

## **ENVIRONMENT & TRADE AT CROSSROADS: A SEARCH FOR THE MESSIANIC ROAD TO RECONCILIATION**

### **1.0 Introduction**

The 1980s saw a growing appreciation of the extent to which economic and social development needed to be environmentally sustainable. First coined by the Brundtland report of the World Commission on Environment and Development in 1987, the term sustainable development would later become a subject of a good number of multi-lateral agreements relating to environmental sustainability and protection. Sustainable development was defined as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs.' There is consensus now that trade and environment are inextricably interlinked and inseparable. The 21<sup>st</sup> century momentum of globalization and trade liberalization has brought environmental concerns at the forefront of international development agendas. Within the new globalised world order, international trade is considered as the new avenue to help developing nations fight poverty. In the industrialized North increased economic activity, trade and other trade related activities like industrialization have threatened the destruction of the environment.

The need to strike a balance between trade and environment has been behind the environmental protection movement. This movement was alive during the promulgation of the World Trade Organization (herein after WTO) and the General Agreement on Tariffs and Trade (**herein after GATT**). Although the WTO agreement itself contains no reference to environmental sustainability (other than a passing reference in its preamble), its founding conference agreed **upon** a work programme for a new Committee on Trade and Environment. **This work programme was** designed to identify the relationship between trade measures and environmental measures, in order to promote sustainable development and to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required.

Prior to the current WTO/GATT regime on environmental protection, there were some Multilateral Environmental Agreements (herein after MEAs) with trade related terms (herein after TREMS), and others have emerged since then. A potential conflict of these two parallel regimes has been predicted by academicians, although no conflict has been tested. In addition, most of these MEAs have no clear enforcement mechanisms although the WTO Appellate Body has in some instances referred to them as other avenues through which member states can meet their environmental goals. Secondly, it is noted that for the sixteen years of its existence, **the** WTO has built the best mechanism for environmental protection at the global scene. However, with its duo role of promoting free trade, it is unlikely that WTO will be able to enforce higher environmental standards.

The purpose of this paper **is** to analyze the effectiveness of the current WTO legal regime on environmental protection. Many of the goals and policies of both sides of the trade-environment paradigm are inconsistent, and difficult to reconcile. These ideological differences need to be reconciled in order to achieve the goal of sustainable development.

This paper therefore seeks to address new avenues that the WTO can utilize to reconcile some of the conflicting goals with a view to enhance its environment agenda. The million dollar question is **this: will** it be possible for the WTO system to enforce higher environmental standards? It is the argument of this paper that the current international regime on environmental protection under the GATT /WTO should be restructured to give credence to other avenues like MEAs if substantial results in global environmental protection are to be achieved. Secondly, a working program on how to protect environment at the national level is also an avenue worth venturing into.

### **1.1 Evolution of the WTO/GATT System**

The end of October 1947 witnessed the opening of the General Agreement on Tariffs and Trade, 1947 for signatures which came into force two months later in January 1948. The GATT 1947 created an international trade regime purporting to reduce tariffs and to establish a code of conduct for international trade. This was expected to address the development dilemmas of the global South, but it has been argued

that the aftermath of GATT saw a widening gap between the rich and poor nations with the latter becoming poorer. The International Trade Organization charter was largely discussed during the Havana Conference on Trade and Employment in 1948, however the charter never came to life after the US congress failed to reject or ratify it. Because the GATT 1947 never required such approval, it remained in force until January 1995 when GATT 1994 came into force. The initial rounds of the GATT 1947 never focused on environmental concerns with most parties delaying dialogue on trade and environment. However, this period marked an era in which environmental treaties and a number of environmental related conferences were held. It can be said that there was growing interest in environmental policy making at this time. This is evidenced by the treaties and conferences which were held during this time. In reality however, the forces of free trade reigned over those of environmental protection. In 1972 the Stockholm Declaration was passed by the UN conference on Human Environment in Stockholm. At this conference, the relationship between economic growth and the environment was addressed and continued being addressed in the years that followed. It can be argued that the need to protect the environment against the increasing rigors of the world had become more evident. During the Tokyo Round of trade negotiations (1973-1979), questions about the degree of environmental measures inform of technical regulations and standards which could be imposed were considered. The Tokyo Round Agreement on Technical Barriers to Trade called for non discrimination in the application and adoption of technical regulations among other things.

