO Secretariat and the establishment of national enquiry points is it's central feature[47].

The most important cases concerning the TBT agreement filed to DSB e.g. EC-Sardines[98] and US-Tuna II (Mexico).[99] The EC–Sardine case mainly concerned a measure of European communities prohibiting other species of Sardines rather than the one called *"Sardina pilchardus walbaumn"* marketed in EC as preserved Sardines. The most important conclusion drawn in the report of AB in this case is about the burden of proof under TBT Article 2.4. The AB referring to conclusion in the EC-hormones case concluded that the complaining party (Peru) bears the burden of proof. This means the member who complains about a given technical regulation or standard of another member not justified under Article 2.4 should provide evidence that relevant international standards is "effective" and "appropriate" to fulfil the legitimate objective of the claimed members. Here the AB, ruled in favour of Peru as it found that a standard set by the Codex

[98]European Communities–Trade Description of Sardines, the report of the AB, WT/DS231/AB/R [hereinafter EC-Sardines]

[99] United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R [Herein after US-Tuna II Mexico]

Alimentarius Commission for Sardines products constituted a "relevant international standard" under the TBT Agreement. The Codex standard set forth specific labelling provisions for canned sardines prepared from fish from a list of 21 species, including *Sardina pilchardus* and *Sardinops sagax*. It was found that this standard had not been used as a basis for the EC Regulation and that the standard was not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the EC Regulation. Therefore, the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement. For the term "legitimate objectives" the AB reaffirmed the Panel's conclusion that it must cover all the objectives explicitly mentioned in Article 2.3 (See law text box 11) and recommended EC to bring its regulation, into conformity with EC's obligation under that agreement.

Law text box 11. Article 2 (3) TBT on Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

Article 2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

The most recent dispute under TBT agreement which has attracted the attention of both environmental and trade specialist is the US-Tuna II case, this became the product versus process issue. Mexico challenged in 2008 that a series of U.S. statutory and regulatory provisions[100] that established the conditions for the use of the "dolphin safe" label on canned tuna sold in the U.S. The U.S. law conditioned the availability of the "dolphin safe" label on a variety of factors, particularly the type of fishing technique used, and the area in which the tuna was harvested are inconsistent, inter alia, with Articles I:1 and II:4 of the GATT 1994 and Article 2.1, 2.2 and 2.4 of the TBT agreement.[101] The U.S. law also targeted the Eastern Tropical Pacific (ETP), where the "tuna-dolphin association" occurred more frequently than in other areas of the ocean. Here by

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[100][US-Tuna II (Mexico) "This dispute concerns following measures; (i) the *United States Code*, Title 16, Section 1385 ("Dolphin Protection Consumer Information Act"), (ii) the *Code of Federal Regulations*, Title 50, Section 216.91 ("Dolphin-safe labelling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels") and (iii) the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007)"]. ["The measure at issue does not make the use of a "dolphin-safe" label obligatory for the importation or sale of tuna products in the U.S."].["The conditions established in the measure at issue vary depending on the area where the tuna contained in the tuna product is caught and the type of vessel and fishing method by which it is harvested. In particular, tuna products made from tuna caught by "setting on" dolphins (that is, chasing and encircling dolphins with a net in order to catch the tuna associating with them) are not eligible for a "dolphin-safe" label in the U.S."]

[101] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#bkmk381abr

Mexico claimed that the measures were discriminatory and unnecessary and started consultation with U.S. in this matter.

After analysis Panel reports that US-dolphin safe labelling provision constituted a technical regulation under TBT agreement and the measures are mandatory within the meaning of Annex 1.1 of TBT. But the Panel rejected Mexico's claims by finding that U.S. dolphin safe labelling provisions do not discriminate against Mexican tuna products hence not inconsistent with Article 2.1 of the TBT agreement, the Panel claimed that Mexican Tuna products are not afforded less favourable treatment than tuna of U.S. or other origins in respect to the U.S. dolphin safe labelling provisions. The Panel concluded on the Mexico's claim under Article 2.2 of TBT, that

i) The US dolphin-safe labelling provisions only partly address the legitimate objectives pursued by the U.S. and
ii) The Mexico had provided the Panel with a less trade restrictive alternative capable of achieving the same level of protection of the objective pursued by the US dolphin-safe labelling provisions.

Further, for the Mexico's claim under Article 2.4 of TBT agreement, Panel concluded that the U.S. dolphin-safe labelling provisions are not in violation of such provision, which requires technical regulations to be based on relevant international standards where possible. Although, finding that the standard mentioned by Mexico is relevant international standard for the U.S. purpose of dolphin safe provision, U.S. has not used it as a basis for its measures. Thus Panel stated it would not be appropriate to achieve the U.S. objectives. Lastly Panel also used the judicial economy with respect to Mexico's claims for non-discrimination under Article 1: 1 and II: 4 of GATT 1994.

However, before the adoption of the Panel report both U.S. and Mexico appeal to DSB for certain issues of law and legal interpretations developed by the Panel in its report. The AB circulated its report with its key findings on 16th May 2012. Following key findings were made by the AB in its report.[102]

1. The first question of concerning the "technical regulation" the AB found that the Panel did not erred in characterising the measures at issue as a "technical regulation" within the meaning of Annex 1.1 of the TBT agreement. The AB added that the measure sets out a single and legally mandated definition of a "dolphin-safe" tuna product and disallows the use of other labels on tuna products that use the terms "dolphin-safe" that do not satisfy this definition.

[102] US Tuna-II (Mexico) WT/DS381/AB/R.
http://www.wto.org/english/tratop_e/dispu_e/381abr_conc_e.pdf

Law text box 12. TBT Agreement, Annex 1.1 Terms and Definition

> **TBT Agreement, Annex 1.1,**
>
> **Technical Regulation**
>
> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

2. For the Mexico's claim under Article 2.1 of TBT, the AB finds that Panel err in its interpretation and application of the phrase "treatment no less favourable" and reverses the Panel's finding that the U.S. "dolphin safe" labelling provisions are not consistent with Article 2.1 of TBT Agreement and found instead that the labelling provisions are inconsistent with Article 2.1 of TBT.[103]

3. The AB found that "the lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market."

   The U.S law focused on one area of the oceans, the (ETP) while Tuna harvested outside the ETP were eligible for the "dolphin safe" label, even if dolphins had in fact been killed or injured in those areas. Mexico had argued that the U.S. applied "relaxed compliance standards" outside the ETP, and the AB agreed. In the view of the AB, the U.S. measure was not "calibrated" to "the risks to dolphins arising from different fishing methods in

