Chapter 7
Conclusions and Recommendations
The inevitable growth in international trade in the coming years is likely to be accompanied with a heightening of concern over worldwide environmental degradation. Thus, the trade-environment interface is certain to be an area of growing concern for law and policy makers. Though the outcome of the elements in the interaction between trade and environment is still theoretically ambiguous, it can be safely concluded that growth in trade, minus environmental safeguards, is likely to negatively impact human welfare. Based on this observation and the fact that international law promotes growth in trade, it is essential to take steps toward making this growth of trade 'sustainable'.

1. The Underlying Debate

First, it must be recognized that the interface between the law and policy domains of international trade and environment will depend on the direction taken by the underlying debate. While there is agreement on the general policy goal of combining trade liberalization and environmental protection in order to promote human welfare through sustainable economic development, there is disagreement over how this goal is to be achieved.

1.1. Joint Discussion and Open Debate

There is an urgent need for reconciling the varying perceptions of the 'environmentalists' and 'free traders', who operate on different assumptions, values and methods, with little understanding or appreciation of each other's position. To cite an example, the initiatives of the WTO secretariat to involve environmental NGOs in symposia have sometimes resulted in situations described as 'a debate of the deaf'. Interaction between the 'trade' and 'environment' communities will hardly be of help if both groups continue to talk past one another. This applies at both the international and national levels. While the international trading system cannot afford to turn a deaf ear to environmental lobbies, it is equally important for Members of the WTO to take into consideration the views of their environmental constituencies before formulating their decisions regarding trade-environment issues. Joint discussion and open debate are thus the starting points for attempts at resolving the trade-environment debate.


**1.2. Research and Analysis**

Resolution of the trade-environment debate will be greatly facilitated by further research and analysis in the area. It is evident that part of the trouble stems from the fact that economic theory has not conclusively determined the cause and effect relationship between free trade and environmental degradation. A case in point is the divergence of empirical evidence on the phenomenon of 'industrial flight'. Theoretical clarity is thus a prerequisite for progress in resolving the conflicts inherent in the simultaneous pursuit of trade liberalization and environmental protection.

**1.3. Balancing the Debate**

One of the major stumbling blocks of the trade-environment debate is its current casting in North-South terms. The debate is at present lopsided in favour of developed countries and pays inadequate attention to the concerns of the South. A balancing of the debate is thus urgently called for. The developing countries will show more interest in efforts at reconciliation only if their concerns are adequately addressed. Thus, if the debate is to make any headway, it needs to focus on equitable solutions, keeping in mind the interests of the developing countries.

**2. WTO and Environment**

**2.1. The Issue of Linkage**

There is no longer a controversy over whether there is a linkage with environmental issues in the WTO. Clearly, such a linkage exists. The central issue raised by linkage claims is whether trade rules and environmental rules should be combined at the WTO in a different way than they now are. The ideal test for responding to this question would be based on a cost-benefit analysis of the impact of the linkage on 'human welfare'.

This is, however, easier said than done. It is difficult for the tools of economic analysis to respond definitively to the question of whether a particular response to a linkage claim increases or decreases human welfare. Economic analysis looks to the market as the best determinant of welfare, assuming no transaction costs. But in the
real world, the market is beset with transaction costs. Ultimately, governments regulate markets based on net individual preferences. In the final analysis, it must be understood that the process of weighing the welfare consequences of a particular linkage is a political process.

2.2. Evolving Mandate of the MTS

The original limited mandate of the GATT was to respond to the problem of post-war protectionism that largely manifested in the form of tariffs. Over the years, however, the GATT took cognizance of and responded to the change in perceived threat from tariffs to non-tariff barriers to trade. Thus, if the non-sustainability of trade is a perceived threat today, it is expected that the MTS will take into consideration and reflect these changed preferences of the international community. The successes of the trade regime cannot be viewed in isolation from the changing international political priorities resulting from changed circumstances. Any legal regime, to be successful, must reflect the political realities and preferences of the times.