The WTO was created in 1995 after the Uruguay Round became the successor of GATT 1947. The creation of the WTO came with the General Agreement on Trade and Tariffs 1994, (hereinafter GATT) which was actually a replica of the old GATT. The WTO is designed to provide a common institutional framework for the conduct of trade relations among its members. The central mandate of WTO is to encourage free trade among members and ensure compliance with all agreements under it. Article XX of the GATT permits members to restrict international trade on grounds of environmental protection. I will refer to this as the duo mandate of the WTO.

## 1.2 The Environmental Protection Regime under the WTO/ GATT System

The Agreement establishing the WTO recognizes that trade should be conducted while allowing for the optimal use of the worlds resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so ... and this was reaffirmed in the Doha Round. Although the WTO has no express provision on environment other than the passing reference in its preamble, Article XX of the GATT provides for general exceptions under which trade can be restricted on the basis of environmental protection. I will reproduce the relevant provisions of Article XX for purposes of clarity.

*“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; ...”*

The exceptions under Article XX (b) and (g) are qualified by the *chapeau*. Even if a measure meets the tests of a provision of Article XX, it would be illegal if it constitutes (i) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (ii) a disguised restriction on international trade. The antidiscrimination provision of the chapeau forbids both arbitrary and

unjustifiable discrimination between countries without qualification; this prohibition appears to have the same field of application as GATT Articles I and III. It would include all countries, both importing and exporting, and would mean, by implication, that Article XX, in contrast to Articles I and III, allows discrimination between countries, as long as it is not arbitrary or unjustifiable. The approach taken therefore in interpreting Article XX is the two tiered approach i.e., for a restriction to be allowed under this Article it must fulfill the requirements under (b) and (g) in addition to the requirements of the chapeau.

A number of complaints have been considered in light of the above provisions. These have demonstrated how far the WTO can go in upholding environmental protection vis-à-vis international trade. As the discussion will reveal, despite the great work of the WTO in this area it is unlikely that it will be able to enforce higher environmental standards given its '*duo mandate*' in which it is inclined to uphold its '*real mandate*' of promoting free trade. (Emphasis added)

### **1.3 Shrimp-Turtle: Setting Standards of the WTO in Environmental Protection**

The Shrimp-Turtle complaint arose from a ban imposed by the USA on India, Malaysia, Pakistan and Thailand against importation of certain shrimp and shrimp products. In 1989, as part of a program to protect the diminishing populations of sea turtles, the United States enacted a law that barred the import into the United States of wild-caught shrimp harvested with technology that could adversely affect sea turtles unless it came from a country that had adopted a program for turtle protection comparable to the U.S. program. The U.S. program simply required shrimp trawlers to install and use "turtle excluder devices" ("TEDs"). Although the U.S. government initially applied this embargo provision only against countries in the wider Caribbean, a federal court in late 1995 ordered the law applied worldwide, as of May 1996. The four countries **noted** above that harvest and export shrimp to the United States, newly subject to the embargo provision, initiated dispute settlement with the United States in the WTO, claiming that the embargo violated U.S. obligations to them under the GATT. The Panel ruled in favor of the claimants in May 1998. The United States appealed to the Appellate Body (hereinafter AB). In a decision issued on October 12, 1998, the AB upheld the judgment of the Panel that the United States' ban on imports of shrimp harvested without TEDs violates WTO rules. Although the AB found that the U.S. law prescribing the import ban was within the scope of measures covered by Article XX (g), the ban was not permissible because it was applied in an arbitrary and discriminatory manner. Below, I reproduce two paragraphs from the AB report which point to the fact that the hope for high standard in environmental protection by the WTO is a far cry from the wilderness.

"185. In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered

species or to otherwise protect the environment”.

“186. What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between members of the WTO, contrary to the requirements of the chapeau of Article XX. ...As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfil their obligations and respect the rights of other Members under the *WTO Agreement*.” (Emphasis added)

The outcome of the shrimp turtle calls us probably to revisit the ‘*real mandate*’ of the WTO. It has been argued by ADDIN RW.CITE{{49 Weinstein,Michael M. 2001}}(Weinstein, Charnovitz 2001) that further progress can take place within the current system of the WTO. This is absolutely true, but to what extent can the WTO system push for high standards of environmental protection?

