Chapter 5

Policy Shifts from GATT to WTO

5.1 Introduction

It is evident so far, that there is a marked, if not a drastic, difference in the rules, and consequently the policies, of the General Agreement and the newly created multilateral trade organisation, towards the issue of trade-environment. The causal factors affecting this policy-shift in the international trade regime have been identified in the preceding chapters. This chapter attempts to study this shift in the policies, on the basis of some key trade and environment cases within GATT/WTO. Moreover, in the light of the current status of trade-environment debate in the international system, it assesses the consequences on the rules, norms and decision-making procedures of the WTO.

5.2 Environmental Disputes in the International System

The production and consumption of most goods involves the use of scarce natural resources. Waste of resources, pollution and other kinds of environmental degradation are likely to arise whenever decisions about the use of environmental resources are made without taking into account the costs of environmental damage to society. Such divergence between private and social costs may result from market failures
(when environmental effects are disregarded as 'externalities')\(^1\) or from government failures (for instance, agricultural subsidies leading to excessive use of chemical fertilizers polluting soil and water, as in the case of the European Union). However, as also recognized by Agenda 21, the interactions between environmental policies and trade issues are manifold and have not yet been fully assessed.

On the national level, there is a tremendous increase in environmental laws, regulations and related court-cases to promote sustainable development, to remedy market failure (to internalize environmental costs so that the prices of goods and services reflect the real scarcity of resources used and the environmental cost of economic activity) as also to rectify government failures (for instance, to develop and enforce environmental property rights). However, on the international level, the making and enforcing of international environmental laws is slow, uncoordinated, cumbersome and uncertain\(^2\). Notwithstanding the dramatic increase in transboundary pollution\(^3\) and the international law principles on State responsibility, the number of international and national court proceedings involving liability claims for reparation of transnational injuries remains limited.

Even though there are now several hundred multilateral and bilateral international agreements in the field of environment\(^4\), their membership and effectiveness often remains limited, largely due to the difference in resource-endowments and priorities of different sovereign states. In addition, in dealing with 'global commons',

\(^1\)This involves the issue of polluter-pays-principle (PPP) and process-production methods (PPMs), both of which are discussed in detail in the context of the multilateral trade organization along with the analysis of trade-environment disputes, later in the chapter.


\(^3\)The latest in this disturbing series being the dense smog engulfing the south-east Asian countries - Malaysia, Indonesia, Phillipines and Singapore - generated by a man-made forest fire. The extent of damage caused to the human, animal and plant life is yet to be assessed.

there exists a tendency for some states to free ride on the efforts of others\(^5\). International Relations theory teaches\(^6\) that the disincentives for cooperation (such as inadequate information, communication and sanctioning mechanisms) can be overcome and international law made more effective through multilateral institutions. However, on the international level, there is no coherent institutional mechanism to deal effectively with environmental problems and coordinate the diffused efforts by specialized agencies\(^7\) and the proliferating number of international environmental agreements.

Since the adoption of the Stockholm Declaration by the UN Conference on the Human Environment in June 1972, a large number of UN Resolutions on principles and rules for the protection of the environment has contributed to the progressive development of customary law and soft law rules for the environment\(^8\). However, the number of international court and arbitration awards based on such customary rules remains limited\(^9\).

Moreover, due to differentiated responsibilities, standards applied and costs involved in different countries, these customary international environmental laws may prove ineffective for preventing and settling international environmental dis-

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\(^6\) For example, in R.O. Keohane's, *After Hegemony: Cooperation and Discord in the World Political Economy* [Princeton, 1984], Chapters 4 and 5.

\(^7\) Such as the United Nations Environment Programme (UNEP), the World Health Organization (WHO), the World Meteorological Organization (WMO), the Food and Agricultural Organization (FAO), the International Maritime Organization (IMO) and so on.


putes. Furthermore, if such disputes are about the use and protection of the global-commons and the rights and duties of States are not defined through multilaterally agreed treaties, the relevant rules of general international law are less clear and may not be enforceable vis-a-vis dissenting third countries. Nevertheless, in practice, governments have tended to avoid judicial and liability-based dispute settlements and seem to prefer to settle their disputes by negotiations, good offices, mediation or through standing transboundary commissions.  

The dispute settlement procedures of the General Agreement and of the European Union (European Community before 1994) have been used most frequently for the settlement of international environmental disputes and for the clarification and progressive development of the relevant rules of law than any other international dispute settlement mechanisms. Besides the abovenoted problems with the international environmental agreements there are some additional positive factors resulting in the international community turning to the dispute settlement mechanism of the multilateral trade regime. Such features are discussed next.

### 5.3 The Multilateral Trade Organization and International Environmental Disputes

Both the General Agreement and the EU differ from most other international organisations in that they provide for comprehensive codes of substantive policy rules, law-making mechanisms including the possibility of majority decisions binding on

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10For instance, the 1990 London Protocol (to the Montreal Agreement on Substances that Deplete the Ozone Layer) provision, enabling any contracting party to submit reservations regarding another party's implementation of its obligations under the Protocol, to an Implementation Committee.

11On the GATT dispute settlement system, see E.U. Petersmann and R. Jaenicke (ed), *Adjudication of International Trade Disputes in International and National Economic Law* [Fribourg, 1992].
all contracting parties, as well as for national and international dispute settlement
proceedings enabling legally binding third-party decisions. Moreover, they qualify
their liberal trade rules by giving priority to the right of member countries to take
non-discriminatory measures and also trade restrictions for the protection of the
environment. The active use of dispute settlement mechanisms has helped to clar-
ify the trade and environmental rules of these treaties and their mutual consistency.

However, the original GATT treaty contained very little on the dispute settle-
ment process, besides providing for consultation (Article XXII and XXIII) and
then submittal of issues to the contracting parties. Disputes were considered in
broad working parties comprising of representatives of governments. In the 1950s
the practice began to evolve more towards a ‘rule oriented’ system. This intro-
duced a ‘panel’ of individuals to make determinations and findings and recommend
them to the contracting parties. Subsequently, the contracting parties utilised the
panel process more and more. Increasingly, the reports began to focus on more
precise and concrete questions of violations of treaty obligations.

At the end of the Tokyo Round in 1979, the GATT contracting parties adopted
an understanding on dispute settlement which embraced some of these concepts,
and embodied the practice concerning dispute settlement procedures which had
developed during the previous decades. In the 1980s, the dispute settlement panels
were for the first time assisted by a new legal section of the GATT Secretariat. This
resulted in the writing of more precise and better reasoned reports, making them a
more useful tool of trade diplomacy.

