

# Examining the Overlap Between Environmental Protection and International Trade Instruments

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## Abstract

This paper attempts both a legal and socio-environmental appraisal of the protection of the human environment through International Trade Instruments. This discourse realises that there exists a seeming conflict of activities between the need to protect the human environment and the sustainable propagation of human activities through international trade. The study embarks on a qualitative review of significant cases largely on the economic and environmental policies on trade. It accepts that protectionism as well as liberalism has been explored in times past as wealth-creation mechanisms, as the exploitation of natural resources has been largely effective leading to technological challenges; but there continues to be conflict without battle. The study avers that nature which has been repeatedly seen as a finite resource should not be perpetually explored and exploited, but concrete regulatory mechanisms through national and international instruments to protect the environment and regulate trade with sustainable development should be emplaced. It concludes that even though substantial progress has been made in identifying the circumstances in which international trade and environmental protection can be mutually compatible, but several areas of contention and conflict remain, whilst making recommendations for effectively managing the areas of overlap.

**Keywords:** Environment, Trade, Environmental Protection, WTO, Economy, Instrument.

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## 1.0 Introduction

It has been contended that there exists an inexorable nexus between environmental protection and international trade and this can only be achieved through an integration of sustainable international trade instruments by the comity of nations<sup>1</sup>. This is largely because most of the infractions and degradations of the environment are consequent upon the commercial and trade activities of man across nations from the exploratory drilling of petroleum to electronic waste trading and dumping, to industrial activities increasing carbon emission to the notorious dumping of hazardous wastes in Koko, in the old Bendel State of Nigeria in 1988<sup>2</sup>. Thus, to nip these deleterious activities of man in the bud, there is suggested a need for a sustainable and collaborative international trade Agreement that would take into consideration the need to protect the Environment at a global plane.

This is even more expedient as the expansion of international trade since the Second World War has gone together with tremendous global economic growth on an unprecedented scale. It has also coincided with a meteoric increase in global environmental degradation, unmitigated effects of the environmental consequences of commercial and industrial activities in the form of increased air and marine pollution, gas flaring, desertification and deforestation, loss of biological diversity and climate change<sup>3</sup>. This then presents a number of questions to the Environmental Law Researcher. The first concerns the general linkage between international trade and environment: that is- Is the liberalization and expansion of international trade in some way responsible for what is referred to in international environmental law as the global ecological crisis? Put differently- does freer trade, increased global competition and greater wealth help to promote environmental protection and a more efficient use of scarce resources? The second is about the specific institutional context of international trade and environmental policy: thus, do the rules of the international trading system, primarily those of the General Agreement on Tariffs and Trade, (GATT) and the World Trade Organization (WTO) system but also bilateral and regional trade agreements, help or hinder efforts to protect the environment? The first question is pretty straight-forward, but the second is not, in that most of the regional and international trade agreements are made with the enhancement of trade, rather than the protection of the environment as policy fulcrum and mindset.

<sup>1</sup> T.E Ayo, (2018) 'Tracing the Inevitable Nexus Between Environmental Protection and International Trade Treaties'. *FJLL*, Vol 23, P251-277.  
<sup>2</sup> *Ibid*.

<sup>3</sup> Robert Falkner and Nico Jaspers, 'The Ashgate Research Companion to International Trade Policy'. Ken Heydon and Steven Woolcock (Ashgate, 2012 eds). P 12.

Furthermore, are international environmental agreements consistent with the rules and obligations of the WTO order? These and other questions about the trade–environment nexus have been intensely debated for decades, and especially since the 1990s<sup>1</sup>. It is instructive to note that they remain very critical to the future of the trading system. This study therefore attempts to review the debate and theorise scholarship insights on the capacity of law and policy legal to achieve environmental protection through the mechanism of international trade instruments. A concise discussion of the general relationship between trade and environment is therefore desired to give the right perspective and a general overview of the institutional context for trade and environmental policy-making: the rules of the WTO and how they relate to environmental matters; the relationship between the WTO and multilateral environmental agreements; recent WTO jurisdiction on trade–environment conflicts; and political efforts to resolve such conflicts within the WTO’s Committee on Trade and Environment (CTE) and the Doha Round.

## 2.0 The Inexorable Nexus between Trade and the Environment

Could it be stated that there is any compatibility or conflict between international trade and environmental protection? This question has provoked a lively debate between academics, environmental campaigners and free trade advocates. It has focused on two types of causal links between trade and environment<sup>2</sup>: the first concerns the effect that trade liberalization has on environmental quality in a given country or across the globe; the second reverses the perspective and addresses the impact that environmental protection policies have on international trade. At the risk of oversimplifying a complex debate, free trade supporters generally argue that liberalizing trade has a mostly positive effect on the environment, but some environmental measures pose a protectionist threat to the free trade order<sup>3</sup>.

In contrast, environmentalists assert that free trade is one of the main causes of the global environmental crisis and that environmental policy should rightly limit free trade where it harms environmental quality.<sup>4</sup> A closer examination of the empirical evidence behind these claims reveals a more nuanced picture.<sup>5</sup> Under certain circumstances, free trade can lead to more polluting production and greater consumption of natural resources. This is the case in countries that specialize in the production of pollution-intensive goods in response to trade liberalization, such as China which has seen a dramatic rise in air and water pollution caused by the expansion of export-oriented manufacturing<sup>6</sup>. In other contexts, free trade can promote greater efficiency in production and the diffusion of environmental technologies and standards throughout the world. For example, more globally-oriented companies in the chemical and steel industries tend to adopt and promote higher environmental standards than national companies<sup>7</sup>.