In theory, the objectives of trade liberalization and environmental protection should be entirely compatible. Both have as their aim the optimization of the efficient use of resources, whether from the perspective of maximizing the gains from the comparative advantages of nations, through trade, or of ensuring that economic development becomes environmentally sustainable. Indeed, each of the Rio and Uruguay Round agreements claims to be in accordance with the other. The former states that: 'An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.' However, as ADDIN RW.CITE{{65 Brack,Duncan 1995}}(Brack 1995) argues **that** given the world's current political and economic systems, the objectives of trade liberalization and of environmental protection frequently do not march so happily hand in hand.

Article II of the Marrakesh agreement provides that the WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments. This provision clearly stipulates the mandate of the body, **which is the** promotion of free trade. Using a scenario here it is unlikely that a parent will help a child of another person when the same parent has not fulfilled his/her parental responsibilities. Given the overriding objective of free trade, in my view, higher environmental standards under the WTO are unlikely. To argue otherwise would be theoretical with no practical reality.

Additionally, a step to enforce higher and costly environmental program may be regarded by developing countries as an imposition by the wealthy industrialized powers. **ADDIN RW.CITE{{66 Chaturvedi,Sachin 2003}}**(Chaturvedi, Nagpal 2003) argues that some of these environmental standards, often resorted to by developed countries, are seen as non-tariff barriers against southern trade. For instance, Thailand, while applauding the final judgment in the Shrimp case, sharply criticized the AB for showing "deference to underlying political concerns" about the WTO's sensitivity to environmental protection, admonishing that "public relevant concerns should not be used to invalidate negotiated treaty obligations." ADDIN RW.CITE{{67 Perkins,Nancy L. 1999}}(Perkins 1999).

The reactions to the Shrimp-turtle decision were diverse and equally mind provoking. I have already noted the ironical decision of Thailand in the aftermath of the decision. The US, on the other hand, applauded the decision of the AB, but some non-governmental organizations reacted with dismay to the Appellate Body ruling, alleging WTO bias against environmental protection. The World Wildlife Fund, for example, asserted that the decision "reveals the profound bias of the WTO against environmental

policies, and in favor of 'free trade' at any cost."

The above reactions are clear on one thing: striking a clear balance between trade and environment in the current WTO system is like day dreaming. There is a need to review the current legal regime, and likewise, for the WTO to adopt other means of environmental protection within its system. Some of the alternatives are discussed below.

#### **1.4 Multilateral Environmental Agreements (MEAs)**

The Tuna/Dolphin case, which was considered under the Old GATT 1947, provides a very good background to the question of MEAs. In this case, Mexico complained about the ban of its tuna by the US because the process of harvesting the same did not comply with the US regulations. The GATT ruled in favor of Mexico, holding that the GATT rules did not allow one country to take trade action for purposes of attempting to enforce its own domestic laws in another country. It seems that the GATT panel's main objection to the US ban was due to the grounds of its unilateral nature. As the panel argued, to accept the US case would be to agree that each GATT member "could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the GATT" ADDIN RW.CITE{{65 Brack,Duncan 1995}}(Brack 1995). A decision to the contrary would tantamount to sanctioning disguised protectionism because countries could always find a production method in the exporting nation to which they could choose to object, making protectionist tendencies hard to constrain. It now agreed that if an environmental action were to be considered necessary, it should be negotiated and organized multilaterally ADDIN RW.CITE{{65 Brack,Duncan 1995}}(Brack 1995) (Saira 2009).

The principle of sovereignty of states of course dictates that international agreement, rather than unilateral action, is preferred. In fact, unilateral trade measures, such as bans, may not be effective in achieving their aims in some cases. For instance, a country with a small market can never use a ban and expect results. Therefore, trade bans can only be utilized by big markets, such as the US and EU, leaving out a number of players.