That environmental protection is high on the agenda of the international community is beyond doubt. Thus new social and ecological indicators are needed to assess the quality of growth engendered by international trade, rather than focusing narrowly on the quantum of growth. The question that needs to be addressed now is whether international trade law is competent to serve the changed political objective of long-term sustainable development? In other words, the WTO might have to consider redefining its mission in light of new interdependencies and resulting preferences.

It is true that the WTO cannot be expected to solve the world's environmental problems, because that is not its mandate. But it must ensure that its rules do not undermine environmental protection and the international agreements and national policies designed to achieve it. In other words, WTO rules must be consistent with and must supplement other international laws aimed at securing sustainable development.
2.3. Concerns of the South

Having said that the WTO must reflect international preferences, it is important to identify these preferences correctly. For instance, it would not be productive if preferences of only the economically powerful, developed countries were reflected in the WTO's mission. The preferences and concerns of the South must also find reflection in the activities of the WTO. Unless this is done, the linkage of environment in the WTO may prove counterproductive for the developing countries, who accord high priority to development concerns.

A primary concern of the South is that of gaining market access in developed countries. This concern is based on the argument that the capital required by developing countries for making the transition to sustainable development will have to come from increased trade revenues. To an extent, these concerns of the South have been recognized in that the CTE has been mandated to pay special attention to market access concerns of the developing countries.

Policies have to be designed to safeguard developing countries from the threat of green protectionism. For it is this perceived threat that has resulted in the deep mistrust on the part of developing countries to the trade-environment debate. The threat of protectionism is further exacerbated by the attempts to legitimize claims for sanctions linkage. So far, the WTO DSS has been relied upon to decide cases of environmental protection from those of green protectionism.

The mistrust of the developing countries in the trade-environment debate is also based on the 'slippery slope' argument that many other issues like 'labour' will also sneak in through the door opened for 'environment' at the WTO.

A starting step for addressing the concerns of the South could take the form of openness and greater transparency in the formulation of national regulations and standards. This needs to be supplemented with capacity-building, funding and technology transfer in order to encourage full and active participation of developing countries in environment protection activities and to help their companies adjust to the
changing regulatory climate in their export markets by developing their capacity for
analysis and negotiation.

2.4. Development of Environmental Component in the WTO

If the WTO is to develop its environmental component, the question that arises
is whether such expansion is to be achieved through diplomatic negotiation (rule
making) or by judicial activism (rule interpretation).

2.4.1. Amendment through Negotiation

The recent inclusion of environmental issues in the formal negotiating agenda
of the WTO marks a departure from the earlier resistance to the according of a formal
place to environmental issues in WTO negotiations. The developing countries, having
failed to block the entry of ‘environment’ into the negotiating agenda of the WTO,
now need to be fully prepared for having their interests and concerns incorporated in
the negotiations that are likely to take place in this area.

A formal amendment of the WTO to develop its environmental component
could be achieved in two ways. A ‘deep’ amendment of the WTO would mean altering
the fundamental policy objectives underpinning the GATT, and making environmental
objectives equal to the objective of trade liberalization. It is submitted that this option
is not a feasible one for the WTO, with its highly heterogeneous membership.

Various ways of amending the WTO rules have been suggested as the
‘shallow’ approach, which would basically entail amending or relaxing the application
of existing WTO rules, without changing the fundamental policy objective of trade
liberalization, to allow for exceptions for environmental measures. If there were
agreement over the need for a formal amendment to the WTO, any one of these
suggestions would be feasible. Ultimately, it is not so much the provision on paper
that will make a difference as the judicial interpretation given to it in particular cases.
Thus, with both the 'deep' and the 'shallow' approaches to WTO reform, allowing for a significant margin of judicial discretion is inevitable. However, it must first be agreed that an amendment to the existing provisions is required in the first place. The current state of debate shows that while agreement may be forthcoming on trade measures taken pursuant to MEAs, the use of unilateral TREMs remains controversial.