The empirical record is also mixed when it comes to the impact of environmental policies on trade. This is largely because environmental protection efforts are capable of disrupting or otherwise limiting international trade and often give rise to accusations of disguised protectionism by different nations. Many developing countries, in particular, have accused advanced economies of using environmental standards to protect their domestic markets against foreign competition<sup>8</sup>. Other measures, however, can be compatible with the international trading system. Abolishing subsidies for fossil fuel use, for example, would not only help in the fight against global warming; it would also promote a level playing field in international energy markets<sup>9</sup>. Overall, therefore, generalizations about the trade–environment nexus debate become challenging and problematic.

It is expedient to note that Trade liberalization and environmental protection can, but need not, be in conflict. This is majorly because much depends on the specific circumstances of the industrial sectors and national economies concerned, and the specific environmental policies pursued by governments<sup>10</sup>. A more useful and prominent way to think about these connections is, therefore, to consider context-specific causalities and to identify particular mechanisms by which trade impacts on the environment. Grossman and Krueger for instance,

<sup>1</sup> S. Sampson, (2005), ‘The Trade-Environment Nexus Debate: Problems and Prospects’. *International Environmental Law Journal*, Vol 35, P. 77-99.

<sup>2</sup> J Bhagwati, T.N Srinivasan, (1996), ‘Trade and Environment: Does Environmental Diversity detract from the Case for Free Trade? In *Fair Trade and Harmonisation: Prerequisites for Free Trade?* Edited by J. Bhagwati and R. Hudec, Cambridge, MA: MIT Press: 159-199.

<sup>3</sup> J. Bhagwati, 2014, ‘In Defence of Globalisation- A Review’. Oxford: Oxford University Press.

<sup>4</sup> E Goldsmith and J Mander, (eds). 2001. *The Case against the Global Economy: And for a Turn towards Localization*. London: Earthscan.

<sup>5</sup> E Neumayer, E. (2001). *Greening Trade and Investment: Environmental Protection without Protectionism*. London: Earthscan.

<sup>6</sup> E.C Economy, (2004). *The River Runs Black: The Environmental Challenge to China’s Future*. Ithaca: Cornell University Press.

<sup>7</sup> R Garcia-Johnson, (2000). *Exporting Environmentalism: U.S. Multinational Chemical Corporations in Brazil and Mexico*. Cambridge, MA: MIT Press.

<sup>8</sup> Organisation for Economic Co-operation and Development, 2019 Bulletin.

<sup>9</sup> K Anderson and W.J McKibbin, (2000) *Reducing Coal Subsidies and Trade Barriers: Their Contribution to Greenhouse Gas Abatement*. *Environment and Development Economics* 5(4): 457–481.

<sup>10</sup> *Ibid.*

proposed three such mechanisms: scale, composition and technique<sup>1</sup>. According to them, the scale effect occurs when liberalized trade stimulates economic growth, which in turn leads to an increase in environmentally harmful activities including increased resource consumption, whereas, the composition effect leads to greater specialization between countries and as a consequence of the shift in economic activity, differential rates of environmental degradation<sup>2</sup>. They contended that Countries with lower environmental standards will see an expansion of environmentally-harmful activity in response to this trade-induced specialization effect. The technique effect involves changes in the technologies for production and resource extraction. Where increased trade and competition leads to improvements in the efficiency of production or the transfer of advanced technologies to less developed economies, trade can raise the level of environmental protection worldwide<sup>3</sup>.

Environmentalists equally consequently added to these two further mechanisms, which are generally not well captured by economic models. One of such mechanisms was said to be found in the cultural change in society which is caused by an opening up to international trade. In this view, trade liberalization creates shifts not only in production technologies but also in consumption patterns, due to a spread of consumerist values and the greater availability of goods, leading to an ever-rising spiral of consumer needs.

In a similar vein, rising consumption may even outstrip any efficiency gains from more trade according to some other researchers<sup>4</sup>. Another mechanism is the so-called distancing effect. International trade is deemed to create longer and more complex chains between geographically dispersed economic actors, from resource extraction and manufacturing to international trade and retailing<sup>5</sup>. As a consequence, consumers are less able to identify and accept the responsibility for the consequences that their decisions have on the environment in evermore distant locations<sup>6</sup>. While free trade advocates and environmentalists continue to argue over the right way to conceptualize the linkages between trade and the environment, international policymakers are keen to stress the mutual supportiveness of trade and environmental policies, as was the case at the 2002 World Summit on Sustainable Development. But whether trade and environmental policy-making support each other or clash depends on how existing international norms and rules are given interpretation. It is to be considered in particular how the rules of the GATT/WTO trade system affect environmental policies and vice versa. Other bilateral and regional trade agreements such as the North American Free Trade Agreement, NAFTA also affect the trade–environment relationship,<sup>7</sup>but the subsequent analysis focuses on the relationship between multilateral trade rules and environmental policies and regimes.

### 3.0 Between International Trade Principles and Environmental Protection

At the time of the creation of the General Agreement on Tariffs and Trade, GATT in the late 1940s, there was no international environmental agenda at the frontline of global discussion<sup>8</sup>. Apart from a small and rather insignificant number of treaties and institutions dealing with trans-boundary environmental concerns, environmental protection was predominantly seen as a domestic policy issue, rather than an international environmental or international trade or investment issue requiring international attention. Understandably, therefore, the creators of the GATT did not include in the agreement any special provisions on the relationship between trade and environmental policy. Still, they recognized that governments might occasionally need to restrict trade in the interest of public health or nature conservation<sup>9</sup>. It is therefore noteworthy to state that the GATT's main objective has been to reduce the overall level of tariffs and other trade barriers through a series of multilateral negotiations. Its legal structure is based on a number of fundamental norms, of which reciprocity and non-discrimination are the most important. Reciprocity in the GATT system is evident from the way in which negotiations on tariff reductions have been conducted. Rather than lower trade barriers unilaterally, GATT members, in multilateral negotiations, have only agreed to reduce their levels of protection in return for reciprocal concessions from other trading partners, rather than inculcate or cultivate ways of accommodating or otherwise cultivating ways of harmonising environmental concerns and sustainable development policies with trade objectives. Notably, Non-discrimination is expressed in two principles in the GATT agreement: the most-favoured-nation (MFN) principle (Article I), which requires each GATT member to accord to all other members the same privileges it has granted to its 'most-favoured-nation'; and the national treatment principle (Article III), which demands that GATT members treat 'like products' imported from foreign producers in the same way as

<sup>1</sup>Grossman, G.M. and Krueger, A. 1993. Environmental Impacts of a North American Free Trade Agreement, in *The US–Mexico Free Trade Agreement*, edited by P. Garber. Cambridge, MA: MIT Press: 13–56.