[103]["The AB reasoned, first that, by excluding most Mexican tuna products from access to the "dolphin-safe" label while granting access to most U.S. tuna products and tuna products from other countries, the measure modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna products"].[Next, "the AB scrutinized whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the detrimental impact from the measure stems exclusively from a legitimate regulatory distinction. In particular, the AB examined whether the different conditions for access to a "dolphin-safe" label are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean, as the U.S. had claimed']. ["The AB noted the Panel's finding that the fishing technique of setting on dolphins is particularly harmful to dolphins and that this fishing method has the capacity of resulting in observed and unobserved adverse effects on dolphins. At the same time, the Panel was not persuaded that the risks to dolphins from other fishing techniques are insignificant and do not under some circumstances rise to the same level as the risks from setting on dolphins"]. [The AB further noted the Panel's finding that, "while the U.S. measure fully addresses the adverse effects on dolphins resulting (including observed and unobserved effects) from setting on dolphins in the ETP, it does not address mortality arising from fishing methods other than setting on dolphins in other areas of the ocean. In these circumstances, the AB found that the measure at issue is not even-handed in the manner in which it addresses the risks to dolphins arising from different fishing techniques in different areas of the ocean."] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#bkmk381abr

different areas of the ocean" hence the detrimental impact of the U.S. law on Mexican tuna did not stem "exclusively from a legitimate regulatory distinction."

4. Concerning the Mexico's claim under Article 2.2 of TBT the AB found that the Panel erred in concluding Mexico's had demonstrated the U.S. dolphin safe labelling provision are more trade restrictive than necessary to fulfil the U.S. legitimate objectives, taking account of the risks non-fulfilment would create. Hence reversed the Panels finding that the measure at issue is inconsistent with Article 2.2 of the TBT agreement. The AB reasoned that the Panel had conducted a flawed analysis and comparison between the challenged measure and alternative measure (label provided by AIDCP) proposed by Mexico, noted that the later would not make alike contribution to U.S. objectives.
5. AB also rejected Mexico's claim that the Panel erred in finding that U.S. objective of the protection of dolphins, by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins, is a legitimate objective within the meaning of Article 2.2 of the TBT agreement.
6. Additionally, it rejects Mexico's request to find the measure at issue inconsistent with Article 2.2 of TBT agreement based on the Panel's finding that the measure did not entirely fulfil its objectives.
7. The AB reversed the Panel's intermediate finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. Thus, the AB concluded that the Panel erred in finding that the AIDCP, to which new parties can accede only by invitation, is "open to the relevant body of every country and is therefore an international standardizing organization" for purposes of Article 2.4 of the TBT Agreement.

Lastly, the AB found the Panel acted inconsistently with the Article 11 of the DSU in deciding to exercise judicial economy with respect to Mexico's claims under Article I:1 and Article III:4 of GATT 1994.The AB recommended that the DSB request the U.S to bring its measures found in the Panel report as modified by this report, to be inconsistent within TBT agreement into conformity with its obligations under that agreement.

In conclusion it could be said that, the AB has provided a clear indication of its interpretive approach to key provisions of the TBT Agreement. The AB's approach is sound and has a strong textual basis, given the parallel wording of the national treatment provisions of the GATT and the

TBT Agreement. Importantly, the AB has adopted a competition-based approach to determining whether a technical regulation provides "less favourable treatment" to imported like products. Additionally the AB affirmed the approach it adopted in assessing a claim of less favourable treatment for imports under TBT Article 2.1, the Panel should "seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country.

CHAPTER FIVE

5. Concerns and Challenges of Developing countries in Trade-Environment Nexus

It is now a well-established fact that linkage between trade issues and environment concerns are deep and complex. Most literature now argues that developing countries have the legitimate and significant apprehensions about the global debate on trade and environment [59, 60]. Particularly, the developing countries fear that imposition of environmental concerns on international trade will

a. Distract them from their more pressing concerns
b. Open the way for green protectionism which is detrimental to their products and services [61] .

Moreover, the major concerns for the developing countries related to trade and environmental issues is that whether the trade related measures might be adopted for the enforcement of environmental standards? These standards are mostly based on pollution and similar process standards and production methods standards of developed countries. Besides, the use of trade related environmental measures to accomplish the environmental objectives could be discriminatory. They argue that the environmental standards of developed countries cannot be imposed upon them without bearing in mind of their socio-economic condition and their level of development. Alongside, they are concerned about imposition of higher environmental standards by developed countries, depriving them of their comparative advantage and subjecting them to trade barriers if they are not able to meet those higher standards [62].

Whatever was the case in the past it has now been increasingly important for the developing countries that they cannot afford to delink trade discussion from environment indefinitely. As the number of environment related dispute has been increasing day by day before the WTO, which shows this linkage is becoming more pronounced, not less. Similarly, analysing the current political trend in Europe and North America reflects a reality that will prove inescapable and it is hard to imagine any future trade agreement which does not seriously address environmental concerns[63]. A good example for this trend is the events that took place in "Third Ministerial Meeting of the World Trade Organization" in Seattle, suggested that the issue have to be dealt with sooner than later. Thus for developing nations now the relevant question is how environmental concerns influence the trade rules.

Additionally, the developing countries not only has worries about linking trade and environment but it also has some major constrains in the effective participation in the WTO dispute settlement system as previously mentioned in chapter 2. Now the following sections will give brief overviews of the concerns and challenges faced by developing countries.

5.1 Concerns for Imposition of Unilateral Measures

An opinion of dissent from developing countries is often focussed on the developed nations attempt to impose their domestic environmental policies via its economic strength through trade sanctions in a form of Eco-imperialism [8]. If unilateral actions are not regulated properly it would essentially shift the multilateral trading system to a power based system rather than rule based. The two most important cases relating this issues which in particular heated debates in the international arena are the initiatives to protect the Dolphins and Sea-Turtles. Among the other discriminatory measures applied by the developed nations on environmental grounds these were perhaps the initiatives that stemmed from least protectionist motives.