2.4.2. Amendment through Interpretation

The use of interpretation as a tool for balancing competing trade and environmental goals is advantageous by virtue of its flexibility – issues can be handled on a case-by-case basis. This is the method that has been employed by the WTO so far in developing its environmental component. A major objection to the interpretive linkage is that it is felt that the values of free trade will inevitably trump those of environmental protection in the trade body. However, it has been pointed out that judges or panelists do not usually apply trade disciplines strictly, but attempt to weigh trade liberalization objectives against other aims such as environmental protection. This contention is borne out by the concerted effort taken by the WTO DSS in recent times to reconcile trade and environmental objectives.

2.5. Appropriate Forum for the Settlement of Disputes

Though the debate over the appropriate forum for settlement of trade-environment disputes is ongoing, it is safe to predict that the WTO DSS will play an increasingly critical role in deciding environment-related cases. It is therefore essential that consideration be given to improving WTO’s ability to adjudicate effectively. This would entail addressing concerns relating to transparency, openness and expertise of panelists and equity concerns in environmental disputes.

The earlier perceived inadequacy of the WTO in serving the interests of environmental protection was fuelled to a large extent by the fact that no TREM had passed the series of tests necessary to benefit from the Article XX exceptions. This fact no longer holds true after the rulings in Asbestos and Shrimp Turtle. Besides, even
in cases where impugned measures have not been upheld, one cannot overlook the increasingly broad legal interpretations of rulings and the conscious effort by the DSS to accommodate environmental concerns. The AB, particularly, seems willing to respect regulatory choices made at the domestic level relating to environment and health protection.

It must be kept in mind that the WTO acts in the absence of a legislative counterpart. In the absence of a multilateral legislature to address environmental problems, timely multilateral solutions to those problems may not be available. Since there exists already a well-oiled and effective machinery for dispute resolution at the WTO, it seems reasonable to utilize it to its full potential. Realistically speaking, it will make more sense to invest energies to develop international law that can be more effectively implemented. Considering the fact that international trade law is highly developed and more ‘implementable’, it may be more fruitful to focus on the ‘greening’ of trade law rather than attempting to distance environmental concerns from the ambit of the WTO.

In the event of a trade-environment dispute, an assumed ‘environment-friendly’ ruling from a dispute settlement body of an environmental forum will not make a positive contribution if there is no mechanism to effectively implement the ruling and it remains a solution on paper. It is better, then, to utilize the dispute settlement mechanism of the WTO which has proven to have more ‘bite’. This option must, however, be accompanied by a real attempt at ensuring that the WTO is more responsive to environmental concerns. In other words, it must develop the capability to distinguish between environmental protection and green protectionism. While it is true that the mandate of the WTO cannot be unrealistically broadened, it is also true that any multilateral trade agreement, in order to be successful, must integrate environmental concerns to some extent. In other words, it may be best to look for solutions to trade-environment problems through a reform of the WTO mechanism.
Till recently, it was felt that distancing trade-environment disputes from the WTO system may not bode well for the developing countries, who can be optimistic about protecting themselves against cases of 'green protectionism' at the WTO DSS. But recent case law reveals a dangerous trend in favour of legitimizing the use of unilateral trade measures for environmental objectives. One of the major arguments in favour of linking environment to the WTO is the perceived threat of 'self-help' unilateralism. However, it may be emphasized that the trend towards permissive unilateral linkage, as embodied in the Shrimp Turtle compliance rulings, may prove to have even more disastrous consequences for the developing countries, who are likely to be at the receiving end of any unilateral measures.

From the point of view of the developing countries, the priority should be to be able to better utilize the 'rules based' WTO system to their advantage and bank on the greater probability of implementation of WTO rulings. They will, of course, need to focus more on building legal expertise and negotiating skills in order to wield more influence within the system.