<sup>2</sup>World Economic Forum, WEF (2020). *How Stronger Trade can help us meet Climate Goals*. 22nd September, 2020.

<sup>3</sup>*Ibid.*

<sup>4</sup>Princen, T., Maniates, M. and Conca, K. (eds). 2002. *Confronting Consumption*. Cambridge, MA: MIT Press.

<sup>5</sup>V Reppel-Hill,(1999). Trade and Environment: An Empirical Analysis of the Technology Effect in the Steel Industry. *Journal of Environmental Economics and Management* 38(3): 283–301.

<sup>6</sup>Princen, *Ibid.*

<sup>7</sup>K. P Gallagher, (2004). *Free Trade and the Environment: Mexico, NAFTA, and Beyond*. Palo Alto: Stanford University Press.

<sup>8</sup>Ayo, *supra*.

<sup>9</sup>Grossman, *supra*.

those of domestic producers. The concept of like products is an important one in the context of trade–environment debates, even though no definite interpretation of it exists in GATT/WTO law and jurisdiction.<sup>1</sup>

Thus, internationally traded goods may either be a comprehensive guide to WTO law and jurisdiction in relation to environmental matters or otherwise<sup>2</sup>. This can be different in some respects, for instance, reflecting different designs or production techniques; but they are to be considered as like products if they share important physical characteristics or are functionally equivalent (such as cars by different manufacturers)<sup>3</sup>. Article XX is the only provision in the GATT that specifically mentions environmental concerns. It sets out the conditions for restricting international trade in the interest of human, animal or plant life or health<sup>4</sup> and the conservation of natural resources.<sup>5</sup> Such measures are allowed if they do not arbitrarily and unjustifiably discriminate between countries with similar conditions or constitute a disguised protectionist measure; if (in the case of sub-clause b) they can be considered necessary, that is no other, less trade-intrusive, measures are available; and if (in the case of sub-clause g) equivalent domestic restrictions are imposed as well.

The GATT thus allows exceptions from its trade disciplines where environmental objectives are concerned, but seeks to ensure that these measures do not give rise to discrimination or protectionism<sup>6</sup>. Like many other elements of the GATT, it should be noted that the conditions set out in Article XX are ambiguous and have given rise to conflicting interpretations. A number of disputes have arisen that centre on the use of Article XX as a rationale for imposing trade restrictions. Some of these cases and the evolution of GATT/WTO jurisdiction are therefore consequently reviewed in this study with a view to determining the extent to which this supposed trade enhancement tool has been used to achieve its opposite objective. It is worth noting in this context, however, that Article XX contains provisions that are bound to come into conflict with a wide range of environmental policies. This is most clearly the case with the non-discrimination rule for like products. As a general rule, GATT provisions prohibit member states from restricting trade based on the way in which goods have been produced, so-called process and production methods (PPMs)<sup>7</sup>.

From the international environmental law perspective, however, it is often the production process that gives rise to legitimate concerns and that is targeted by environmental measures (for example greenhouse gas emissions of manufacturing processes). Indeed, many international environmental agreements are about restricting the environmentally deleterious consequences of global economic activities, and environmentalists have long complained about the GATT's 'chilling' effect on taking out trade measures focused on polluting production methods<sup>8</sup>. In recent years, the creation of the WTO at the end of the Uruguay Round has equally signaled a greater willingness in the trading system to recognize the legitimacy of environmental policies.<sup>9</sup> This is most clearly evident in the preamble of the Marrakesh Agreement Establishing the WTO, which lists sustainable development and environmental protection as explicit objectives for the trading system. Although not legally binding, the preamble represents an important departure from the GATT's previous philosophy of a strict separation of trade and environmental policy<sup>10</sup>.

Furthermore, because the WTO also strengthened the GATT's dispute settlement mechanism and made its rulings legally binding, the evolving WTO jurisdiction on cases involving environmental trade measures has assumed greater importance in balancing the competing perspectives of trade and environmental protection. Other notable achievements of the Uruguay Round that are of relevance to the trade–environment link include the Agreements on Technical Barriers to Trade, (TBT) and on the Application of Sanitary and Phytosanitary Measures (SPS). The TBT Agreement for instance, importantly sets rules for the use of technical regulations and standards with a view to minimizing their trade-distorting effect<sup>11</sup>. It recognizes the right of countries to impose such measures to protect human health and the environment, but stipulates notably that these should not be more trade-restrictive than necessary. For example, an environmental label that informs consumers about the potential health risks associated with a particular product could be considered acceptable under WTO rules if it is applied in a non-discriminatory manner<sup>12</sup>. However, a label that aims solely at PPM characteristics of a product like the carbon-intensity of car manufacturing might fall foul of the TBT agreement. This applies particularly to

<sup>1</sup>G.P Sampson, (2005). *The WTO and Sustainable Development*. Tokyo: United Nations University Press.