To this end, the WTO should encourage and embrace MEAs in its legal regime. Why? Currently, the possibility of conflict between MEAs and the WTO is very high, although no case has been tested. The Montreal Protocol, for instance, permits parties to ban imports of chlorofluorocarbons and other controlled substances from non-parties, which is in breach of the 'most favoured nation' and national treatment clauses of GATT. Trade provisions were a critical element in creating incentives for non-party states to join the regime. Although the GATT Secretariat has suggested that 'GATT rules could never block the adoption of environmental policies which have broad support in the world community,' the same document admits the possibility of conflict between GATT rules and MEAs with trade provisions, and suggests that 'it is not clear that such departures from the non-discrimination principle are always necessary to achieve the environmental goal of the environmental agreement.' The WTO's Committee on Trade and Environment suggests that some risk of conflict exists between provisions of MEAs permitting trade measures and WTO rules. There are approximately 20 MEAs with trade related terms.

#### **1.5 A View from the Developing Countries**

Amidst the entire campaign of environmental protection, the economic downturn has pushed developing countries to untold misery and suffering. Before making any conclusions, it is important that I consider a view from these economies. As a starting point, the Doha Declaration notes that the majority of WTO Members are developing countries. It calls for positive steps to ensure that developing countries,

especially the least developed, secure a share in world trade. Today, a number of regulations have emerged in the developed world aimed at protecting human and animal life, which falls within the realm of environmental protection. Some of the EU regulations have been criticized for their attempt to establish the precautionary principle as a norm of international law in order to alter the WTO rules.

It is generally agreed that a developing country's government and industry generally lack the experience and financial resources necessary to comply with overly stringent health, safety and environmental regulations, and standards that serve as defacto barriers to trade. It is not surprising, therefore, that these developing countries have considered some of these regulations as disguised barriers to trade aimed at crippling their development. One developing country commentator from Kenya has passionately described the social and economic plight of developing countries:

“Why do developed countries impose their environmental ethics on poor countries that are simply trying to pass through a stage they themselves went through? After taking numerous risks to reach their current economic and technological status, why do they tell poor countries to use no energy, agricultural or pest control technologies that might pose some conceivable risk of environmental harm? Why do they tell poor countries to follow sustainable development doctrines that really mean little or no energy or economic development? If only people in developed countries [who] are ‘passionate about environmental causes’...could see...the millions who are poverty stricken, sick, starving and even dying because of misguided environmental policies...”

African countries face other tough battles, too. Europe, in particular, has confined their exports largely to primary products and imposed high tariffs on processed commodities. Many agricultural products from poor African countries face quarantine rules that act as trade barriers, if these countries do not follow strict environmental standards. The developing nations generally believe that they have the right to industrialize, since the developed nations who are now pushing environmental policies were allowed to develop by polluting on their way to wealth.

In such a situation the WTO's duo mandate translates into a duo faced dilemma--to ensure that developing countries have a stake in the increasing international trade and fulfill the environmental aspirations of the North. Developing countries are definitely looking forward to expand their economies in order to meet the increasing human needs. How best can we achieve a holistic goal amidst these conflicting interests? The WTO and its partners should hopefully work out plans to ensure environmental protection at the country level through building capacity of environmental bodies and other initiatives. Secondly, protectionism policies in the agriculture sector through tariffs should be stopped because these have further hampered any hope for development of the global South. As Ananya Roy (2009) notes, the substantial agricultural subsidies that the Northern countries provide to their own farmers greatly imperil the ability of farmers in the global South to command a fair price for agricultural products in the national and global markets. While the Doha conference in 2001 called for the elimination of such subsidies, they continue to exist much to the dismay of the global South. These subsidies have pushed the economies of the global South to consider other unsustainable means to development at the detriment of the environment.

## 1.6 The Way Forward

To be overly critical to the WTO's regime may not provide any viable solution to the environmental dilemma. It has been stated that the WTO is 'crossing the river by feeling the stones' ADDIN RW.CITE {{51 Wolfe,Robert 2004}}(Wolfe 2004). There is an anticipated long period of evolution of the system, and hopefully some of the ideas outlined below can contribute to this evolution.

In the above discussion, I have set out the conflicting interests of the WTO in promoting free trade and environmental protection. I have also highlighted the plight of developing countries in their attempts to attain development amidst increasing pressures from the developed world to comply with high environmental standards. It is also noted from the discussion of the Shrimp-turtle case that the WTO is not likely to enforce higher environmental standards. The purpose of this section is to outline some of the avenues which can be considered to strike a delicate balance between trade and environment within the current WTO legal regime.