12 GATT Articles III and XX.
13 See J.H. Jackson, ‘The WTO: Watershed Innovation or Cautious Small Step Forward’, The
World Economy; Special Issue, 1995; p.19.
14 The Agreement on the Interpretation and Application of Articles VI, XVI and XXIII, GATT-
BISD 26 Supp.56.
GATT dispute settlement rulings under Article XXIII:2 are legally binding only on the parties to the dispute and not on third GATT contracting parties. Yet, since these rulings are regularly adopted by consensus decisions of the GATT Council and are subsequently confirmed by the annual plenary conferences of the GATT contracting parties, they become part of the treaty practice. Many of the clarifications of GATT rules, agreed upon in these rulings, were subsequently formally included in the 1979 Tokyo Round Agreements, as mentioned earlier, and into GATT 'secondary law' or 'side codes' (such as the decisions on improvements of GATT dispute settlement procedures or the Code on Standards) to ensure a uniform application of agreed interpretations. Therefore, the GATT dispute settlement system has the dual function of settling disputes and through agreed interpretations, to progressively develop GATT law.

As has been examined in Chapter 3, inspite of a number of GATT Articles and provisions which have an impact on environmental policies, protection of environment receives only limited recognition in GATT and the GATT Codes. Although GATT rules permit non-discriminatory environmental policies and prohibit discriminatory trade restrictions and trade distortions; this has not prevented an increasing...
ing number of international disputes over the GATT-consistency of environmental measures and over the interpretation of pertinent GATT rules.

Since the 1980s there have been several dispute settlement proceedings leading to panel reports on whether the use of environmental taxes, labelling requirements and import or export restrictions for environmental policy purposes was consistent with GATT law; and whether import restrictions may be used to influence the environmental measures of another country or to protect domestic producers against the impact of foreign environmental policies on international competitiveness. Some of these cases are discussed here with their implications for the trading system.

5.4 Case-studies

Out of the hundred and one adopted panel reports within the framework of GATT 1947. quite a few have an impact on the trade-environment debate in the international system. In addition, these cases also highlight the policy adopted by GATT on this rather contentious issue. Some of the key trade-environment cases are analysed below. This is not an exhaustive case-study, only representative trade-environment disputes within the multilateral trading system have been included.

5.4.1 U.S. Prohibition of Imports of Tuna and Tuna Products from Canada

In 1980, Canada complained under GATT Article XXIII against the U.S. prohibition of imports of tuna and tuna-products from Canada; claiming it inconsistent with the GATT obligation of the U.S. under Articles I, XI and XIII. The United States justified the ban under Article XX(g) as a measure to conserve an exhaustible natural

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17 Online document; http://www.wto.org/Dispute/Panel.htm
18 GATT Panel Report, BISD 29 Supp.91 [1982]
resource\textsuperscript{19}.

The GATT Panel Report adopted in February 1982, after bilateral consultations, led to the withdrawal of the import prohibitions without leading to a complete settlement of the dispute. Finding the import embargo inconsistent with Article XI:1 the panel, however, noted that the U.S. action did not constitute a "disguised restriction on international trade" because the U.S. had announced the ban as a trade measure publically\textsuperscript{20}.

The panel further decided that the U.S. measure was not primarily aimed at environmental protection as required for an Article XX(g) exception. This was based on the fact that the U.S. ban applied to all species of tuna, including those not in danger of depletion, and also because the U.S. had taken no steps to restrict domestic tuna consumption commensurate with its efforts to restrict imports of tuna from Canada\textsuperscript{21}.

The reasoning in the panel report supported the view that GATT rules focus on the product itself. The comparison is between the imported product "as a product" and the domestic product "as a product". The principle of non-discrimination established by Articles I and III is between "like" products. When determining whether products are like, the analysis focuses on the characteristics of the products

\textsuperscript{19}This was the first time that Article XX(g) was invoked as a defense in a GATT dispute. Steve Charnovitz observed that it set the precedent of diluting the headnote or the preamble of Article XX. As a result, subsequent adjudication has gone askew in insinuating disciplines into subsections (b) and (g) rather than invoking the ones already in the headnote. See Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', Journal of World Trade; 25(5) 1991; 37-55 and 'Free Trade, Fair Trade, Green Trade: Defogging the Debate', Cornell International Law Journal; 27 (3) 1994; 459-525.

\textsuperscript{20}Subsequent GATT practice criticized this finding (e.g. GATT Council Minutes C/M/155 at p.13) because the function of the prohibition of disguised protection is not only to ensure transparency, but also to prevent indirect protection of domestic producers.

\textsuperscript{21}The fact that the ban was a U.S response to Canada seizing 19 U.S. fishing vessels operating within its Exclusive Economic Zone, also casts suspicion on whether the measure was environmentally motivated or related to jurisdiction over Pacific fisheries.
themselves rather than differences in production methods or other characteristics of the country of origin which do not result in differences in the resulting products. However, from an environmentalist perspective, the monitoring of production process is equally important and environmental measures that discriminate between like products because they result from different production processes may violate GATT's non-discrimination obligations.

5.4.2 U.S. Taxes on Petroleum and Certain Imported Substances

The U.S. Superfund Act of 1986 provided for excise taxes on imported petroleum and products produced with petroleum, the proceeds of which were used to cleaning up toxic-waste sites. Canada, Mexico and the European Community brought a case against the U.S. on the grounds that differential tax rates on imported and domestic petroleum and petroleum-based products\(^\text{22}\) violated the principle of national treatment for foreign goods under GATT Article III.

With regards to adverse trade effects, the panel found that the U.S. taxes on petroleum inconsistent with the prohibition of tax discrimination in Article III:2, first sentence\(^\text{23}\). Regarding the tax on certain imported substances, the panel noted that the U.S. justified this tax as a border tax adjustment, corresponding in its effect to the internal tax on certain chemicals from which these substances were derived\(^\text{24}\). The panel concluded that the tax on certain chemicals was eligible for border tax adjustment irrespective of the purpose it served because it is irrelevant

\(^{22}\)The rate of tax applied to the imported petroleum products was 3.5 cents per barrel higher than the rate applied to the like domestic products.

\(^{23}\)GATT Panel Report, BISD 34 Supp.136 [1987]

\(^{24}\)The EEC considered the border tax adjustment ineligible because it was designed to tax polluting activities that occurred in the U.S. and to finance environmental programmes benefitting U.S. producers. Consistent with the polluter-pays-principle (PPP), the U.S. should have taxed only products of domestic origin because only their production gave rise to environmental problems in the U.S.
to the GATT-consistency of the tax.

The panel consequently neither examined whether the tax on chemicals served environmental purposes nor, if so, whether the border adjustment tax would be consistent with these purposes. However, the panel did mention that the Group on Environmental Measures and International Trade provided the forum within GATT to pursue the environmental issues (including the consistency of the taxes with PPP), which the panel could not address because of its limited mandate of examining the case "in the light of the relevant GATT provisions".

The U.S. refined its law to be consistent with the panel ruling that the tax on imported petroleum was higher and thus unacceptable, and the tax on imported products made from petroleum was comparable and therefore acceptable under Article III:2.