The U.S. embargo on Mexican tuna was imposed in compliance with the decision of a Federal Court. Earth Island, an environmental NGO with strong conservation ethic, had filed and won a suit claiming that the US Marine Mammal Protection Act required embargo.[104] The U.S. ban on shrimp caught in countries that did not used the Turtle excluder devices (TED) on the fishing vessels, was the result of another legal decision. An alliance of environmental NGOs filed and won a suit to compel U.S. government to require that nations establish policies related to the use of TED.[105]

Even though U.S. can escape of the charges of using green protectionism but it also shows evidence of moral imperialism to impose domestic values on foreign countries. U.S. does not want to lose its sovereignty over its social policy but on the other hand to retain its sovereignty it affects the sovereign right of the other nations for e.g. Mexico, who does not have an absolute right to choose its own policy either. Thus, developing countries find cases like Tuna-Dolphin and Shrimp-Turtle challenging because of unilateral nature of the sanction involved therein and the extra-territorial domain of the relevant U.S. decree. Since there is a long practice of unilateralism in international environmental relations i.e. unilateralism to achieve, in effect, extra territorial applications of domestic laws for e.g. U.S. authorization of trade measures against countries using

[104] Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Circuit, 1991).
[105]Environmentalists File Suit to Protect Sea Turtles, from New U.S. Guidelines which open the Door for Sea Turtle Slaughter, Earth Island, Press Release, September 17, 1998.
http://www.earthisland.org/news/news.html.

drift nets that harm Pacific Salmon and Dolphins[106], U.S. Pollution Deterrence Act that allows U.S. authorities to impose countervailing duties on imports produced under environmental standards less strict than U.S.[107] to name a few.

In developing countries' view such unilateralism is an unlawful use of power in an unequal world. They remark trade sanction as undemocratic tools to achieve environmental motives by imposing their economic power and it also infringed upon the sovereign right to formulate its own environmental policies. Though, justifying circumstances may exist in some cases of unilateralism, the increasing practice of unilateralism in international trade has created distrust between the developed and developing nations. Therefore, in this kind of issue (protection of dolphin or turtle) the legitimate way to determine the international minimum consciences is through a multilateral environmental agreement. For instance, In the Shrimp-Turtle case both Panel and AB endorsed multilateral approaches to environmental protection.[108]The Panel in this case held that if there exist a common interest in a global resource," it would be better addresses through the negotiation of international agreements then by measures taken by one member conditioning access to its markets to the adoption by other members of certain conservation policies".[109]But both Panel and AB didn't provide any guidance on the WTO-acceptability of trade measures that are undertaken pursuant to a MEA, particularly if directed at non-members of the MEA. Even if so, one would assume however that if an MEA exists, it would provide an array of possible responses to non-compliance. The legitimacy of the specific unilateral action in question would depend on the ability of the nation taking the unilateral action to verify that it had exhausted all possible multilateral choices before resorting to unilateral action [64].

5.2 Concerns for Production and Process Methods (PPM)

One of the most controversial issues for developing countries is the interpretation of the product under the GATT is in linking trade with environmental policies is defining what a "like product" is. The difficulty in defining like product related to environmental issues is whether the product that is made by methods that harm the environment and another product that damages the environment less can be treated as like products, although the final physical characteristics are same.

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[106] *See* Marine Mammal Protection Act, 16 USC 1826 (1998).

[107] "International Pollution Deterrence Act Introduced To Balance Market Competition", BNA INT'L ENVT DAILY, May 14,1991 available in LEXIS, Nexus Library, BNAIED File.

[108] United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R (15 May 1998) at Para 7.54 and United States Prohibition of Shrimps and Certain Shrimp Products, WTO Doc. WT/DS58/AB/R (98-000)(12 October 1998) at Para 185

[109] United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R (15 May 1998) at Para 7.52.

If each nation treats these products differently and each nation imposes differential tariffs in accordance with the level of environmental pollution or imposes tariff to internalize environmental cost caused by producing process, there will be no problems from an environmental view point. On the other hand, if these products are treated as like products, imposing tariffs such as differentiated tariff and environmental cost can possibly violate "the most-favoured nation principle".

The provisions in the WTO Agreement have treated a product as a like product if it has identical physical characteristics, despite adopting different PPMs. However, there is a huge difference in the interpretation of term "like products "between WTO and MEAs. There are many provisions in MEAs which emphasize environmental protection and take approach that focus on PPM rather than physical characteristics in defining the "like products". Restrictions on trade by adopting PPMs for interpreting "like products" can cause problems to keep up with WTO provisions, as trade restriction can be imposed even though physical characteristics are similar when the adopted PPMs are different[65].

The argument posed by the developing countries regarding this matter is that applying environmental standards to production processes can be detrimental to them. Because allowing countries to distinguish between products on the basis of their production threatens down to the "Slippery slope" to protectionism which would challenge the very basis of the international trade systems [8]. If PPMs measures are used in international trade it would restrict the access of developing countries to the markets of developed countries. As stated by Kym Anderson and Jane Drake-Brockman, 'firms will observe this as another way to justify their demands for protection from import competition. Furthermore, the use of trade restrictions, in place of more efficient instruments impacting directly on production or consumption rather than on trade, will unnecessarily reduce the level and growth of global economic welfare and may even add to, rather than reduce, global environmental damage and resource depletion [66].

Under the current trade regulations in WTO, it is difficult to take restriction on PPMs basis that are not connected to characteristics of product for e.g. Panel in US-Tuna I (Mexico) showed definite attitudes that trade measures based on PPMs could not be justified under the GATT provisions. According to the Panel, by using the method of catching tuna as a basis for differential treatment of imports, the U.S. measures attempted to regulate the method of catching tuna rather than the product and were not justified under GATT. Similar rationale can be seen in subsequent dispute settlement decisions under the GATT.

But redefining the term “like products” can be found in the US-Shrimp case where the AB decided that trade restrictions against the products including environmentally non-sustainable production process and methods could be acceptable by defining "like products" in a narrower sense than before. Here the method of shrimping is a part of production process of shrimps and shrimps caught using TED are same whether they come from certified countries or not in this case American measures arguably violates Article XIII of the GATT even if PPM is taken into consideration. WTO law allows PPM based measure only if production process affects the physical characteristics of the product; a member can resort to Article XX if its measure cannot be justified under these criteria. An important point to be noted is that restriction based on PPM is allowed under Article XX only if the product is harmful to environment. Thus AB’s report legitimizes measures to protect environment based on PPM, however it is quite difficult to attain the level of protection comparable to U.S. without modifying the production process as the method of shrimping is a part of shrimp production process and it has to change to attain the protection of turtles required by U.S.

Thus, it is quite challenging so far as developing countries are concerned because developing countries lack the technological and financial means and they will not be able to take benefit from the comparative advantage, allowing for the disguised protectionism by developed countries. Hence it seems that these measures could act as an obstacle to development in developing countries [2].

This type of interpretation could be found in the EC-Asbestos case as well and began to take account of environmental consideration based on PPMs. Even if this is the case differences in environmental standards should be borne in mind in the context of historical production and process and the existing inequalities between developing and developed countries.