A need exists to change the WTO approach in environmental decision making. The WTO approach in handling complaints has been restrictive both substantially and procedurally. The GATT panel and the AB of the WTO are more inclined to protecting the interest of trade rather than environmental protection. My modest view would be that in interpreting these trade rules, recourse should be made to other references like the MEAs, some of which came into existence much earlier than the WTO. In the wake of the Seattle protests, the WTO approach has been under serious criticism for its rather restrictive and often insensitive approach to the broader environmental goals. It has been argued, for instance, that the WTO has proven to be profoundly anti-environmental both procedurally and substantively, handing down environmentally damaging decisions whenever it has had the chance to do so. Fears of a race to a dirty bottom are proving prescient, and optimism that trade rules can be greened from within has waned appreciably ADDIN RW.CITE{{55 Conca, Ken 2000}} (Conca 2000). Procedurally, the WTO should be more participatory by bringing other actors on the decision making Panel and the AB. One of the foremost critiques of the WTO procedures is the fact that its proceedings are secretive and that decisions are handed down by trade lawyers or economists who have little knowledge about the environment.

Regarding the global South, a persuasion to drop agriculture subsidies in the North is necessary. It is not only sad, but also unfortunate that the perpetrators of the free market economy who forced the global south to drop subsidies to their farmers have clung on the same practice to the detriment of the most vulnerable people in the global South. As noted above, devising other means through which trade and environment can be harmonized at the national level is worth venturing into. The new standards set by the global North, especially the European Union, call for capacity building in the global South to meet these standards. Without such capacity, the South is implied of being thrown out of international trade, contrary to the aspiration of the Doha round.

The issue of MEAs is by far the most contentious, because most of these agreements with trade related terms (TREMs) often conflict (on paper) with the WTO/GATT rules, especially the “Most Favored Nation” clause and non discrimination clause. Agenda 21 of the UN conference on Environment & Development stressed that the common goals of trade and environmental policy should be to “promote sustainable development through trade liberalization” and to make “trade and environment mutually supportive.” Achieving this goal is still a work in progress, and as already noted, a number of conflicts still exist between MEAs and the WTO's rules. Many environmentalists believe that international trade rules and dispute settlement procedures should give great deference to highly protective environmental policies. The WTO should give MEA policies deference and immunize them from WTO attacks in accordance with the Preamble of the WTO agreement. The Committee on Trade & Environment should create criteria that allow it to defer to TREMs, taken pursuant to MEAs that promote sustainable development. Since MEAs have unclear dispute settlement mechanisms and a low level of enforcement, the WTO is a better place to resolve disputes. The WTO is perhaps the most developed, legalized, and enforced international dispute resolution system in existence, aside from regional regimes.

A similar approach is found in the North American Free Trade Agreement (NAFTA), which allows

certain MEAs, such as Montreal Protocol, CITES, and Basel Convention, to take precedence over NAFTA obligations. However, this does not provide a process for the approval of future MEAs. Because of the strength of the WTO dispute mechanism, incorporating MEAs into the system would make the enforcement strong. There is need for caution before a MEA is recognized to ensure that it complies with the WTO rules. Some options to amend Article XX general exceptions are to permit trade measures specific to the MEA or to simply broaden the exception to provide more room for environmental provisions. Another option would be to adopt a collective interpretation of Article XX that would validate the existing MEAs, provide for notification of future MEAs, and define a 'safe harbour' they would have to fulfill in order to receive approval. The impasse between trade and environment is still work in progress which needs international cooperation.

## 1.7 Conclusion

The trade/environment debate is far from ending, and if anything, it's getting more complicated with every day that passes. The WTO and the world at large will have to consider more options on how best it can help developing countries, not on the global scene, but at the national level. The likely effect of MEAs conflicting with the WTO regime should be mitigated by recognizing the MEAs under the WTO. However, it is noted with concern that some of the Agendas in the MEAs epitomizes the theory that interests, rather than genuine concerns, have dominated the environment protection movement in some cases. For instance, the current Kyoto Protocol on carbon trading is, in my view, utterly misconceived, because a country can continue polluting its own environment by simply buying credits from a non-polluting country or one that is polluting less. Why not consider cleaner mechanisms that will instill a sense of responsibility and discipline among the actors? What we need to do is to find solutions which are more localized, because these will change the consumption patterns and bring higher returns to environmental protection. The agriculture subsidies in the West are hurting economies of the developing countries. The emerging standard trends especially in the EU block will require concerted efforts to ensure that the South is not completely left out of world trade.