5.4.3 Canada's Restrictions on Exports of Unprocessed Herring and Salmon

The United States objected to the statutes issued by Canada prohibiting the export of unprocessed herring, herring roe, and pink and sockeye salmon under the Canadian Fisheries Act of 1970. The U.S. brought the case before the GATT panel, arguing that the ban was inconsistent with Article XI:1, which prohibits members from banning the free flow of goods to another member. Canada justified an exception under Article XI:2(b), permitting export prohibitions for the purpose of ensuring quality or regulations relating to the international marketing of a good, and Article XX(g), permitting measures relating to the protection of a natural resource25.

The panel found the Article XI:2(b) exception unacceptable, noting that unprocessed fish, the object of the Canadian ban, was not the target of marketing or

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promotion. Further, as the Canadian export prohibitions did not limit access to herring and salmon supplies in general and only the foreign purchase was limited, in the absence of comparable restrictions on domestic consumption and production the panel concluded that these prohibitions were not primarily aimed at conservation. Canada accepted the panel’s findings and pledged to lift its export prohibition. However, soon after further prohibitions replaced the unprocessed herring regulations.

5.4.4 Thailand’s Restrictions on Importation and Taxes on Cigarettes

The government of Thailand placed an import ban, quantitative restrictions and discriminatory internal taxes on imported cigarettes, citing the need to protect the health of Thai citizens. The U.S. argued that comparable obstacles to commerce were not imposed on the Thailand state tobacco monopoly and that the restrictions were inconsistent with Articles III and XI. Thailand claimed that the taxes were consistent with Article III and the import restrictions were justified by Article XX(b) as “measures necessary to protect human...life or health”\(^{26}\).

The panel found that Thailand’s refusal during the past ten years to grant licenses for the importation of cigarettes was inconsistent with Article XI:1 and not justified under Article XI:2(c). It further ruled that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be ‘necessary’ within the meaning of Article XX(b).

In rejecting Thailand’s trade measures, the GATT panel interpreted Article XX(b) strictly, defining necessary to mean that no other less GATT-inconsistent

\(^{26}\)GATT Panel Report, BISD 37 Supp.200 [1990]
policies were available that the contracting party could be reasonably expected to employ instead of the chosen trade measures. The outcome of this decision is two-fold: on one hand, the narrow interpretation of Article XX intends to limit the abuse of environmental measures for protectionist purposes. At the same time, this creates a high hurdle for invoking Article XX because some less GATT-inconsistent policy can almost always be conceived.

5.4.5 U.S. Restrictions on Imports of Tuna (I)

The arguments and the ruling of this case, also known as Tuna-Dolphin I\(^{27}\), have been analysed in detail in Chapter 3 and its significance for the trade and environment debate in Chapter 4. Instead of repeating the same details, a brief background of this controversial case is provided here.

The U.S. Marine Mammal Protection Act (MMPA) of 1972, required the government to take steps to curtail the incidental killing of marine mammals by domestic and foreign commercial fishermen. In 1988, believing that dolphins in the Eastern Tropical Pacific Ocean were being killed by foreign tuna fishermen in violation of this law, Earth Island Institute, a California based environmental group, sued to enforce the Congressional mandate\(^{28}\). A federal judge agreed that the government was failing to uphold the law and ordered Mexican tuna imports banned from the United States.

Mexico argued that its right to sell tuna in the U.S. had been violated and asked for a GATT dispute settlement panel to adjudicate the matter. In September 1991, the panel concluded that the U.S. was in violation of its GATT obligations.

Although the tuna-dolphin panel's finding has not been adopted by the GATT

\(^{27}\)GATT Document DS 21/R [3 Sept.1991]
Council and so technically has no value as a GATT precedent, the case is seen as indicative of GATT decision-making priorities and has provoked heated debate over the fairness of GATT resolution of trade and environment conflicts\textsuperscript{29}.

The panel decision raised more questions than it answered - it brought to the fore GATT's hesitation of legitimizing trade-based production and process methods (PPMs)\textsuperscript{30} and the importance of PPMs for environmental protection is proved beyond doubt\textsuperscript{31}; it highlighted the dilemma of balancing the concepts of extraterritoriality with national sovereignty - undermining international environmental efforts of getting broad adherence to global environmental programmes; and most importantly, for this study, it casts doubt on GATT-consistency of the trade provisions of any international agreement aimed at influencing environmental activities outside a country's own border\textsuperscript{32}.

5.4.6 U.S. Restrictions on Import of Tuna (II)

Since the panel report on Tuna-Dolphin I was not ratified by the GATT Council\textsuperscript{33}, the European Community brought its own challenge to the MMPA and specifically


\textsuperscript{30}Also evinced in the Canada-U.S.tuna dispute. Although the Tokyo Round Standards Code explicitly addresses environmental standards, it shares the flaw of its apparent successor, the Uruguay Round Agreement on TBT - both agreements exclude PPM trade measures from protection.

\textsuperscript{31}Since without the ability to regulate harmful PPMs, environmental law would be virtually useless. Of course, it also involves the dispute on harmonization of standards, which is a controversial issue between the developed countries' environmentalists and the developing countries. Yet despite such complicated international politics the need to forge rules linking environmental protection and liberal trade can not be over-stressed.

\textsuperscript{32}However, the panel did suggest that amending Article XX would be preferable to permit extraterritorial trade related environmental measures. This would enable the contracting parties to carefully consider the appropriate scope of such measures and to avoid their abuse.

\textsuperscript{33}On the basis of a joint request from Mexico and the United States, as they were trying to resolve the dispute bilaterally.
to the “secondary embargo” provision of the U.S. statute. This provision bars tuna imports to the U.S. from any country engaging in tuna trade with an embargoed country, in this case, Mexico. Several European countries import tuna from Mexico. The case raised similar questions as the first tuna-dolphin case about the right of a nation to impose environmental trade measures unilaterally and extrajurisdictionally.

In May 1994, the arbitral panel found again that both the primary and intermediary country embargoes were not justified under several relevant GATT provisions. As in the Canada-U.S. tuna case and the earlier tuna-dolphin case, the panel made a distinction between actual products and practices that produce such products, and found the U.S. measure inconsistent with Article III. Both the Tuna-Dolphin panels found that the embargoes were unallowable quantitative restrictions and thus not permissible under Article XI.

Considering the justification of the intermediary embargo measures under Article XX the panel found that dolphins were an exhaustible natural resource under Article XX(g); and that for several reasons XX(g) may apply to policies related to the conservation of exhaustible natural resources, even if those resources are outside a contracting party’s territorial jurisdiction. Thereby, focusing on the unilateral nature of the U.S. policy rather than the extraterritorial aspect of the measure, which was definitely a more sound basis of addressing the issue.

However, the nebulous language used in XX(b) created confusion when the

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34 GATT Document DS 29/R [20 May 1994]

35 This was a promising development in international trade law and the reasons cited for reaching this conclusion regarding Article XX(g) were: firstly, the text of XX(g) did not limit the location of the resources; secondly, two other GATT panels on migratory fish under XX(g) made no distinction between fishing inside or outside territorial jurisdiction; and finally, under general international law, states may regulate their citizens’ and vessels’ conduct with respect to persons, animals, plants and natural resources outside their territories.