5.3 Concerns for Financial Assistance and Technology Transfer

The third most essential concern of developing countries regarding the trade-environmental issues is their weak economic condition and lack of technological advancement. In most of the trade related environmental dispute mentioned in this study it is apparent that developing countries are still lagging behind. Because the delusion of the environmental effectiveness of trade measures does not give attention to the concerns of developing countries like their inability to meet higher environmental standards of the developed nations.

In spite of subjecting developing countries to trade sanctions, they should be given access to effective alternatives such as financial commitments, technical cooperation and political support from the international community to build their capacity for sustainable development. Since trade restrictions to force developing countries to comply the higher environmental standards is not a panacea to issues of sustainable development.

For these reasons developing countries have been seeking for necessary financial support and technology transfer to resolve environmental issues but it has not been materialised in reality despite of the promises. For the attainment of such technology they have to again go through numerous conditions, meanwhile environment friendly technology is transferred to these countries through official development or through foreign direct investment and nearly three quarters of them is received on purely commercial terms [67]. As a result they have decreased access to the market of industrial countries leading to decreased economic growth.

5.4 Concerns for Harmonization of domestic environmental standards

An often suggested alternative for the trade sanctions for addressing environmentally harmful PPM used by exporting countries is the harmonization of domestic environmental standards[13]. From the perspective of developing countries for harmonisation of pollution and other process standards could also work against their interest. For instance if these standards were incorporated into the TBT agreement as proposed by certain interest group then in that situation, the developing countries would be forced to adopt the higher and stringent standards established in developed countries. As a result developing countries will not be able to cope with the pressure with their limited resources and poor technological capacity. The consequence would be they lose market access since they will not be able to compete with the products of developed countries made with sophisticated technology[110][67]. Therefore, developing countries insists that harmonization of environmental standards and quality must be done gradually, recognizing the special and differential treatment to them. It has been alleged that "harmonisation of environmental standards" is an effort by the developed nations to overlook the commitments they had made at UNCED to recognize the developmental necessities of individual countries.[111]

[110]"Agreement on Implementation of Article VI of the General Agreement on Tariffs and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2.6. Trade 1994, Article 2.6.".WTO, The legal Text (1999).
[111]" It was recognised at the UNCED that national environmental standards and laws should be allowed to differ and may reflect different stages of economic development."

5.5 Challenges to developing countries after "Third Ministerial Meeting of the World Trade Organization"

A number of important messages were conveyed to the WTO as well as to the developing countries from the massive protest in Seattle. The challenge to the developing countries in a post-Seattle world is now steep and clear.

a) First it is clear after these protests that environmental activist of developed nations will continue to push even more aggressive stands for the impositions explicit environment linkages to trade regulations. So it is increasingly difficult if not impossible, for developing countries to keep trade discussion delinked from environment.

b) Second it has to be realised that the groups that were aggressively campaigning for environmental conditions are the ones, who have narrow vision for environment and its definition and have least understanding about developing nations concerns, challenges realities and priorities.

c) The third challenge to the developing countries is to restore their image as they were portrayed as "antienvironmental" as activist and the media were proclaiming them as they just do not care enough about the environment. Hence, the developing countries need to demonstrate through word and action that they are not antienvironmental. It is only that their environmental priorities are different than that of the developed countries such as environmental justice, sustainable livelihood, poverty alleviation and human security [61].

The above stated challenges have been posed towards developing countries after the third ministerial meeting of WTO. Now it is utmost important for the developing countries about how to meet these challenges for further negotiation rounds.

5.6 Constraints for Developing–Country Participation in WTO Dispute Settlement

There are numerous hurdles limiting developing country participation in WTO dispute settlement proceedings as mentioned above in Chapter 2 now it is discussed here. According to Gregory Shaffer, there are three major constrains if they are to participate effectively in dispute settlement systems; legal knowledge, financial endowment and political power or namely

I. Lack of legal expertise in WTO law and financial resources, to fund external WTO lawyers

II. Inability to Enforce Rulings through Retaliation

III. Lack of Domestic Mechanisms to identify and Communicate Trade Barriers to WTO Lawyers [68]

I. Lack of legal expertise in WTO law and financial resources, to fund external WTO lawyers

According to a number of WTO developing country members, the WTO dispute settlement system is complicated and expensive which needs insurmountable human resources as well as financial implications.[112]This concern of developing country stems from many governments lacking internal WTO legal expertise. To take full advantage of WTO law developing countries need the facility to pursue their rights in increasingly complex legal trade regime. Therefore, to have such capacity a country needs for example, experienced trade lawyers to litigate the case, experienced politician and bureaucrats to decide whether to litigate a case or not. It also needs a staff abroad to monitor trade practices and also needs domestic institutions necessary to participate in international negotiations on important issues like health and safety standard [19, 39].

However most developing country lack internal expertise in WTO law, they require to hire external legal counsel and the cost of hiring a private legal counsel has increased drastically at the recent time. The increased cost of litigation is due to the multiple stages of WTO dispute settlement under DSU, where challenged measures may be reviewed by Panel. AB, an arbitrator determining the reasonable period of time to comply further reviews to determine compliance, on level of suspensions of concessions.

Similarly the cost of participation in these multiple stages of WTO dispute settlement is compounded by increasingly complex technical submissions. For example, with the introduction of SPS Agreement scientific evidence of human, animal and plant risks has been heavily litigated. For these kinds of disputes, success needs input of legal expertise that might also need to be contracted externally at additional cost. Therefore, lack of technical expertise is considered as the major obstacle for developing countries to initiate WTO dispute settlement proceedings under

[112]"This view has been espoused by the African Group in the context of negotiations on DSU review, Proposal by the African Group, Negotiations on the Dispute Settlement Mechanism Understanding" TN/DS/W/15, 25 September 2002, at 2. "This paper focuses on the costs of the WTO litigation process as a potential explanation for the limited participation of poor countries in dispute settlement."

SPS agreement whereas developed countries have brought a number of disputes under SPS agreement.[113]

The problem of cost for litigation in WTO encountered by developing countries is heightened by their small trades and government budgets. Another area where developing countries are at disadvantage is that WTO litigation is often funded by private industries since they lack support from well financed private industries willing to support the government.