<sup>2</sup>N Bernasconi-Osterwalder, D Magraw, M.J Oliva, M. Orellana and E. Tuerk, (2006) *Environment and Trade: A Guide to WTO Jurisprudence*. London: Earthscan.

<sup>3</sup>*Ibid.*

<sup>4</sup>Article XX (b), GATT.

<sup>5</sup>Article XX (g), GATT.

<sup>6</sup>Neumayer, pp 24-25, *supra*.

<sup>7</sup>Robert Falkner and Nico Jaspers, 'The Ashgate Research Companion to International Trade Policy'. Ken Heydon and Steven Woolcock (Ashgate, 2012 eds). P 12-18.

<sup>8</sup>R Eckersley, (2004). The Big Chill: The WTO and Multilateral Environmental Agreements. *Global Environmental Politics* 4(2): 24–50

<sup>9</sup>Charnovitz, S. 2007. The WTO's Environmental Progress. *Journal of International Economic Law* 10(3): 685–706.

<sup>10</sup>H.E Daly, (1993). The Perils of Free Trade. *Scientific American Journal* 269(5): 50–57.

<sup>11</sup>Stein, J. 2009. The legal status of eco-labels and product and process methods in the World Trade Organization. *American Journal of Economics and Business Administration* 1(4): 285–295.

<sup>12</sup>Robert Falkner and Nico Jaspers, *supra*.



mandatory standards and a regulation imposed by governments, whereas measures such as voluntary eco-labels, which are created by private actors, do not fall under WTO jurisdiction<sup>1</sup>. The SPS Agreement, which deals with measures to protect human, animal or plant life or health, equally allows States to take such measures where they do not lead to discrimination or disguised restrictions on international trade<sup>2</sup>.

Instructively, both the TBT and SPS Agreements encourage the harmonization of standards or the creation of international standards, such as through multilateral environmental agreements. For instance, Article 2.2 of the Agreement further specifies that SPS measures are to be based on scientific principles of risk assessment and sufficient scientific evidence. This requirement can be temporarily suspended where ‘relevant scientific evidence is insufficient’, but additional scientific information is to be obtained to carry out a full risk assessment ‘within a reasonable period of time’<sup>3</sup>. The SPS Agreement is the only trade agreement that formally recognizes precaution as a justification for taking trade measures where there is scientific uncertainty but some evidence of potential harm. The question that has repeatedly pitted the WTO against environmentalists is whether such uncertainty is only a temporary phenomenon or a more persistent and thus long-term problem that pervades many areas of environmental policy-making, such as food safety and genetically modified organisms.<sup>4</sup>

#### 4.0 Among Multilateral Environmental Agreements, Trade Moves and the World Trade Organisation

It has been restated that well over 200 multilateral environmental agreements (MEAs) have come into existence since the first United Nations (UN) environment conference in 1972<sup>5</sup>. Some treaties, such as the UN Framework Convention on Climate Change (UNFCCC), have achieved near-universal membership, while others are of a more regional nature or represent small clusters of countries. A small but growing proportion of these MEAs include trade measures among their regulatory instruments. As trade restrictions become more popular in global environmental policy-making, global concern is increasing over the fact that these measures will increasingly come into conflict with WTO rules. The definition of trade measures in MEAs is fairly wide and often imprecise. It most commonly refers to various forms of restrictions on trade for environmental purposes, such as bans on the trade of certain polluting substances or embargoes on specific countries that are in breach of environmental obligations<sup>6</sup>. It may also include other measures that have an indirect trade impact, such as reporting requirements, labeling systems, prior consent requirements, or fiscal instruments (such as taxes, subsidies).<sup>7</sup>

Whilst it is restated that some MEAs are designed to regulate trade- the Convention on Trade in Endangered Species (CITES), for example, uses trade restrictions to control and where necessary, ban the trans-boundary movement of animal and plant species that are close to extinction<sup>8</sup>. It also uses trade restrictions as a form of punishment for those parties that do not comply with its provisions. Other treaties use trade restrictions as one of many instruments to support their main environmental goal. One of such examples is the Montreal Protocol on Ozone Layer Depletion, which imposes a phase-out schedule for certain chemical substances that harm the stratospheric ozone layer. The treaty also includes a ban on trade in these substances with countries that have not ratified the Protocol, the so-called non-parties.<sup>9</sup> Trade measures have become popular instruments in MEAs for a number of reasons. They broadly serve three purposes.<sup>10</sup> First is to combat environmental harm. Most trade measures in MEAs seek to tackle environmental problems by restricting the international movement of products or species that are potentially harmful or endangered such as CITES, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Cartagena Protocol on Bio-safety<sup>11</sup>. The second purpose is to promote compliance and regime effectiveness. Since some MEAs use trade measures to ensure the effective operation of an environmental regime. For instance, restrictions may be imposed to punish countries that do not fully comply with a regime’s provisions, or to prevent industrial flight to non-parties, so-called ‘leakage’, et al, whilst the third purpose is to encourage participation in environmental protection legal regimes. This is mostly because trade restrictions are often seen as a form of pressure on countries that are reluctant to join an environmental regime. For example, the Montreal Protocol’s prohibition of trade with non-parties encouraged some countries to join the Agreement to prevent being excluded from the international trade

<sup>1</sup>*Ibid.*

<sup>2</sup>S. Charnovitz, (1999). Improving the Agreement on Sanitary and Phytosanitary Standards, in Trade, Environment, and the Millennium, edited by G.P. Sampson and W.B. Chambers. Tokyo: United Nations University Press: 171–194.

<sup>3</sup>Article 5.7.

<sup>4</sup>G.E Isaac and W.A Kerr, (2007) The Biosafety Protocol and the WTO: Concert or Conflict?, in The International Politics of Genetically Modified Food: Diplomacy, Trade and Law, edited by R. Falkner. Basingstoke: Palgrave Macmillan: 195–212.