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See the ruling of the Appellate Body in the Shrimp –Turtle case available at HYPERLINK

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In theory, GATT was supposed to have assisted developing countries in achieving a greater level of parity with developed countries; in reality, its initiatives have pushed developing countries to a higher level of dependency. According to the 1992 *Human Development Report*, international trade during GATT's existence widened the gap between the rich and the poor and produced "underdevelopment" in later countries. See Khator (2000) *Ethical Implications of World Trade on the Environment of Developing Countries*

The International Convention for Regulation of whaling , 1946, the International Union for Conservation of Nature and Natural Resources ( the World Conservation Union -IUCN) was established in 1947-8, the International Conference for the protection of Nature and Scientific Conference on the Conservation and Utilization of resources promoted by UNESCO in 1949 and many others.

Marrakesh Agreement Establishing the World Trade Organization, preamble, paragraph 2

Paragraph 6 of the WTO Doha Ministerial Declaration, 14 November 2001, states that “We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.” Environmental provisions are also contained in a number of other agreements of the WTO like the Agreement on Agriculture; the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) (WTO 1994b); the Agreement on Subsidies and Countervailing Measures; the Agreement on Technical Barriers to Trade (TBT) (WTO 1994c); the Agreement on Trade-Related Intellectual Property Rights (TRIPS) (WTO 1994d); the General Agreement on Trade in Services (GATS); and the Agreement on Government Procurement.

In international law, an unnumbered introductory clause or paragraph covering several subsequent provisions is called a chapeau.

Available at [HYPERLINK "http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm"](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)

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For a detailed discussion of this case see Sanford Gaines (2001), *The WTO's reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*(Ibid) A summary of the case can be retrieved from the WTO website at [HYPERLINK "http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm"](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)

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["http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf"](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf) [http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf) Last checked December 07, 2011

Available at [HYPERLINK "http://www.wto.org/english/tratop\\_e/envir\\_e/edis07\\_e.htm"](http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm)

[http://www.wto.org/english/tratop\\_e/envir\\_e/edis07\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm) Last Checked December 15, 2011

Article II provides for the general scope of the WTO

ADDIN RW.CITE{{67 Perkins,Nancy L. 1999}}(Perkins 1999) in her commentary on the United States - Import Prohibition of Certain Shrimp and Shrimp Products remarks that this decision was ironical because Thailand was on the winning side.

In announcing the U.S. intention to abide by the judgment, the U.S. Trade Representative to the WTO stated: "We are pleased that the Appellate Body found no inconsistency between the U.S. legislation at issue [as opposed to the application of that legislation] and our obligations under the WTO. We are also pleased that the Appellate Body made a number of important and positive findings that help clarify the critical relationship between WTO rules and measures taken to protect the environment."

ADDIN RW.CITE{{67 Perkins,Nancy L. 1999}}(Perkins 1999)

Available at [HYPERLINK "http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm"](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm)

[http://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm)

The US Marine Mammal Protection Act (MMPA) prohibited the “taking” (harassment, hunting, capture, killing or attempt to do any of these), and importation into the US, of marine mammals, except with explicit authorization. It governed, in particular, the taking of marine mammals incidental to harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean, an area where dolphins are known to swim above schools of tuna. The act meant a ban on the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards.

Citing the GATT, Analytical index: guide to GATT law and practice (Geneva: GATT, 1994 (sixth edition))

Ibid

*See generally* U.N. Environmental Programme & the International Institute for Sustainable Development, *Environment and Trade: A Handbook* (2000).

Ministerial Declaration of the World Trade Organization (WT/MIN/(01)/DEC/W/1), Ministerial Conference Fourth Session, Doha, (Nov. 9-14, 2001), at par. 2.