II. Inability to Enforce Rulings through Retaliation

Another important constraint which limits the utility of WTO dispute settlement system for developing countries is the incompetence to enforce positive rulings against larger non-complying members [19].Although DSU allows retaliation against non-complying WTO members via the suspension of trade concessions or obligations as well as countermeasures.[114]While developing countries criticise these retaliation rules as they lack market size to credibly threaten retaliation for noncompliance of larger WTO members [41].Their concern is that even if they have a legal victory they are unable to compel the defendant to liberalize as its threat to retaliate lacks credibility. In fact, the suspension of trade concession may be even detrimental to them than the non-complying members. On the other hand developing countries might also be unwilling to initiate dispute due to fear of reprisals like interruption of foreign aid and unilateral trade preferences [19, 39].

III. Lack of Domestic Mechanisms to identify and Communicate Trade Barriers to WTO Lawyers

Most of these members lack proper domestic mechanism to identify and communicate trade barriers to WTO lawyers [19].According to Gregory Shaffer, prerequisite for the effective use of the WTO system are mechanisms to perceive injuries to its trading prospects, identify who is responsible and mobilize resources to bring a legal claim or negotiate a favourable settlement or also known as "naming, blaming and claiming" process. This process depends on effective domestic methods to gather and process trade barriers information, where most developing countries lagging behind. Hence they are still at disadvantage in their initial steps to identify trade barriers. For successful use of WTO dispute settlement requires strategic coordination and effective cooperation between different governmental agencies and public/private sector.

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[113]"The only developing countries to have initiated dispute settlement proceedings under the SPS Agreement are Argentina" (in WT/DS293) and the Philippines (in WT/DS270 and WT7DS271).
[114]Article 22 of the DSU and Articles 4.10 and 7.9 of the SCM Agreement. "This paper refers to these enforcement options, collectively, as "retaliation rules."

Currently, most of the developing countries face this problem meeting these coordination challenges basically due to lack of experience and failure to prioritise litigation coordination [43]. The proper coordination between different ministries is essential for proper functioning of any government principally in formulation, adoption and implementation of policy specifically in international trade and dispute settlement. Because lack of this coordination results in developing countries ability to respond effectively to a compliant. For e.g. studies on experience of China, Kenya and South Africa showed similar challenges.[115]

This kind of insufficient coordination between different agencies is probably due to lack of human resource, expertise and specific knowledge. Despite of this fact some of the frequent user of DSU among the developing countries like Thailand[116] , and Argentina[117] has shown positive examples of establishing an international trade law unit which helped in improving their coordination among the governmental agencies.

[115]For more detail in experiences *See* Dispute Settlement at WTO; The developing country experience, ICTSD International Trade law Programme by Gregory C. Shaffer and Ricardo Melendez-Ortiz.
[116] European Communities – Export Subsidies on Sugar, WT/DS283.
[117]Argentina –Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56 (1997).

CHAPTER SIX

6. Discussion and Conclusion

Economic growth is an important tool to the creation of conditions which helps in improving social conditions and advancing environmental protection. Liberalisation of trade can also be an important contributor to sustainable development when applied with complementary environmental policies. Hence, striving for an international trading system could be an important instrument for the environment protection. The liberalization of trade and globalization of capital have resulted in innumerable environmental issues that seem in their complex interaction with the economic world, continually unanswerable. According to Rio Declaration, principle 12 has emphasised on the mutual co-existence of trade and environment will promote sustainable development.[118] But to achieve these both economic and environmental comparative advantages needs to be settled. In this process the special factors affecting environment and trade policies in developing countries and their important specific challenges should be born in mind. Further the debate on the trade and environment has sharply polarized between the developing and developed nations wherever the debate takes place in the WTO, academia and in literature.

In this study we discussed the general relation between trade and environment and resolution of specific trade and environment conflict in practice. From the analysis it can be concluded that there is indeed some fundamental issues between environment protection and multilateral trading systems. To resolve this trade liberalization and environmental protection should progress together for human welfare. Further this study has outlined the necessity for the GATT/WTO to clarify or modify some of its rules if it is to better accommodate the concerns and situation of developing countries and environmentalist that ensures environment-related trade measures do not constitute disguised protectionist measures. In this regard developing countries believe that their power to set the agenda and shape the outcome in the multilateral environmental domain would be enhanced if they had developed economies and less vulnerable to unilateral trade measures taken by the developed nations for environmental reasons.

However, the position adopted by developing nations till now shows that they were trying to stall any movement on trade and environment issues in the WTO due to their specific concerns. This has resulted in giving opportunity to the developed nations to use them as escape goats on the

[118]"States should cooperate 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."Rio Declaration, Principle 12. *Rio Declaration on Environment and Development*, June 14, 1992, 31 *ILM* 874 (1992).

one hand. On the other hand, developing countries have removed themselves from a position where they could have influence the emerging discussion on these issues and make them in their interest as well [61].

Additionally, this study also evaluated the challenges faced by the majority of developing countries, their lack of active participation in the WTO dispute settlement system and also about some developing countries[119] that were successful in using this system.

Henceforth, it could be established that the system is undoubtedly working for all complainant but it appears that it is working better for those with the knowledge and savvy to take maximum advantage of the legal opportunities the system offers. This is not to say that the legal decisions given down by the WTO are politically biased against developing countries. Far from it, developing countries are not less likely to win a case than developed countries.[120] Moreover, defendants are just as likely to obey with a ruling won by a developing country as they are with a ruling won by a developed nation. But the problem for the developing countries is the poor negotiating capacity to settle a dispute before a ruling is issued. It means that developed countries are inclined to resolve their disputes through negotiation, either in consultations or at the Panel stage before a judgment, but developing nations are unable to get complainants to offer substantial concessions at these points in the process. For e.g. trade disputes between the U.S. and the EU most cases yielding concessions ended before the Panel rules.[121] For that reason it is important for developing countries to follow an "early settlement" strategy.

Even though this is the case, WTO, as the frontrunner of the trade regime, provide broad chances to include environmental goals, including environment exceptions under Article XX of GATT, the SPS and TBT Agreements for the conservation of environment with the flexibility provided by the DSB in applying these environment related trade rules. So, WTO ought to be trusted to have the ability to resolve these on-going trade-environment conflicts. Though the mode of operation of WTO has been often condemned in relation to how environmental policies are considered as being in conflict with trade liberalization.

The criticism mostly occurs on the DSU procedure, as illustrated by the cases brought before the WTO dispute settlement Panels. The interpretation and the applicability of the law by the Panel

[119] "It means the successful and the most frequent user of the DSU for e.g. Brazil, India, and Thailand".
[120] "Both groups win rulings about 60% of the time, with only a little variation from that figure depending on how you define the "development" categories". (Busch, 2004)
[121] "The benefits of adjudication disproportionately happen before formal litigation is complete, and often before it even commences." (*Ibid*)

and AB are very narrow as in relation to WTO law as public international law. At the moment, it appears that insufficient attention has been given to environmental considerations. Besides, a review of relevant GATT rules must ensure that a balance is struck between trade and environmental objectives and that the global environmental issues are incorporated. Similarly, GATT/WTO must also address doubts concerning the conformity of measures set out in MEAs [14] .