<sup>5</sup>*Ibid.*

<sup>6</sup>Eckersley, *supra*.

<sup>7</sup>D Brack and K Gray, (2003). Multilateral Environmental Agreements and the WTO. London: The Royal Institute of International Affairs, P 5-6.

<sup>8</sup>*Ibid.*

<sup>9</sup>D Brack, D. (1996). International Trade and the Montreal Protocol. London: Earthscan

<sup>10</sup>Brack and Gray, *supra*, pp 13-15.

<sup>11</sup>*Ibid.*

in regulated substances and products containing them<sup>1</sup>.

While trade measures have become a central element of international environmental treaties, they pose certain problems from a trade perspective. As discussed above, WTO rules require environmental trade measures to be non-discriminatory, that is they should not discriminate between like products from different WTO members or between domestic and international production. Where environmental treaties target products because of the underlying process and production methods rather than environmental quality of the product itself, any resulting trade interference could be seen to be in breach of WTO obligations. One prominent area where MEAs and the WTO rules could clash is where one party to an MEA uses trade sanctions against a non-party, but both parties are members of the WTO. In such cases, the party that suffers a trade sanction could take action under the WTO alleging breach of trade rules. As yet, no WTO member has challenged an MEA in the WTO's dispute settlement mechanism. However, as the number of environmental treaties with trade restrictions grows and the value of the affected trade increases, a future conflict over the application of MEA-based trade restrictions cannot be ruled out.

One major area where WTO–MEA tensions may surface in the not too distant future is climate change. Indeed, the potential use of climate regulation to justify restrictions on trade in carbon-intensive goods has raised considerable interest and concern in the academic and policy community.<sup>2</sup> Overlaps between trade and international policies aimed at reducing carbon emissions are inevitable, given the centrality of fossil fuel-based energy to international shipping and manufacturing. As yet, the international climate regime does not include explicit trade measures. But a successor Agreement to the Kyoto Protocol, which expired since the year 2012 failed to include such measures, and since no known comprehensive climate regime is agreed for the post-2012 era, then national or regional climate policies should be made to include some form of border tax adjustment to deal with the competitiveness effects of an uneven regulatory environment. This was equally the view of some international environmental law researchers.<sup>3</sup>

This is mostly because one way or the other, climate policy is bound to come into contact and potentially conflict with WTO rules. This is evident on the recent WTO dispute settlement cases' reflection on the evolution of WTO jurisdiction on trade–environment conflicts. It is against this background that one of the most high-profile environment-related trade disputes of the last 25 years would be reviewed in this study before the consideration of the current state of operation in multilateral negotiations. Trends in WTO Jurisprudence so far suggests that only a very small fraction of the over 500 disputes that have been considered under the GATT/WTO dispute settlement mechanism relate to environmental issues, and virtually all of them occurred over the past three decades. Despite their small number, environment-related trade disputes have attracted a great deal of public attention. A closer examination of the most important cases reveals important developments in international trade jurisdiction.

#### 4.1 The Tuna–Dolphin Case

It so happened that one of the earliest and most controversial trade–environment disputes concerned a US ban on certain tuna imports as part of a wider effort to protect dolphins. The 1972 Marine Mammal Protection Act (MMPA) required US fishermen to use dolphin-safe fishing methods to prevent the unwanted trapping of dolphins in purse seine nets used by tuna fishing fleets. In 1984, the US Congress added a Direct Embargo Provision to the MMPA that allowed the US to impose import bans on tuna from countries that did not employ dolphin-safe fishing methods<sup>4</sup>. This trade measure was designed to prevent foreign competition from circumventing the MMPA's provisions and gaining an unjustified competitive advantage over US fishermen. When the United States implemented an embargo on tuna imports from Mexico and a few other countries in 1990, Mexico filed a complaint with the GATT arguing, among others, that the US ban was illegal as it was focused on process and production methods (type of nets that trap dolphins), rather than the product itself (tuna). Mexico further argued that the United States was not allowed to use GATT Article XX to force other countries to abide by its domestic environmental laws, proving the bias of extraterritoriality. The GATT panel that heard the case decided in Mexico's favour in 1991, but the ruling never became legally binding. In light of the upcoming negotiations on the North American Free Trade Agreement, (NAFTA), Mexico decided not to demand the formal adoption of the decision. In any case, the GATT rules gave any party, such as the United States, the right to veto a panel decision. The decision caused uproar among environmentalists and led to a protracted debate in the 1990s about whether the GATT was fundamentally hostile to environmental concerns.<sup>5</sup>

<sup>1</sup>*Ibid.*

<sup>2</sup> United Nations' Environmental Programme, 2019 Reports.

<sup>3</sup> Houser, T., Bradley, R., Childs, B., Staley, B., Werksman, J. and Heilmayr, R. 2008. Leveling the Carbon Playing Field: International Competition and US Climate Policy Design. Washington, DC: *The Peterson Institute for International Economics*.

<sup>4</sup> An Overview of these and other environment-related cases, as well as panel and appellate body reports is available at: <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)> Accessed 24th August, 2020.

<sup>5</sup> Esty, D. 1994. Greening the GATT. Washington, DC: *Institute for International Economics* Vol 5, p. 23.

#### 4.2 The Shrimp–Turtles Case

A similar case to the tuna–dolphin dispute emerged in 1997, when India, Malaysia, Pakistan and Thailand filed complaints at the WTO against a US decision to force foreign shrimp trawlers to use so-called ‘turtle excluder devices’ (TEDs) when fishing in areas where sea turtles are present. The plaintiffs argued that this measure, which was based on the US Endangered Species Act of 1973, was in breach of WTO rules as it threatened foreign producers with a trade ban if they did not comply with US environmental law. Again, the case was decided under the enhanced powers of the WTO agreement and in the context of the WTO’s greater emphasis on balancing free trade with environmental sustainability. In 1998, the dispute settlement body (DSB) ruled that the US import ban was generally a legitimate policy with regard to provisions under Article XX related to ‘exhaustible natural resources’.