*See EU Regulation, Standardization and the Precautionary Principle: available at the WTO website* [HYPERLINK](http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_exsum_e.pdf)

["http://www.wto.org/english/forums\\_e/ngo\\_e/posp47\\_nftc\\_enlightened\\_exsum\\_e.pdf"](http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_exsum_e.pdf)

[http://www.wto.org/english/forums\\_e/ngo\\_e/posp47\\_nftc\\_enlightened\\_exsum\\_e.pdf](http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_enlightened_exsum_e.pdf) (Last Checked December,10 2011) A full report on the EU policies by the National Foreign Trade Council Inc. can be accessed from [HYPERLINK](http://www.nftc.org/default/white%20paper/precprin2EXECsum803.pdf)

["http://www.nftc.org/default/white%20paper/precprin2EXECsum803.pdf"](http://www.nftc.org/default/white%20paper/precprin2EXECsum803.pdf)

<http://www.nftc.org/default/white%20paper/precprin2EXECsum803.pdf> (Last checked 10 December, 2011)

John S. Wilson and Tsunehiro Otsuki, “Food Safety and Trade: Winners and Losers in a Non- Harmonized World”, World Bank Development Research Group – Trade, (2001); H. Newing and S. Harrop, “European Health Regulations and Brazil Nuts: Implications for Biodiversity, Conservation and Sustainable Rural Livelihoods in the Amazon”, *Journal of International Wildlife and Policy* 3(2), pp. 109- 124, at p. 10 (2000), citing “Summary of SPS Committee of 12-13 March 1998, G/SPS/R/10.

Alan Oxley, Kristen Osborne and Lisa Marty, “European Unilateralism – Environmental Trade Barriers and the Rising Threat to Prosperity through Trade”, Australian APEC Study Centre, Monash University (Aug. 2003). Quoted in *EU Regulation, Standardization and the Precautionary Principle by the National Foreign Trade Council Inc*

Ibid

ADDIN RW.CITE{{55 Conca,Ken 2000}}(Conca 2000) argues that important proceedings of the WTO such as dispute resolution hearings are closed and highly secretive, with no opportunity for stakeholders and public advocates to evaluate the quality of evidence or decisions. Judgments are rendered by trade lawyers and economists with little or no knowledge about environmental problems. The burden of proof is placed squarely on the shoulders of those arguing for environmental precaution. Although these procedural concerns are not unique to environmental issues, they create deep and recurring problems when environmental values and outcomes are at stake. Given the broad array of stakeholders in most environmental disputes, closed procedures guarantee that decisions will be poorly made and illegitimate

Trade measures have been a vital tool for Multi Lateral environmental Agreements. Conca argues that in some cases, trade itself has been the targeted activity. The Convention on International Trade in Endangered Species controls the import and export of species listed as endangered. The Basel Convention tackles the problem of abuses stemming from the trade in hazardous waste from the OECD to the global south (initially through a system of prior informed consent for waste imports and subsequently through an outright ban on the north-south waste trade). The Montreal Protocol, widely hailed as a model for international environmental regimes, was nearly derailed by a disagreement over whether to regulate production or consumption of the culprit chemicals. Trade provisions were a critical element in breaking this impasse, as well as in creating incentives for non-party states to join the regime

World Commission on Environment and Development, *Our Common Future* 54 (Oxford Univ. Press 1987)

John J. Audley, *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics*, at 33 (Georgetown Univ. Press 1997).

See John H. Jackson & Carlos M. Vazquez, [HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100188&FindType=Y&ReferencePositionType=S&SerialNum=0294168063&ReferencePosition=561"](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100188&FindType=Y&ReferencePositionType=S&SerialNum=0294168063&ReferencePosition=561) *Some Reflections on Compliance with WTO Dispute Settlement Decisions* [HYPERLINK](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100188&FindType=Y&ReferencePositionType=S&SerialNum=0294168063&ReferencePosition=561)

["http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100188&FindType=Y&ReferencePositionType=S&SerialNum=0294168063&ReferencePosition=561"](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100188&FindType=Y&ReferencePositionType=S&SerialNum=0294168063&ReferencePosition=561) *33 Law & Pol'y Int'l Bus.* 555, 561-62 (2002).

See Saira Bajwa, 2009 *The World Trade Organization and the Environment*, *Gonzaga Journal of International Law*