Still, WTO has been recognised as having the strong power of WTO dispute resolution system which is thought the most highly juridical one in the arena of international law as its composition is a combination of compulsory jurisdiction, right to appeal, legally binding results and provision for sanctions in case of non-compliance. Further, it has also been noticed that after the amendment of the old GATT in 1994, the WTO has shown considerable inclination and improvement to co-operate with environmental issues within the WTO legal domain, e.g. the creation of Committee on Trade and environment (CTE) that has been trying to bridge the relationship between trade and environmental policies, making efforts to facilitate trade to developing and least developed countries through elimination of trade barriers and non-trade barriers etc.

But from the perspective of developed countries and environmentalist WTO's power would be properly managed in favour of environmental policies. While developing countries argue that it should be examined in border context of sustainable development taking account of both environment as well as development aspects of human needs, e.g. The United Nations such as in the Commission on Sustainable Development CSD or UNCTAD being more suitable forum to discuss these issues, as they claim it provides a more transparent and democratic fora than WTO.[122] Similarly, it has been reported that global institutions dealing with international trade protect the interest of developed countries and give rise to greater economic differences between developed and developing countries.[123]

On the other hand, WTO has provided capacity building and technical assistance programmes to developing countries e.g. the agency for International Trade Information and Cooperation offers assistance to developing countries in understanding trends in the global economy and also

[122] United Nations General Assembly Doc. A/47/191 (1992).

[123] ["Expansion of world trade has been unevenly spread, and only a limited number of developing countries have been capable of achieving appreciable growth in their exports"]. ["Protectionist pressures and unilateral policy actions continue to endanger the functioning of an open multilateral trading system, affecting particularly the export interests of developing countries."] Agenda 21, paragraph 2.8. 'U.N. Conference on Environment and Development, Annex II'.UN Doc A/CONF.151/26/Rev 1 (1992).

provided subsidized legal assistance through Advisory Centre. Correspondingly, in a recent address to the International Trade Centre (ITC) Joint Advisory Group, Director General of WTO Pascal Lamy focused on trade facilitation, Aid for Trade, least-developed countries, and regional integration in its future work.[124]

As mentioned in earlier sections, the WTO members are permitted to enact their own environmental policies but if it is related to trade then it should be legitimate for e.g. these measures may be saved by Article XX (b) or (g) exceptions. The use of trade measures to enforce environmental policies must be non-discriminatory, least trade restrictive, transparent, or it should also comply with the Chapeau of the Article XX and must provide adequate statement of domestic regulation and must think about the developmental requirements of developing countries before trade sanction[69].

So the main objective of the member's participation in the multilateral system is to be benefited from new and improved concessions in areas that confer upon them a comparative advantage at the end of the negotiation process. Therefore broadening the mandate of the WTO to such an extent to cover the aspects belonging to domestic spheres is rationally supposed as an unlawful intrusion and deviation of the original objective.

Nonetheless, impingement on the sovereignty is not desired in the WTO system as it is an integral part of emerging global governance architecture, and must be logical with other areas including international law. Till date the WTO rules had not compelled its members to follow determined standards in their domestic law for the protection of their own environment however it does not mean that it should hinder environmental or social goals to protect the sovereignty of the country. As mentioned above the WTO agreement allows exceptions on environmental grounds which permit the members to advance from their trading obligations under determined circumstances. The success of these measures will depend in large part on the interpretation adopted by the dispute settlement bodies. Until now the conclusion of the WTO decisions has not preferred the application of unilateral measures or the imposition of trade sanctions with environmental or social aims. Nevertheless, there has been great progress regarding the construction given to the exceptions of GATT Article XX. This new explanation could open the

[124]Director-General Pascal Lamy, in his address to the International Trade Centre (ITC) Joint Advisory Group" on 21 May 2012.http://www.wto.org/english/news_e/sppl_e/sppl230_e.htm

door to measures adopted for social and environmental concerns. Yet, multilaterally adopted policies are preferred for solving global problems.

It could be concluded form the case studies that that supporters of the incorporation of environmental standards (developed countries) and its implementation through the WTO, have not yet succeeded in proving its legitimacy. Therefore pursuing environmental solutions by trade restriction will further threaten the prospect of sustainable development in developing countries. Also, there is a fear that addition of these standards might be used for protectionist purposes. Because, at the current time developed countries' relative lack of cooperation of technical and financial support towards capacity building of developing nations has given founded reasons for the third world countries to be suspicious about their intentions.

Thus, developed countries and environmentalist should admit that environmental protection does not require the creation of new trade barriers and learn to work within the context of the legal framework for international trade (WTO law) to achieve their goals. At last, the prospect to advance both environmental protection and trade liberalization under the main goal of sustainable development relies on both the international trade and environment regimes to facilitate cooperation and mutual support.

CHAPTER SEVEN

7. Recommendation

Overall the following recommendations can be offered after the analysis of the trade-environmental issues and their linkage with the developing countries trade within the WTO system.

a) **Article XX of the GATT and its provision**: The case analysis in this study establishes that there is an urgent need to reform the provision of Article XX in particular and the DSU in general to fill in gaps identified in the law. So that it provides better support for the attainment of environmental goals to ensure that environment related trade measures do not create disguised protectionism and also take account of the situation of developing countries.

b) **Combining Environmental Provisions within WTO**: It is recommended that all issues concerning trade-environment should be dealt together by pooling various environmental provisions scattered within different WTO provisions e.g. Current WTO provisions on trade-environment could be found in four instances; Article XX GATT 1994, TBT, SPS and TRIPS. Hence it's better to negotiate them together.

c) **Trade Restrictive Measure as a Last Resort**: It is advisable to use the restriction on trade as a last option even though it is one of the essential principles of the WTO because it could be used as a protectionist tool in the name of environment protection. It should be addressed in both context of the WTO and in the MEAs. It implies that trade restrictive measures should be considered only when all other means of Improving MEA compliance and environmental conditions have been exhausted.

d) **WTO-MEA Coherence**: MEA is acknowledged by the WTO as the best way to achieve goals of trade related environmental measures. So, the goal here should achieve substantive and jurisdictional coherence between WTO and MEAs on all matters concerning trade and environment. The compliance of both WTO and MEA should be understood in the context these agreements were negotiated. It means that any measures would be relevant if both parties are full member of both WTO and MEAs in question. This means that violation of MEA requirements due to lack of international contextual conditions should not be a subject of WTO action.

e) **Protectionism**: Environmental issues should not be used as protectionist barrier to trade. Hence it is suggested that there should be clear rules or explicit definition of the conditions and criteria for e.g. for Eco labelling or PPM based distinctions.

f) **Developing Country and WTO Dispute Settlement**: There is some tentative recommendation to increase meaningful participation of developing countries in DSU.