However, it also found that the way the ban operated and the fact that the United States had previously negotiated treaties on sea turtle protection with some but not all affected countries, constituted ‘arbitrary and unjustifiable discrimination’ between WTO members. The United States subsequently changed its rules to be targeted at individual shipments rather than at countries – a practice that the WTO decided was justified under Article XX. While the United States technically lost the initial case, the decision marked an important shift in WTO jurisdiction as it essentially acknowledged that in certain circumstances, countries can use trade measures with the aim of protecting natural resources. The United States lost the case not because it aimed to protect the environment but because it had designed the measure in a discriminatory way – similar to the above gasoline case. Critically for the debate on whether the WTO and environmental policies are compatible, the ruling also pointed to the possibility that trade restrictions can be based on process and production methods in another country if these restrictions do not arbitrarily and unjustifiably discriminate between different countries<sup>1</sup>.

#### 4.3 The EC–Biotech Case

A series of food and feed safety scares in Europe in the late 1980s and in the 1990s created considerable public pressure for more stringent food safety measures at the European level. In the second half of the 1990s, NGO campaigns and consumer hostility against genetically modified organisms (GMOs) led the EU to impose a de facto moratorium on GMO approvals and imports. Under pressure from their farming and biotechnology sectors, the United States, Canada and Argentina in 2003 brought a WTO case against the EU’s restrictions on the marketing of GMOs. At the heart of the dispute was the question whether the EU was entitled to act in a precautionary manner even though a high degree of scientific uncertainty surrounded the GMO safety debate. The use of the WTO as a forum to settle a dispute over the appropriate use of precaution in environmental risk regulation proved controversial, not least since the Cartagena Protocol on Bio-safety had been adopted in 2000 against US resistance<sup>2</sup>. In the year 2006, the WTO ruled against the EU on procedural grounds, finding that the de facto GMO moratorium was in violation of WTO law, but did not pass a substantive judgment on the WTO consistency of the EU’s precautionary GMO legislation as such. By the time the ruling was announced, the EU had already revised its regulations on GMOs and lifted its moratorium at least partially, even though its GMO approval process remains complex and prone to substantial delays due to domestic resistance to agricultural biotechnology<sup>3</sup>. (Lieberman and Gray 2008).

#### 4.4 The US–Gasoline Case

The United States amended the Clean Air Act, (CAA) in the year 1990 in a desperate bid to improve air quality by reducing adverse emissions from gasoline use<sup>4</sup>. The law mandated the sale of reformulated or otherwise cleaner gasoline in heavily populated urban areas but permitted the continued sale of conventional gasoline in more rural areas. To prevent a shift in inexpensive but highly polluting gasoline ingredients from urban to rural areas, the law also stipulated that conventional gasoline must remain as clean as it was in 1990, being the baseline. By and large, domestic refiners were allowed to use individual baselines that were actually in use in 1990, while foreign producers had to follow an average baseline set by the Environmental Protection Agency (EPA). This, Venezuela and Brazil argued, was in conflict with Article III of the GATT as it discriminated against imported products. In the year 1996, the WTO Appellate Body decided that the baseline establishment methods were indeed inconsistent with Article III and could not be justified by Article XX, as the United States had claimed. However, the Appellate Body found that the US measures were aimed at the conservation of natural resources and that WTO members were free to set their own environmental objectives, provided they do

<sup>1</sup>R Howse,(2002). The Appellate Body rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate. *Columbia Journal of Environmental Law* 27(2): 491–521.

<sup>2</sup>Falkner, R. 2007. The Political Economy of ‘Normative Power’ Europe: EU Environmental Leadership in International Biotechnology Regulation. *Journal of European Public Policy* 14(4): 507–526

<sup>3</sup>S Lieberman and T Gray. (2008) The World Trade Organization’s report on the EU’s moratorium on Biotech Products: the Wisdom of the US Challenge to the EU in the WTO. *Global Environmental Politics* 8(1): 33–52.

<sup>4</sup><[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)> Accessed 24th October, 2020.

so in conformity with WTO rules, in particular with regard to the treatment of domestic and foreign products. The dispute settlement body, now operating under the strengthened rules of the WTO agreement, thus took a broader view of the environmental purpose of the trade measure and did not focus solely on the discriminatory nature of the measure<sup>1</sup>.

#### 4.5 The Brazil–Retreaded Tyre’s Case

In late 2004, Brazil decided to strengthen its import restrictions on retreaded tyres which are reconditioned old tyres for further use from non-MERCOSUR countries, arguing that the disposal of such tyres creates environmental and human health problems<sup>2</sup>. A year after Brazil imposed these restrictions, the EU asked for a WTO panel to consider whether they conformed to WTO rules. Brazil claimed that its import restrictions were justified under Article XX of the WTO and that it was obliged to exclude MERCOSUR countries from the restrictions according to the rules of the customs union. The EU countered that the exemption of MERCOSUR countries from the import restriction constituted a breach of the WTO’s non-discrimination rule, among others. Both the Panel and the Appellate Body ruled in 2007, albeit for different reasons, that Brazil’s import restrictions were inconsistent with WTO rules and could not be justified by Article XX. Similar to earlier rulings such as US–gasoline or shrimp–turtles, the Appellate Body argued that import bans can be justified on environmental grounds, but that the chapeau, that is the introductory provisions, (Preamble) of Article XX stipulates that they must not lead to ‘arbitrary and unjustifiable discrimination between countries’. Brazil complied with the DSB’s request to revise its laws to make them conform to WTO rules.