Further, the WTO DSS must address the problem of non-compliance by its more powerful members. What does the system do when governments lack the political will to comply and are too big to be bullied into doing so? For a dispute settlement procedure to work effectively, the strong and not just the weak must be forced to adhere to its rulings.

Steps towards reform have already been initiated within the WTO. The major concerns that have been expressed regarding the unsuitability of the WTO as a forum for addressing environmental concerns, such as transparency, openness, consideration of outside expertise and collaboration with MEAs, must be addressed. An environmental assessment of WTO rules is a good place to begin with.

The strength of the WTO legal regime cannot be denied and wishing away the WTO as a forum for addressing environment-related trade issues will not help. Focus
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should be on the reform of the trade regime, keeping in mind that all international law should aim at the enhancement of human welfare. In sum, it may be more practical to view trade-environment disputes as 'environment-related trade disputes' rather than as 'trade-related environmental disputes', while maximizing the possibility of trade rules that ensure the sustainability of trade.

Also, since the number of disputes over technical issues relating to the TBT and SPS Agreements is likely to increase, it is imperative for developing countries to familiarise themselves with the provisions of the SPS Agreement. Any review of the DSS must recognize the constraints of the developing countries and provide for specific financial and legal assistance to enable them to effectively participate in dispute settlement.

2.6. Committee on Trade and Environment

By setting up the CTE, the WTO has provided a forum for the exchange of the range of perspectives that exist on this issue at the international level. But the non-performance of the CTE in terms of concrete results has led to its relegation to the status of a 'talk shop'. Any evaluation of the CTE must, however, be done in light of the inherent contradictions and dividing lines embedded in most trade-environment issues. It is suggested that the CTE should not only continue to address its mandate with revitalized zeal, but should also strengthen the development dimension in its deliberations and pay particular attention to the interests of the South. To this extent, it can take seriously its mandate, as per the Doha Declaration, to accord particular attention to issues of the South. It is hoped that the CTE's report to the Fifth Ministerial Conference will mark a departure from its earlier report, which in many words, said very little.

3. International Environmental Legal Regime and Trade

3.1. MEAs and Trade Rules

As far as the international environmental legal regime goes, it must keep as its foremost objective, the addressing of environmental problems at source rather than
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relying too much on trade measures. However, to the extent that trade measures make an important contribution to the effectiveness of MEAs, such trade provisions must be designed at the outset to conform to the trade rules to avoid a clash of legal provisions. MEAs should aim at achieving more participation in WTO processes in order to facilitate the movement for reform of the WTO to better incorporate environmental interests.

Trade restrictions have proved to be an important part of the overall package of regulations designed to restrict and eventually eliminate an environmental hazard. Although the restrictions may never need to actually be employed, the threat of trade restrictions is an important factor in boosting participation in MEAs. So, trade measures are likely to continue to play a role as one component of effective environmental agreements. As the situation currently stands, it is not clear whether trade measures taken pursuant to an MEA would be considered acceptable by the WTO. The unresolved question of GATT-compatibility may result in a ‘chilling effect’ on the negotiation of trade provisions of further MEAs.

MEAs employing trade measures must anticipate the problems arising from their use and address their trade incompatibility potential at the negotiation stage itself. In doing so, they could keep in mind the various tests a trade measure must usually face in a bid to be least-GATT inconsistent. For instance, before deciding on trade measures, MEAs could do an options survey to see if there could be another way of achieving the same objective. The trade measure must also be tested against the Article XX chaopeau test. Trade measures must be designed to be legitimate, effective and proportionate to the problem they seek to address. In the face of the reality that trade-environment disputes will inevitably land up in the WTO, it is best for the MEA to be prepared for such an eventuality.