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United States interpreted “necessary” to mean “needed”, while the EU argued that it meant “indispensable” or “unavoidable”. Following previous panel decisions, the panel agreed that the U.S. should look for reasonably consistent alternatives, and if no such alternatives exist, then it should look for the one which entails the least degree of inconsistency with other GATT provisions.

Therefore, the panel concluded that the U.S. measures were unjustifiable under Article XX(b) or (g). Under XX(d), the panel found that because the primary embargo was inconsistent under Articles III and XI, there was no justification for the secondary or intermediary embargo.

Moreover, another important observation, provoking the ire of environmentalists, was made by the panel in the context of examining the Vienna Convention on the Law of Treaties in order to interpret the GATT in relation to other international environmental agreements. The panel found that most bilateral or plurilateral treaties were not relevant as a primary means of interpreting the text of the GATT. By implication meaning that the GATT is the supreme international agreement when any trade restriction is implemented. This raises serious questions about the structure of power between the GATT/WTO and the multilateral environmental agreements.

5.4.7 U.S. Standards for Reformulated and Conventional Gasoline

The growing tension between free trade and environmental protection can be ascertained by the fact that the first litigated dispute to come before the WTO involved environmental regulations.

In 1995, Venezuela and Brazil, later on joined by the EU and Norway as

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36 See for example William J. Snape, n.30.
37 DS 29/R, n.34, para 5.19
third parties, filed a formal request to the WTO dispute settlement body (DSB) to establish a panel\textsuperscript{38}. They contended that certain regulations setting forth ‘Standards for Reformulated and Conventional Gasoline’, promulgated by the Environmental Protection Agency (EPA) of the United States violated GATT Article III:1 and III:4\textsuperscript{39} by denying foreign refiners the chance to establish individual baselines, it afforded less favourable treatment to imported gasoline than to domestic gasoline.

The United States disputed this claim, arguing that the Gasoline Rule treated similarly situated refiners equally and that the Gasoline Rule fell within the exceptions of Article XX(b) and (g).

The panel report, issued in January 1996, agreed with the U.S. that the protection of air quality was a measure “related to the conservation of exhaustible natural resources” and thus consistent with XX(g). Nevertheless, the panel found that the Gasoline Rule was a clear violation of Article III:4 since it discriminated against imported gasoline on the basis of allegedly different record-keeping and data characteristics of foreign refiners, rather than any differences in the gasoline itself.

As in the Tuna-Dolphin cases, the panel found that the exceptions contained in Article XX were not applicable because the U.S. failed to demonstrate that the differing baseline rules for imported and domestic refiners were “necessary” to carry out the legitimate objectives of the Gasoline Rule or that they were “primarily aimed” at the conservation of exhaustible resources. In the light of these findings, the panel did not consider the issue of the Gasoline Rule’s compliance with the

\textsuperscript{38}The first decision of the WTO Appellate Body (AB-1996-1 [22 April 1996]).

\textsuperscript{39}Also known as the Gasoline Rule, it was to determine whether domestic and imported gasolines satisfied the requirements of the U.S. 1990 Clean Air Act Amendments. It sought to reduce air contaminants (volatile organic compounds (VOCs) and specified toxic pollutants) in the nine urban ‘nonattainment areas’ throughout the United States by requiring the sale of reformulated gasoline with reduced VOCs and toxics. In order to prevent the refiners from ‘dumping’ these substances into conventional gasoline sold in other U.S. markets, the Gasoline Rule also required refiners to maintain at least 1990 contaminant levels in conventional gasoline.
preamble to Article XX\textsuperscript{40} or other claims made by Venezuela and Brazil under the Uruguay Round Agreement on Technical Barriers to Trade (TBT).

On the appeal of the United States the WTO Appellate Body issued its decision in April 1996\textsuperscript{41}. It agreed with the panel that the Gasoline Rule discriminated against imported gasoline in violation of Article III:4, thereby requiring the United States to justify its action under an Article XX exception. While agreeing with the panel that clean air is an exhaustible natural resource, the Appellate Body sharply disagreed with respect to the Gasoline Rule’s treatment under Article XX(g). It ruled that the overall purpose of the Gasoline Rule as a whole should have been evaluated for its relationship to the conservation of natural resources, and not just its differing baseline rules. Under that test the Gasoline Rule clearly satisfied XX(g), which requires only that the challenged measure “relate to” such conservation.

However, despite reaching such interim conclusions, the Appellate Body also found that the United States had failed to meet its burden of demonstrating that the different baseline rules were “justifiable”, in consistence with the preamble of Article XX, because of the absence of any reasonable alternative to achieve its environmental goals. Like the panel, the Appellate Body was not persuaded that the United States had exhausted other remedies\textsuperscript{42} in order to eliminate the need for disparate treatment of foreign refiners. Neither the U.S. had shown the same sensitivity to the reporting and compliance costs of the foreign refiners under the

\textsuperscript{40}The preamble of Article XX requires that such measures should not constitute an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

\textsuperscript{41}An important procedural point noted was that since Venezuela and Brazil had not appealed they were precluded from challenging either the panel’s conclusions or its failure to decide their TBT claims.

\textsuperscript{42}Including cooperative reporting and monitoring procedures with the governments of Venezuela and Brazil to verify foreign refiners’ records or the use of statutory baselines by both foreign and domestic refiners.
Gasoline Rule, as it did to the domestic refiners.

In view of these failures by the U.S., the Appellate Body ruled that the differing baseline requirements of the Gasoline Rule amounted to both "unjustifiable discrimination" and a "disguised restriction on international trade" and hence was ineligible for protection under the preamble to Article XX. The WTO's DSB formally adopted the decision on 20 May 1996.

The significance of this case lies in the Appellate Body's reversal of the panel's much narrower interpretation of Article XX and its generally sympathetic recognition of the legitimacy of environmental goals pursued. It is definitely a useful first step in the WTO's development of a law of international trade that seeks to reasonably reconcile the goals of free trade and protection of global and domestic environment. Thereby, providing some basis for optimism that this first instance of WTO decision will work to expand the international recognition of the conditions under which nations may legitimately abridge free trade in order to protect the environment.

5.5 The Analysis

As is apparent by the above case-studies, there are certain recurrent issues at stake in the trade-environment debate within the multilateral trade system. These issues, so pertinent to the debate, are often overlapping and in the following discussion they are arranged according to their perceived importance. A careful handling of these issues, within the international trade regime, is imperative for striking a balance between the objectives of free trade and environmental protection.
5.5.1 Interpretation of Article XX

A common denominator to all the cases studied in the preceding section is the reference to Article XX which provides for exceptions to basic trade rules such as non-discrimination. Although 'environment' is not explicitly mentioned, clause (b) "necessary to protect human, animal or plant life or health" and (g), "relating to the conservation of exhaustible natural resources", undeniably address environmental based trade measures.