- It could be suggested that development of public-private networks to assist export sectors for communication of trade barriers to the government and for the increased capacity building to ensure that governments are able to convey those barriers to WTO lawyers for legal assessment which is an important area where initiatives could be beneficial for most developing countries. It will lead to increase institutional capacity and coordination of trade policy at multiple levels from national to regional to the global level.

- It could be recommended that to face extra-legal pressure from developed nations they can forge alliances with constituencies within the global power like working with consumer group in bringing WTO cases for e.g. EC-Sardines case.[125]

- The developed countries and International organizations like WTO should provide adequate legal assistance, financial support and bureaucratic coordination to the developing countries to increase their internal capacity. Though some initiatives have been taken by WTO for e.g. Advisory Centre[126] of WTO provides training and partially subsidized legal assistance but these initiatives seems insufficient.

- In addition, a constraint that limits developing countries participation on WTO dispute settlement to date is delays in gaining relief which reduce the attractiveness of the WTO dispute settlement for most developing countries. Thus, the DSU should use its existing procedures[127] to expedite proceedings to accelerate disputes brought by the developing countries.

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[125] "In the case *EC-Trade Description for Sardines*, the UK Consumers' Association, the largest consumers association in Europe and the second largest in the world, worked with a UK law firm, Clyde & Co, on a *pro bono* basis to prepare an *amicus curiae* brief in support of Peru's submissions to the WTO panel."(Gregory C, Shaffer,2006)

[126] *See* the web site of the Advisory Centre, on WTO Law, *Welcome to the Advisory Centre on WTO Law*, at http://www.acwl.ch/e/index_e.aspx

[127] Article 3.12 of DSU; "Permits developing countries to invoke the provisions contained in 1966 Procedure in any dispute against a developed country" (Decision of 5 April 1966 on Procedures Under Article XXIII, BISD 14S/18).
Alternative dispute resolution (ADR) Article 24.2 DSU; "Contemplates LDCs requests the alternative procedures of 'good offices, conciliation and mediation" by the Director-General.
Article 5 of DSU ("Good Offices, Conciliation and Mediation").

- **Proactive strategy for Developing Countries on Trade-Environment:**

  Environmental concerns became an important determinant of future trade regulation. So it is an urgent need for the developing countries to shift their strategy from a more reactive negotiation strategy to a proactive negotiation strategy whereby they can put their alternative strategies that meet their own interest instead of simply reacting to the agenda set by the developed nations and cribbing about how it does not meet their interest which might give them chances to influence the final outcome.

REFERENCE

1. Harris., J.M., *Environmental and Natural Resource Economics: A Contemporary Approach* 2002.
2. Kishore., P., *Revisiting the WTO Shrimps Case in the Light of Current Climate Protectionism: A Developing Country Perspective.* George Washington journal of Energy and Environmental Law, 2012. **3**(13): p. 78-90.
3. Thomas, C., Schefer, K. N. *Conflict Resolution. Assessing the story so far: Hope on the Horizon: in Trade Investment and the Environment*. in *Proceeding of the Royal institute of international Affairs conference*. 1998. Chatham house London: Halina Ward and Duncan Brack
4. Gabiatti, S., *Trade related Environmental Measures under GATT Article XX (b) and (g)*, in *Faculty of Law , International Legal Studies* 2009, University of Iceland. p. 101.
5. Esty, D.C., *Greening the GATT: Trade, Environment and the Future*1994, Washington DC: Institute for International Economics
6. Rajamani., L., *Developing Country Resistance to Linking Trade and Environment: the Perceptions of Inequity and the Politics of Autonomy*, Y.C.f.E.L.a.P. Working Paper, Global Environment and Trade Study, Editor 2000.
7. Esty, D.C., *Greening the GATT: Trade, Environment and the Future* 1994, Washington DC: Institute for International Economics.
8. Hunter, D., Salzman, J., Zaelke, D *International Environmental Law and Policy*. 2 ed2002: Foundation Press, New York. 1127.
9. Adamantopoulos, K., Suddards, H.,Staff., H.S., *An Anatomy of the World Trade Organization*1997: Kluwer Law International.
10. Desta, M.G., *The Law of International Trade in Agricultural Products;* . 1 ed. From GATT 1947 to the WTO Agreement on Agriculture2002: Springer.
11. John, H.J., William, J.D., Alan, O., Sykes, J.R., *Legal Problems of International Economic Relations*. 4 ed. American Casebook Series2002.
12. Louka, E., *International environmental law: fairness, effectiveness and world order*2006, New York: Oxford university Press.
13. Hunter D., S.J., Zaelke D, *International Environmental Law and Policy*. 1 ed1998, New York: Foundation Press.
14. Shawkat., A., "*Trade-Environment Nexus in Gatt Jurisprudence: Pressing Issues for Developing Countries.* Bond Law Review, 2005). **17**(2).
15. DiMento, J.L., *The Global Environmental and International Law*2003, Austin: University of Texas Press.
16. Duncan, F., *International law and Policy of Sustainable development*. Business and Economics2005: Manchester University Press.
17. Cole, M.A., *Trade liberalisation, Econmic Growth and the Environment*. Vol. 1. 2000: Edward Elgar Publishing, Inc.
18. Van der Meulen, B.M.J., Van der V.M., *European Food Law Hand Book*2008: Wageningen Academic Publishers, The Netherlands.
19. Nottage, H., *Developing Countries in the WTO Dispute Settlement System*, 2009, The Global Economic Governance Programme, University Collage, Oxford.
20. Steger., D., Hainsworth., S, *World Trade Organization Dispute Settlement: The First Three Years.* JIEL, 1998. **1**(2).
21. Van der Meulen, B.M.J., *The Global Arena of Food Law: Emerging Contours of a Meta-Framework.* Erasmus Law Review, 2010. **3**(4): p. 217.
22. Bhargav., M., Pareek., A *WTO and Environmental Issues*

23. Clarke, C.A. *The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development'*. in *WWF Discussion Paper.* 1991.