#### 5.0 The Implication of the Decisions

Overall Trends in WTO Jurisdiction over the past two decades, GATT/WTO jurisdiction on environment-related trade measures has however changed considerably, thus putting into proper perspective the hurdles encountered in achieving environmental protection in the light of international trade measures and instruments. Previous rulings as in the tuna–dolphin case insisted that trade restrictions must not be aimed at process and production methods (PPMs) outside a country’s own jurisdiction, a position that threatened to undermine many trade-related environmental policies<sup>3</sup>. The aftermath of this decision, however is that the US–gasoline case marked the cautious beginning of a less restrictive interpretation of environmental measures. While the WTO panel stressed that trade measures must not discriminate among countries, it acknowledged that they can be used as a tool for discrimination based on grounds of environmental protection. The shrimp–turtle case is equally widely seen as a watershed in the WTO’s interpretation of environmental trade measures as a way in which international trade instruments and measures can be used to undermine or otherwise befuddle environmental protection initiatives. This decision almost reversed the earlier tuna–dolphin decision by arguing that a trade measure based on PPMs can be directed at other countries under Article XX of the WTO and that animals can qualify as an ‘exhaustible natural resource’ that may be protected through trade bans.

In the EC–biotech case, the WTO Panel reinforced the importance of non-discrimination and the proper application of regulatory procedures, but acknowledged the importance of scientific uncertainty in justifying trade restrictions, arguing that a moratorium amidst scientific uncertainty need not necessarily violate international trade law<sup>4</sup>. Thus, WTO jurisdiction has gradually come to accept that trade-restricting measures under Article XX can be justified for environmental reasons, but continues to insist that they must not constitute an arbitrary and/or unjustifiable discrimination. Indeed, the primary reason for why environmental measures in gasoline, shrimp–turtle, and retreaded tyres were found to be in breach of WTO rules was not the ultimate objective of these measures but the way in which they had been applied. Many of the researchers<sup>5</sup> argued that the WTO ruled against these measures not because they were inherently bad, but because they ‘were either clear attempts at industrial protection dressed up in environmentalist clothes, or they were poorly thought through or inappropriate tools for the environmental management intended’<sup>6</sup>.

Furthermore, the Committee on Trade and Environment and the Doha Round One of the outcomes of the Uruguay Round was the creation of the Committee on Trade and Environment (CTE) in 1995, which was tasked to consider the relationship between environmental and trade measures and to formulate recommendations on how to modify WTO rules with regard to environmental policy if modifications are required. The CTE’s initial work program covered an extensive policy terrain, ranging from the relationship between MEAs and WTO rules

<sup>1</sup>M.J Trebilcock, and R Howse. (2005). *The Regulation of International Trade*, 3rd Edition. New York: Routledge. UNEP. 2009. *Climate and Trade Policies in a Post-2012 World*. Nairobi: UNEP. WTO. 2004. *Trade and Environment at the WTO*. Geneva: WTO.

<sup>2</sup><[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)> Accessed 15th November, 2020.

<sup>3</sup>T.L Brewer, (2010). *Trade Policies and Climate Change Policies: A Rapidly Expanding Joint Agenda*. *The World Economy* 33(6): 799–809.

<sup>4</sup>*Ibid*.

<sup>5</sup>R DeSombre and J.S Barkin(2002) *Turtles and Trade: The WTO’s Acceptance of Environmental Trade Restrictions*. *Global Environmental Politics* 2(1): 12–18.

<sup>6</sup>*Ibid*.



to issues related to transparency, market access, intellectual property rights, and arrangements with NGOs. To date, the CTE has made only minimal progress in trying to resolve the issues on its agenda. At best, it produced a series of background studies and annual reports on trade–environment matters and provided a forum for different stakeholders from national and international bodies to exchange their views<sup>1</sup>. At the centre of the CTE’s failure to resolve any of the issues on its agenda are deep-seated differences in national interests, particularly between developed and developing countries, but also a more general unwillingness among participants to address the underlying tensions between WTO norms and principles and those of environmental regimes.<sup>2</sup>The role of the CTE in the WTO framework changed with the launch of the Doha Round in 2001, when it was given a negotiating mandate at the WTO Trade Negotiations Committee (TNC). The 2001 WTO Doha Ministerial Declaration recognizes the importance of ‘enhancing the mutual supportiveness of trade and environment’<sup>3</sup> This paragraph calls for ‘the reduction or, as appropriate, elimination of tariffs and non-tariff barriers to environmental goods and services’. Other elements of the negotiation mandate include the relationship between the WTO and MEAs and procedures for information exchange between MEAs and WTO committees. Little progress has been made in any of these areas. Notwithstanding the potentially large gains from the liberalization of environmental goods and services,<sup>4</sup> because ‘environmental goods’ were not defined in the Doha mandate, much of the focus in negotiations has been on competing attempts to arrive at a workable definition. This task is further complicated by the fact that technological and industrial progress and development makes it difficult to establish the specific items of goods that fall into this category of exemption.

Apart from the connection of certain international trade instruments like General Agreement on Tariff and Trade, GATT, World Trade Organisation, WTO, North America Free Trade Agreement, NAFTA, Africa Growth and Opportunity Act, AGOA and the New Partnership for Africa Development, NEPAD which could be contended to not have significantly portrayed sufficient environmental protection and sustainable development objectives, the Agreement for the Implementation of the Provisions of the United Nations’ Convention on the Law of the Sea of 10th December, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks provided in Article 5 that ‘in order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal states and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the convention ... b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global’... It is however noted that with the many caveats, restrictions, special reservations, considerations and qualifications and economic interests given to coastal and fishing States, it is difficult to see how the environmental protection would be given utmost priority by this international legal instrument.