There have been several GATT panel reports where Article XX (b) and (g) exceptions have been invoked, interestingly, none of them have been successful. The trade measures employed by the challenged countries ranged from prohibited exports or sale of the products in Canada-Salmon, to import restrictions and licencing requirements in Thai Cigarettes and the Gasoline Rule, and to import embargo in both the Tuna-Dolphin disputes. Essentially, the most far-reaching problem in the use of Article XX is its nebulous language resulting in confusion over what government actions it sanctions.

Particularly, terms such as "necessary", "primarily aimed" (at conservation or environmental protection) and "in the absence of alternative measures which are not inconsistent with other GATT provisions" give rise to uncertainty and ambiguity. It is virtually impossible to prove these conditions and therefore they are unenforceable. The repercussions of the confusion created by the use of these terms is amply demonstrated in the cases above. These narrow terms have been the subject of increasing debate in the international discussion on trade and environment, inspite of

43 See Chapter 3 for details of the provisions of Article XX.
44 Article XX also allows measures necessary - to protect public morals; to secure compliance with laws or regulations not inconsistent with the GATT; relating to the products of prison labour (a non-environmental PPM); and for the protection of national treasures. Exceptions for "essential security interests" are provided by Article XXI.
which the Uruguay Round failed to modify this article. Apparently supporting the contention that trade restrictions must be very narrowly based if they are to qualify as environmental provisions within the context of the trade regime.

Although this raises the danger that Article XX will be mutilated through interpretation\textsuperscript{45} making international trade rules appear to be an obstacle to environmental progress. However, the recent ruling of the WTO Appellate Body in the dispute regarding U.S. standards for gasoline, gives some cause for hope. The Appellate Body not only reversed the narrower interpretation of Article XX, given by an earlier panel, but also expressed sympathetic recognition of the legitimacy of governments pursuing environmental goals.

In this context, it can also be pointed out that many of the trade-environment conflicts have involved measures which failed the scrutiny of the dispute settlement panels, since the discipline being applied to foreign producers was not the same as that being applied to domestic producers\textsuperscript{46}. Such omissions could be connected to the requirements in the headnote or preamble of Article XX which includes a soft national treatment test\textsuperscript{47}. The justification being that for any politically feasible option governments need to weigh commercial and environmental factors against each other. Moreover, the mission of GATT/WTO is to eradicate protectionism and judging the merits of environmental law would involve the issues of legitimacy (appropriateness of the goal) or proportionality (whether the benefits exceed the

\textsuperscript{45} For a detailed and excellent discussion, see Steve Charnovitz's, 'Environmental Exceptions in GATT Article XX', n.19.

\textsuperscript{46} Examples being - the controversial environmental rule of the U.S. involved in the two Tuna-Dolphin disputes, the MMPA, did not apply numerical dolphin mortality limits to American producers in the same way it did to foreign producers; and in the Gasoline Rule controversy, the Appellate Body observed that the U.S. had shown itself to be highly sensitive to the reporting and compliance costs faced by domestic refiners under the Gasoline Rule, however, it had shown no such sensitivity to the same problems faced by foreign refiners.

\textsuperscript{47} Steve Charnovitz advocates this point in, 'Free Trade, Fair Trade, Green Trade: Defogging the Debate', n.19, at 486-87.
costs), which will distract it from its basic mandate. In other words, the multilateral trading system can police environmental measures for hidden protectionism, but it is not equipped to decide whether such measures are sensible on economic or environmental grounds.

These difficulties emerge due to the fact that Article XX does not cover the full range of policies aimed at environmental protection, and therefore, strained arguments are made to include particular environmental policy measures under the exceptions. Albeit, the basic function of Article XX is to check attempts to mask protectionist pursuits in sanitary or environmental guise, the trade-environment friction calls for clarification of the language used, as well as amendments to add provisions specifically allowing measures related to environmental protection48. Thereby, the multilateral trading organization could play a more positive role by identifying protectionist policies that squander resources and diminish a society’s capacity to pay for environmental rehabilitation.

Therefore, in the final analysis on Article XX, it can be safely asserted that in view of the role it plays in the trade-environment debate within the multilateral trading system, there is a pressing need for reinterpretation of and amendment to this frequently cited article to prevent the future collisions of trade and environmental concerns.

48Eliza Patterson suggests, that the requirement that a measure “relates to” protection of the environment would be met if the measure is consistent with, and a part of, the environmental policies of the nation imposing the measure. This would guard against the imposition of protectionist measures as well as preserve each country’s right to decide its own environmental policies. (‘GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects’, *Journal of World Trade*, 26 (3) 1992; 99-109).
5.5.2 Process and Production Methods (PPMs)

PPMs are trade restrictions regulating the environmentally destructive methods of production of an afflicted product and national and international conservation laws apply them in a variety of ways. PPMs are the most frequently appearing theme in the trade-environment saga within the GATT/WTO. Inspite of it being a rather complicated issue, its significance for environmental protection is undeniable and its incorporation in the trade regime would go a long way in reconciling environmental protection and liberal trade. Certain substantive, yet relevant, matters involved in this issue are - the definition of 'like' products in the GATT/WTO; harmonisation of standards versus sovereignty of states; and the clash with the theory of comparative advantage.

Past panel rulings suggest that differing production methods do not make the final product "unlike" if its end uses and physical properties remain "like". However, this concept was modified in the panel report on U.S. Measures Affecting Alcoholic and Malt Beverages, adopted in 1992, which emphasized that:

...like product determination... be made not only in the light of such criteria as the product's physical characteristics, but also in the light of the purpose of Article III, which is to ensure that internal taxes and regulations 'not be applied to imported or domestic products so as to afford protection to domestic production'. The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country... it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.

In this case, the panel decided that low-alcohol beer and high-alcohol beer, even though similar on the basis of their physical characteristics, should not be

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49 As illustrated in the GATT decisions in the Canada-U.S. Tuna case and the two Tuna-Dolphin disputes. Specifically, the 1991 Tuna-Dolphin Panel Report gives a considerably narrow interpretation of Article III to cover "only measures affecting products as such".

50 GATT Document DS 23/R [19 June 1992]; p.95
considered as like products because their distinction in various U.S. laws was made for purposes of protecting human health (i.e. to encourage the consumption of low-alcohol beer) and that there was no evidence that the distinctions between different alcohol contents of beer had the purpose or effect of favouring domestic producers over foreign producers\textsuperscript{51}.

The Uruguay Round TBT Agreement has also broadened the definition of product standards to cover “related process and production methods” and includes rules on harmonization of technical regulations, conformity assessment procedures as well as for acceptance of equivalent foreign technical regulations and conformity assessments. Further, the Agreement on Sanitary and Phytosanitary Measures establishes additional rules for the adoption, enforcement, harmonization and acceptance of equivalent phytosanitary measures in order to minimize their negative effects on international trade.