24. Das, B.L., *WTO Agreements: Deficiencies, Imbalances and Required Changes.* 1 ed1997.
25. Shahin, M., *From Marrakesh to Singapore: The WTO and Developing Countries.* Trade and Development Series, Third World Network, 1996 Penang, Malaysia.
26. III, H.S., *GATT and the Environment*, 1992, WTO.
27. Prasad, M., *Developing Nations Unanimous Against New Issues in WTO*, 1996, Third world Network.
28. Organisation, W.T., *Trade and Environment ;A Developing Country Perspective*, in *WTO Symposium on Trade and Environment;*1999.
29. Assembly, U.N.G., *Doc. A/47/191*, 1992.
30. Martin., K., *Trade, Environment and Sustainable Development: A developing country view of the issues, including in the WTO context*, in *WTO Symposium on Trade and Environment* 1999.
31. Yamin, F., *The CSD Reporting Process: A Quiet Step forward for Sustainable Development.* Year book of International Co-operation on Environment and Development. Vol. 51,53. 1998/99.
32. Economist, T., *A Global Disaster*, in *The Economist*1999.
33. Esty., D.C., *Non-Governmental Organizations at the WTO: Co-operation, Competition or Exclusion.* Journal of International Economic Law, 1998: p. 123-147.
34. Agarwal, A., *International Pressure and The Civil Society*, in *Down To Earth* 1999.
35. Dunoff., J.L., *The Misguided Debate over NGO participation at the WTO* 1 Journal of International Economics Law, 1998: p. 433.
36. Henson, S., Loader, R, *Impact of sanitary and phytosanitary standards on developing countries and the role of the SPS Agreement.* Agribusiness, 1999. **15**(3): p. 355-369.
37. Centre, S. *The WTO multilateral trade agenda and the South*. 1998.
38. OECD, *"Eco-labelling: Actual Effects of Selected Programmes"*, 1997, OCDE/GD/. p. 105.
39. Busch M, L., Reinhardt, E, *The WTO Dispute Settlement*, D.f.i.a. Cooperation, Editor 2004, published by Sida 2004.
40. Davey, W.J., *The WTO Dispute Settlement System: The First Ten Years.* Journal of International Economic Law, 2005. **8**(1): p. 17-50.
41. Bown, C., Hoekman B.M., *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector.* Journal of International Economic Law, 2005. **8**(4): p. 861-890.
42. Bagwell, K., Mavroidis P., Staiger, R, *The Case for Tradeable Remedies in WTO Dispute Settlement*, 2004, World Bank Washington, DC. p. 14-15.
43. Hoekman, B.M., Petros, C. M. , *"WTO Dispute Settlement, Transparency, and Surveillance".* World Economy, 2000. **23** (4): p. 527-542.

44. Thomas, C., Mavroidis, P.C., *Regulatory Barriers and the Principle of Non-Discrimination in WTO Law* The World Trade Forum. Vol. 2. 2000: University of Michigan. 456.

45. McDonald., J., *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order.* Environmental Law, 1993. **23**(2): p. 12.

46. Matoo, A., Mavroidis, P.C., *Trade, Environment and the WTO; The Dispute Settlement Practice relating to Article XX of GATT, in International Trade law and the GATT/WTO Dispute Settlement System* Ernst-Ulrich Petersmann ed., ed1997.
47. WTO, *Trade and Environment at the WTO*2004: WTO Secretariat.
48. Bossche., P.V., *The Law and Policy of World Trade Organization*, ed. Cambridge2006: Cambrige University Press. 737.

49. McDonald, J., *GATT, GATT Activities 1989*, 1990. p. 100.
50. Charnovitz, S., *Exploring the Environmental Exceptions in GATT Article XX.* Journal of World Trade 1991. **25**(5): p. 49.
51. Birnie., P.W., Boyle., A E, *International Law and The Environment*. 2 ed2002, New York: Oxford University Press.
52. Holder., L., *Environmental Protection, Law and Policy*2007, Cambridge: Cambrige University Press.
53. Bernasconi, O., Nathalie M., Daniel, O., Maria, J., Orellana., Marcos, T., Elisabeth, *Environment and trade. A guide to WTO Jurisprudence*2006: London and Sterling, VA, Earthscan.
54. Hakan, N., Vaughan, S, *Trade and Environment*. Special Studies 4. Vol. 13. 1999: WTO Publications.
55. Bell, S., Donald, M, *Ball and Bell on environment law*. 5 ed. The law and Policy Relating to the Protection of the Environment2000: Oxford Umniversity Press.
56. Dunoff., J., *International Dispute Resolution: Can the WTO Learn from MEAs?*, in *Trade and Environment, the WTO and MEAs. Facets of a Complex Relationship*, S. Liene, Editor 2001, Heinrich Boll Foundation: Washington. p. 63-69.
57. Trebilcock., M.J., Howse., R.,, *"The Regulation of International Trade"*. 3 ed2005, London and New York: Routledge.
58. Michael J T., R.H., *Regulation of International Trade*. 3 ed2005: Taylor and Francis group. 759.
59. Centre, S. *The WTO multilateral trade agenda and the South.* . 1998.
60. Youssef, H. *Special and differential treatment for developing countries in theWTO(Trade Related Agenda).* in *Development and Equity Working Paper No. 2.* 1999. Geneva: South Centre.
61. Najam, A., *Trade and Environment After Seattle: A Negotiation Agenda for the South.* The Journal of Environment & Development, 2000. **9**(4): p. 405-425.
62. Esty, D.C., *Bridging the Trade-Environment Divide.* Journal of Economic Perspectives, 2001. **15**(3): p. 113-130.
63. Najam, A., Robins, N, *Seizing the Future: The South, Sustainable Development and International Trade.* International Affairs (Royal Institute of International Affairs 1944-), 2001. **77**(1): p. 49-68.
64. Rajamani., L., *Differential treatment in international environmental law*2006, Oxford: Oxford University Press.
65. Lee., E.S. *"Legitimation of Trade-Related Environmental Measures under the WTO"*. Working Paper 1788, 2006.
66. Anderson, K., Brockman, J.D., *'The World Trade Organization and the Environment'*. Environmental Outlook: Law and Policy, No 2, ed. F.a.G.e. Boer1996, Sydney: Federation Press.
67. Organisation, W.T., *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, WTO, Editor 1999, Cambridge University Press: New York. p. 114.
68. Gregory., C.S. *"The Challenges of WTO Law: Strategies for Developing Country Adaptation"*. World Trade Review, 2006.
69. Nations, U., *'U.N. Conference on Environment and Development, Annex II'Agenda 21, paragraph 2.8*, in *'U.N. Conference on Environment and Development*1992, UN.