## 6.0 Conclusion

The trade–environment nexus remains a controversial and challenging issue on the international trade agenda. This is because Protectionism as well as liberalism has been explored in times past as wealth-creation mechanisms, as the exploitation of natural resources has been largely effective leading to technological challenges. Nature has therefore been seen as a finite resource which should not be perpetually explored. Some progress has been made in identifying the circumstances in which international trade and environmental protection can be mutually compatible, but several areas of contention and conflict remain. At the national plane, the combined efforts of the National Environmental Standards and Regulations Enforcement Agency, NESREA is not unnoticed, but more work is required in the area of its enforcement mechanism and balancing environmental regulation with trade enhancement. The first area of the instant discourse relates to the WTO’s general approach to environmental policy and the need to set as a core agendum environmental protection by every other international trade measure. Some observers call on the WTO to become more engaged with environmental issues, not least since the WTO already adjudicates cases that involve the lingering conflicts between environmental measures and international trade law. Given the WTO’s de facto impact on global environmental policy, they argue that the WTO should take on more formal environmental responsibilities, even though details of such a closer engagement with the global environmental agenda remain sketchy. On the other hand, concerns have been raised that environmental protection might actually take a backseat on the international trade agenda due to an increasing use of bilateral agreements instead of multilateral ones and a generally low

<sup>1</sup> Charnovitz; Neumayer, *supra*.

<sup>2</sup> M Gabler, (2010). Norms, Institutions and Social Learning: An Explanation for Weak Policy Integration in the WTO’s Committee on Trade and Environment. *Global Environmental Politics* 10(2): 80–117.

<sup>3</sup> Paragraph 31 of the WTO Doha Ministerial Declaration.

<sup>4</sup> R Steenblik, D Drouet and G Stubbs, (2005). Synergies between Trade in Environmental Services and Trade in Environmental Goods. *OECD Trade and Environment Working Paper* 2005–1. Paris: OECD.

interest among some countries on issues related to environmental protection, more so that in cases of conflict between national economic or commercial interests and environmental concerns to other adjoining nations, the former often prevails.

The WTO has therefore so far trod a careful path through this debate, stating repeatedly that, while it aims to contribute to sustainable development, it does not consider itself as an environmental protection agency<sup>1</sup>. The second area relates to the interpretation of existing legal provisions. Despite an evolving mandate and institutional framework, the WTO has had significant impact on certain environmental measures, as outlined above. Past decisions have clarified what a ‘necessary’ environmental measure is; what is meant by ‘exhaustible natural resource’; whether measures can extend extraterritorially; and how ‘arbitrary’ and ‘unjustifiable’ should be interpreted under the chapeau of Article XX. Disagreement still exists, however, with regard to environmental measures aimed at PPMs, especially when they are ‘unincorporated’, that is when they cannot be detected in the final product. The definition and use of precaution remains equally contested, as has been illustrated by the EC–biotech case and the question of ‘sound’ science as a criterion for policymaking versus a broader interpretation of the evidence basis for risk assessment. Moreover that most international trade Agreements have as their focus-enhanced inter-State relations and consequently, economic growth and development, rather than environmental protection.

The third area relates to the question of inclusiveness and transparency of decision-making. While the CTE has been tasked with addressing the relationship between MEAs and the WTO, both in institutional and jurisdictional terms, there remains considerable debate on how to integrate the two, especially when the former continues to employ trade-restricting measures that remain vulnerable to challenges under WTO law. Another issue of contention is the access of external stakeholders, especially civil society and NGOs, to WTO decision-making processes. While the WTO has promoted dialogue with interested organizations, NGOs continue to raise valid concerns about the lack of transparency in the WTO’s deliberations and negotiations, especially with regard to environmental issues. The fourth and final area relates to the increasingly important impact of the climate change debate on international trade. As States explore different options for reducing greenhouse gas emissions, it is becoming increasingly clear that trade measures will be part of the international effort to combat global warming as one is consequent upon the other. This could be in the form of border tax adjustment to address international competitiveness issues, preferential treatment of climate-friendly goods and services, renewable energy subsidies and product labels indicating carbon content, among others. The issue of the unwillingness of developed power nations to agree to stated acceptable carbon emission targets because of their economic objectives equally occupies a front-burner.

Concerted efforts to enforce international climate policy through trade measures may severely test the scope of Article XX and a push to target carbon-content in internationally traded goods may test the WTO’s willingness to accept trade measures that are based on PPMs. The WTO itself recognizes its responsibility in the international community to address climate change as part of its sustainable development agenda, but sees its role primarily as an arbiter of conflicts. The challenge will therefore be to avoid the trap of green protectionism where general trade restrictions are used to seek compliance with quite distinct climate goals. Climate policy may yet prove to be the biggest challenge for the WTO’s ability to manage the trade– environment relationship without compromising one at the valuable expense of the other.

## 7.0 Recommendations and the Way Forward

States must bear in mind the need to balance the concerns of environmental protection as they wilfully enter into international trade Agreements. Environmental protection should thus be recognised as the new fulcrum upon which trade liberalism and nature protectionism should be measured with a view to evolving an internationally supervised national environmental protection architecture that does not deflate international trade objectives.

There must be a conscious effort geared towards providing an international institutional environmental compliance and enforcement mechanism that imposes sanctions on States for environmental infractions.

The International judicial apparatus must be strengthened the more to ensure redress for any infringement of environmental protection on trade grounds.

International Trade Agreements must willfully incorporate environmental concerns as natural after-clap of their trading activities.

There is a need to develop the culture of good neighbourliness, regional and international collaboration that incorporates unity of purpose as an integral part of the trading culture amongst the comity of nations.

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<sup>1</sup> World Trade Organisation Bulletin, 2019, p 38.

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