Therefore, under the Uruguay Round Agreements, the national sovereignty over non-discriminatory environmental measures will be limited by increased recourse to the principles of: proportionality; acceptance of equivalent standards; and harmonization on the basis of international standards including the need to justify use of higher national standards\textsuperscript{52}.

However, it remains to be clarified to what extent health policy purposes, consumer policy (e.g., labelling and packaging systems) and environmental policy considerations (e.g., waste disposal and recycling requirements) can likewise influence the definition of like products and thereby justify differential treatment of similar

\textsuperscript{51}ibid, p.96
\textsuperscript{52}Analogous to the European Union law where the national freedom to adopt non-discriminatory environmental measures has also been limited and prescribes the use of harmonized international standards. See E.U. Petersmann, 'International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT', \textit{Journal of World Trade}; 27 (2) 1993; 43-81.
products (according to their risk assessment, packing material, pollution impact and so on) within the multilateral trading system. At the same time, making sure that they do not offer protection to domestic production. Moreover, the anxiety of free traders that trade distinctions based upon PPMs will lead to a disguised protectionism, itself warrants formulating reasonable trade rules on PPMs and other environmental concerns.

Undoubtedly, the differences among national product regulations in different countries may give rise to trade barriers, double taxation of environmental costs, protectionist abuses and trade distortions. Nevertheless, harmonisation of standards is not a solution to this problem in a sovereignty oriented national perspective upon which international law and the multilateral trading system are founded. The principle of state sovereignty calls for a national formulation of the case for liberal trade with due regard to the sovereign right of countries to define their own national environmental standards and social costs as long as any national pollution does not seriously injure the environment of other countries.

Therefore, the solution to this difficult problem could be negotiated harmonization instead of adjudication, and the first step could be setting minimum and maximum standards. The Uruguay Round moves in this direction by committing parties to basing their sanitary and phytosanitary (SPS) measures on international

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53Since discrimination favouring domestic over foreign production is hardly ever an efficient and effective tool of environmental policy. In fact, GATT’s tax-adjustment rules, which encourage the use of indirect taxes, may be sub-optimal for correcting production externalities and can lead to the imposition of domestic environmental costs on imports, as in the abovementioned Superfund case.


55Another argument that goes against harmonization is the fear that it may have a tendency toward installing the least common denominator of protection; of special concern to developed countries with higher environmental standards.

standards. In the same vein, on the one hand, it can be pointed out that as comparative advantage has always been influenced by policy differences between countries, and diversity among trading nations is a precondition for mutually beneficial trade, differential national environmental policies are likely to be compatible with mutual gains from liberal trade. On the other hand, total national sovereignty to regulate domestic environmental problems and the acceptance of higher environmental standards as a factor of comparative advantage has the danger of justifying actions such as the relocation of "dirty industries" to less developed countries and undermine environmental protection. Therefore, there is need to impose necessary limits to the doctrine of comparative advantage just as the advent of national antitrust, social security, food safety and environmental laws has been accepted as practical and political limits of capitalism.

Consequently, as the above analysis points out, even if there is no single criteria that defines a like product, nor a simple answer to the questions of harmonization, sovereignty or comparative advantage, yet the issue is not so much a matter of defining the concepts broadly or narrowly but rather deciding the policy purpose behind matters like PPMs and like product. In order to limit future conflicts between trade and environmental policies the multilateral trading system needs to clarify the

57 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [Marrakesh, 1994]; p.75
58 The theory of comparative advantage, which is singled out as the theoretical underpinning of the multilateral trading regime, posits that a country makes products (i.e., engages in a specific PPM) which best suit it - both with regard to other countries and within its own country (See Patrick Low, Trading Free: The GATT and The U.S. Trade Policy [New York, 1993]; p.146).
59 Notably, J.Bhagwati emphasizes the need to divorce the theory of trade policy and gains of trade from unrealistic notions of market determined comparative advantages. According to him the models of liberal trade theory need to be rewritten in order to clarify whether policy differences among countries and non-economic objectives will lead to greater or less gains from trade (in R.Stern (ed), The Multilateral Trading System: Analysis and Options for Change [Michigan, 1992]).
extent to which the environmental impact of a product and its production method are relevant factors in defining 'likeness'.

5.5.3 Extrajurisdictionality and Unilateralism

The issue of extrajurisdictional environmental trade measures\(^{60}\) figured most prominently in the two Tuna-Dolphin disputes. Notably, this approach of dealing with environmental problems is increasingly being used in the international system. The E.C. Regulation on the Importation of Certain Furs (banning imports from countries where the leg-hold trap is still used), the Driftnet Prohibition Act 1991 (of New Zealand) and most importantly, the Convention on International Trade in Endangered Species (CITES) are just a few examples of measures which are unilateral (except for the example of CITES here) as well as extraterritorial\(^{61}\).

The GATT panel in both the Tuna-Dolphin disputes cited extraterritoriality as GATT-inconsistent, treating the U.S. measures as unallowable quantitative restrictions under Article XI instead. However, in the second Tuna-Dolphin dispute, the panel accepted that for several reasons XX(g) may apply to policies related to the conservation of exhaustible natural resources, even if those resources are outside a contracting party's territorial jurisdiction. The reasons cited for this softening of attitude towards extraterritoriality related only to the technical interpretation of Article XX(g) and past practices\(^{62}\). Nonetheless, in a world where there are now increasingly fewer environmentally related actions that can be called wholly 'domestic', extraterritoriality in the case of environmental measures can be justified on the

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\(^{60}\) Extrajurisdictional trade measures aim to promote environmental goals outside the country taking the measure.

\(^{61}\) Although many commentators might view trade measures imposed pursuant to any treaty as non-unilateral, whenever such measures are imposed on a non-party, that country is likely to view the measure as unilateral.

\(^{62}\) See footnote n.35

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grounds that the environment knows no borders and that adequate protection of one's domestic environment requires the protection of the global environment.

The debate on unilateralism, on the other hand, is a much more complex one and more often than not, it overlaps with the problem of extraterritoriality. Many commentators have characterized such unilateral environmental trade measures as "eco-imperialism" and expressed concern that nations are trying to impose domestic environmental (or labour) standards on other countries through trade measures. More serious is the concern that there might be greater recourse to unilateral measures in place of multilateral ones or that unilateral actions may impede multilateral cooperation.

However, in the context of environmental policy, as Richard B. Bilder notes, the choice is often not unilateralism versus multilateral, but rather unilateralism versus inaction. An interesting hypothesis offers that unilateralism may be a precondition for multilateralism. There is no denying that there has been a fruitful interplay between unilateral and multilateral action in the history of environmental cooperation when the threat or willingness of nations to act alone stimulated international agreement. Nevertheless, unilateralism can not resolve the problems of 'free rider' or 'prisoners dilemma', consequently pointing towards the need for international cooperation.

65 By Steve Charnovitz in 'Free Trade, Fair Trade, Green Trade: Defogging the Debate', n:20, at 493-98. He argues that many of the most important health and environmental treaties were preceded by unilateral trade measures. Substantiating his claim with a series of examples, he outlines the significance of unilateralism for furthering environmental objectives.
66 Some countries enjoying a benefit without submitting to the discipline.
67 A hypothetical paradigm, derived from game theory where two persons have partially opposing goals and might achieve a better result from cooperation than competition.
The optimal approach can only be through broad based multilateral treaties and rules. This brings the argument full circle, since such rules invariably depend on trade sanctions for their effective implementation. Given the imperfections of the international system, and particularly its system for developing new rules (with the least common denominator constraints) environmental policy experts can legitimately argue that there must be some room for unilateral national actions designed to support the global environment. However, a more universally acceptable solution could be the provision for an explicit exception in the international trade rules for certain kinds of trade actions to help enhance the effectiveness of international environmental rules, while preventing misuse of the exception.

5.5.4 The Polluter-Pays-Principle (PPP)

The use of environmental resources without internalizing the costs of environmental damage to society leads to a divergence between private and social costs, and consequently to market failure. Environmental economics recommends the correction of such market failures by internalizing pollution externalities in accordance with the polluter-pays-principle (PPP), adopted by the OECD countries in 1972 as a basis for their environmental policies, as well as in Principle 16 of the 1992 Rio Declaration on Environment and Development. Internationally, the PPP has become a principle of non-subsidization of polluters so as to prevent international trade distortions. However, in GATT/WTO, PPP has only been mentioned in passing by a number of delegations when discussing other issues, including in the latest report of

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the Committee on Trade and Environment (CTE) of WTO at Singapore\textsuperscript{70}.

In the context of the multilateral trade organization, the PPP question essentially involves the issues of dumping, border-tax adjustment and subsidies, all of which are discussed thereon.

Article VI and the Antidumping Code\textsuperscript{71} deal with dumping - generally defined as selling in another country at less than the price in the exporting country. The GATT allows countries to impose offsetting duties on dumped imports if those imports cause or threaten 'material injury' to a domestic industry. However, the determination of dumping and the amount of the offsetting duty becomes complex because it is difficult to determine which prices to compare. In order to ensure a balancing of environment and trade policies it is critical that the costs and prices on which trade rules are based reflect environmental costs. In the case of dumping, permissible adjustments of the export price could be made consistent with the PPP so that the price of goods or services should fully reflect all negative environmental externalities. In this context, the European Commission's arguments in the Superfund dispute (mentioned ahead) are notable. However, the difficulty would be in determining the value of environmental costs.

The issue of border tax adjustment becomes significant for the environment when internal taxes are levied for environmental purposes. For simple product taxes the border adjustment rules are relatively straightforward. However, complications occur when countries base there internal taxes on PPMs since GATT rules are not clear on 'factor taxes'\textsuperscript{72}. In 1970, the report of the GATT Working Party on

\textsuperscript{70}Communication from Doaa Abdel Motaal, Economic Affairs Officer/ Trade and Environment Division, WTO, dated 29 Sept.1997.

\textsuperscript{71}Agreement on Implementation of Article VI of the GATT, it is an interpretive Code. Negotiated in 1967, it sets forth certain definitions of terms used in Article VI and establishes standards for the procedures used to impose duties.

\textsuperscript{72}Relating to the factors of production, such as labour, capital, land (natural resources) and
Border Tax Adjustments was adopted, which noted a "divergence of views" as to the border adjustability of factor taxes. This ambiguity is also reflected in the first Tuna-Dolphin case, where the panel declared that border adjustments were permitted on taxes borne by products but not on taxes not borne by products, such as social security charges. Without making a reference to the fact that the GATT has no rules on factor taxes, the panel determined that the U.S. measure violates Article III by analogizing from the GATT’s rules on border tax adjustments.

The issue of border adjustments also arose in the Superfund dispute, when the European Commission complained that the U.S. tax adjustment departed from the PPP. The panel did not directly address the question of whether the U.S. tax was consistent with the PPP, but instead dismissed the EC’s argument, deciding that the PPP was not a GATT obligation. The GATT decision makes clear that border adjustments can be used to match not only taxes expressly levied on a domestic product but also taxes levied on ingredients embodied in the product.

The Uruguay Round retreats from the concept of PPP by removing the right to impose countervailing duties against certain pollution control and research subsidies unless there are "serious adverse effects" and then too only with WTO approval. However, these provisions may not violate the PPP recommendation since they generally fit the OECD exceptions.

The issue of subsidies is a complex one. On one hand, subsidies are a direct way to finance environmental improvements. Conversely, on the other hand, they

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74 Agreement on Subsidies and Countervailing Measures, Articles VIII-IX, in the Final Act, n.52, p.232.
are undesirable because they lead to externalization of environmental costs and do not reflect prices correctly. The subsidies question is dealt with in GATT Articles VI and XVI and the Tokyo Round 'Code on Subsidies'\(^{76}\). These provisions admit production subsidies as well as countervailing duties (CVDs) on subsidized imports if the subsidy causes or threatens material injury to an established industry in the importing country. In the Subsidies Code, factor tax rebates were included in the illustrative list of export subsidies which the signatories agreed not to grant. The Code refers only to export rebates. Moreover, these rules apply only to GATT parties who are members of the Code; they are not GATT rules. Nevertheless, even countries that have adopted the Code have no obligations for border adjustments on imports. In a notable development, the Uruguay Round Agreement on Subsidies and Countervailing Measures would apply the Subsidy code rule to all the members of WTO.

An underlying problem for the rules concerning subsidies was the definition of "subsidy" itself, which was stated in very broad terms in the GATT provisions. However, the Uruguay Round Agreement on Subsidies and Countervailing Duties filled this lacuna by defining subsidy as a government financial contribution conferring a benefit to the recipient. The Uruguay Round Subsidies agreement makes several changes to the previous rules with potentially significant implications for environmental issues\(^{77}\). The agreement will therefore discipline eighty percent of specific environmental subsidies while allowing for subsidy schemes that are generally available. However, a potential source of uncertainty may be in clearly distinguishing between specific and nonspecific forms of subsidy.

\(^{76}\)GATT, Agreement on Interpretation and Application of GATT Articles VI, XVI and XXIII. BISD 28 Supp.56 [12 Nov.1979]

\(^{77}\)See, Chapter 4, section on WTO Provisions for Environment.
Reverting back to PPP, it is a cost allocation rule which says, "The polluter should bear the expenses of carrying out... measures decided by public authorities to ensure that the environment is in an acceptable state."78. It also states that public measures should not include "subsidies that would create significant distortions in international trade and investment."79. Therefore, in effect, it is a procedural injunction to governments, aimed only at avoiding government subsidization of pollution control. In recent years, the idea that the polluter should pay the costs of government mandated pollution control, now increasingly means that the polluter should pay the social costs of the pollution80. Along with factors like - budget deficits, the threat of countervailing duties and increasing environmental consciousness - the PPP could be credited for reducing subsidies for pollution control in the international system. This makes the principle relevant for the international trade regime and the reconciliation of trade-environment objectives.

5.5.5 International Environmental Agreements

The relationship of multilateral environmental agreements (MEAs) with the international trade regime is one of the crucial questions in the trade-environment debate. On the one hand, GATT has time and again assured the superiority of multilateral environmental cooperation over unilateral trade restrictions81. Additionally, in the 1991 Tuna Panel report, a country invoking Article XX was asked to demonstrate, "... that it had exhausted all options reasonably available to it... in particular through the negotiation of international cooperative arrangements..."82. Whereas,

78OECD, n.68, p.23-25
79ibid.
81See, GATT, n.54.
82Panel Report, n.27, p.46
on the other hand, pursuant to its observations regarding MEAs in the second Tuna-Dolphin case\textsuperscript{83}, there have been concerns that the multilateral trading system could be asserting its supremacy as the ultimate authority with regard to the interpretation of trade rules.

As also mentioned in Chapter 4, according to the 1969 Vienna Convention, as a matter of international law, where treaty obligations conflict the more recent established obligations prevail. Therefore, the adoption of WTO arguably makes the trade obligations more recent permitting it to acquire dominance. Although the CTE has recommended that in the event a dispute arises between WTO members who are each parties to the MEA, they should try to resolve it through the dispute settlement mechanisms available under the MEA. However, were a dispute to arise with a non-party to an MEA the WTO would provide the only possible forum for the settlement of the dispute. Nevertheless, the GATT/WTO dispute settlement body (DSB) is not necessarily the most appropriate forum simply because the DSB only considers the nations’ obligations under GATT/WTO and not any additional treaty obligations. This conflict creates a problem for the enforcement of multilateral environmental agreements because, in many instances, enforcement of MEAs will violate GATT/WTO obligations as currently defined.

Although, trade restrictions in the MEAs, necessary for the protection of the environment of the importing country from direct imports of harmful products, or from indirect damage resulting from pollution of global commons may be justifiable under Article XX of GATT. However, with regard to MEAs for the protection of fauna and flora (which constitutes the majority of the MEAs with trade provisions), the 1992 GATT report on International Trade emphasized that non-discriminatory

\textsuperscript{83}See the section on case-studies.
GATT-consistent sales restrictions are likely to be the most effective way of achieving the environmental goals of these agreements.

It is noteworthy, that none of the several hundred MEAs nor any of the over 300 national environmental regulations, which have been notified to GATT in the context of the 1979 Agreement on Technical Barriers to Trade, were challenged in the GATT panel proceedings. However, in respect of those MEAs which require member countries to apply more restrictive trade provision to non-parties than to parties (such as the Montreal Protocol, the Basel Convention and CITES), the GATT report finds it unclear whether such departures from the non-discrimination principle are always necessary to achieve the environmental goal of the agreement. Furthermore, whether trade restrictions on non-parties for the sole purpose of preventing free-riding and encouraging participation in MEAs are justifiable under Article XX also remains to be clarified in international trade practice.

Although, theoretically, international trade laws do not limit the sovereign right to apply internationally agreed measures for the protection of environment. The GATT-consistency of MEAs can only be assessed on a case-by-case basis, at present. An OECD draft guideline for balancing environmental and trade considerations when using trade provisions in MEAs underlines the need to minimize trade distortions and avoid conflict with GATT law by taking into account trade principles such as non-discrimination, necessity and least-trade-restrictiveness. However, the ambiguity of these terms and the resulting confusion is amply evident in the cases studied above. Given these confusions and the importance of the issue to the trade-environment debate, it would be useful for the multilateral trading system to recognize existing MEAs; perhaps something in the line of NAFTA's list of protected MEAs with trade provisions.
Finally, there is the broad and important issue of enhancing the public understanding of the trade regime and its work. This leads to the subject of transparency and public participation and is discussed next as part of the institutional problem of the international trading system.

5.5.6 Institutional Problems

The most important institutional weakness of the trading regime is the lack of transparency and public-participation. Evidently, as measures to protect the environment will proliferate there will be an increasing number of disputes over their trade effects. It is therefore essential that there should be an effective dispute settlement mechanism which fosters consultations and conciliation in the GATT/WTO tradition. In other words, it provides a sound basis for an argument for participatory democracy being introduced in the multilateral trade system.\(^{84}\)

The failure of GATT to adopt more democratic procedures is a reflection of the period surrounding its creation. The Groatian concept of sovereign nation-states which dominated international affairs came under attack in the 1960s. However, GATT democracy issues arose only with the advent of the trade-environment debate, particularly, since the Tuna-Dolphin panel decision in 1992. On one hand, environmentalists realized that their work was being stymied by the GATT's procedural rules and hence, democratic reforms of the trading system became a critical issue. On the other hand, business interests also joined this call for fear that GATT's failure to follow current democratic trends may ultimately undermine the legitimacy of the international trading system.\(^ {85}\)

\(^ {84}\)It is an element of democracy which is most applicable to international relations, viz. the right of citizens to have knowledge of and participate in decisions that will affect their interests. This narrow definition can, in practice, allow participation by interest groups in principle. (See Carole Pateman, Participation and Democratic Theory [1970] for participatory elements of democracy.)

\(^ {85}\)See Robert J. Morris, 'A Business Perspective on Trade and the Environment' in Durwood
The GATT dispute resolution procedure has been notoriously undemocratic. Neither GATT nor the parties are required to provide notice of disputes to the general public. The hearings of the panel and the pleadings were closed to all but the involved parties. Moreover, citizens could be denied access to the final decisions of dispute panels. Individual citizens or NGOs who have a personal stake in the outcome could neither appear before the panel hearing the dispute, nor independently submit information to that panel.

Apart from a provision for consultations\textsuperscript{86}, the Uruguay Round agreement changed little. Moreover, it is silent as to whether the public may have access to the reports of the dispute panels and the appellate body. However, there is no doubt that trade-environment conflicts can be resolved most amicably by consultation, negotiation and consensus building approach. Over time, such steps will enable the international community to coordinate policy, develop legal norms, supervise the implementation of these norms, generate community pressure on recalcitrant nations, and resolve international conflicts of interest.

\subsection*{5.6 Conclusion}

This chapter has dealt largely with the multilateral trading system's capacities and limitations regarding global environmental issues and the possibilities to bring about changes to minimize the conflict between trade and environmental issues. The new trade organization does offer significant potential, however, an appreciation of the system's institutional strengths and weaknesses, reveals certain limitations which

\textsuperscript{86}Article V.2 provides that the WTO "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."
are crucial for a profitable reconciliation of trade-environment. The conclusive part of the study takes into account these capabilities and limitations to bring out the present status of this debate in the multilateral trade regime and the final conclusions of this study.