MEAs must seek to preclude problems likely to arise between countries at different stages of implementation, including countries in non-compliance. Moreover, trade measures, to be considered fair, must always be accompanied by effective
enabling measures such as finance and technology transfer mechanisms. Since trade measures used in MEAs address only part of the problem, the capacity of developing countries to implement MEAs effectively needs to be enhanced.

Current international thinking seems to reinforce the belief that there should be no hierarchy between MEAs and trade law and they should be mutually compatible. However, this is a position with no practical relevance as it does not help resolve actual disputes. Resolving the issue of the WTO-MEA relationship is the joint responsibility of the WTO and the environment community. In future developments of both the regimes, the compatibility factor needs to be given paramount importance, in order to avoid further international legal complications and conflict. Now that it is on the negotiating agenda of the new trade round, a move towards resolution of the issue may be expected.

3.2. Global Environmental Organization

A global environmental organization may be useful to the extent that it could facilitate negotiations of environmental agreements related to trade, examine the environmental impact of WTO rules and offer recommendations for changes in international trade practices to improve the environment.

4. Learning from Regional Experiences

Both EC and NAFTA serve as models of increased integration of environmental policies with the integration of markets. Other existing and future trade agreements attempting to reconcile trade-environment concerns have much to learn from both these approaches based respectively on law-building and enforcement/implementation strategies.

Though both EC and NAFTA, as free trade agreements, seek to remove obstacles to trade, including regulatory barriers that may be created by environmental standards, both regimes also recognize that trade liberalization should not override legitimate environmental standards. The EC Treaty and NAFTA contain language
designed to ensure that legitimate environmental standards are not trumped by free trade concerns.

The successes or otherwise of EC or NAFTA must be seen against the backdrop of their composition and other conditions peculiar to their regions and circumstances. The regional associations that have succeeded in substantially harmonizing competition policy such as the EC consist of member states with relatively similar types of national economic systems and associated similarities in national competition policy rules. The WTO, on the other hand is composed of members with profoundly different national economic systems and structures of industrial organizations. But, the WTO could draw on the EC and NAFTA experiences in its own attempts at reconciling trade-environment tensions as the broad conceptual conflicts are the same and therefore the potential lessons must not be overlooked.

4.1. Learning from the EC Experience

Among the lessons that EC offers are an integrated approach; a recognition of environmental principles such as preventive action, polluter pays and precautionary principles; principles from ECJ jurisprudence such as the ‘proportionality test’; flexible harmonization; enhanced role of international organizations in environmental standard setting; capacity building, temporary derogations and assistance through a ‘cohesion fund’ for less developed countries and a more open dispute settlement system.

4.2. Learning from NAFTA

Similarly, from the NAFTA experience, the WTO could take inspiration from, inter alia, multi-stakeholder participation, use of environmental assessments as policy tools, a focus on enforcing national environmental laws, a clarification of its relationship with MEAs and the provision of a funding package for developing countries to enable them to conduct trade more sustainably.
5. Policy Recommendations for India

While the reconciliation of trade and environmental concerns is being carried out at the international level, countries need to contribute to as well as gain from this process. Successful models at the domestic level will be critical in building an international consensus on trade-environment issues. Briefly outlined below are some policy recommendations for India in order for it to play a more meaningful role in the trade-environment debate. It may be mentioned that these recommendations could broadly be applied to developing countries in general.

India’s concerns regarding the trade-environment debate reflect those of other developing countries. It must aim to participate in and contribute to the trade-environment debate at the international level. The trade-environment debate is less well-defined and less-pronounced in India. It has not grabbed the attention of the media and therefore of the general public to the extent that it has in the more developed countries. For instance, even in a WTO case where India was directly involved, namely Shrimp Turtle, the case did not make headlines in the way the tuna-dolphin cases did in the US.

This is partly a result of the fact that there are relatively few NGOs working consistently to bring trade-environment issues into public vision through sustained campaigning and advocacy. Another reason may be the relatively low priority that environmental issues receive in general in comparison to development objectives. These inadequacies need to be addressed at the outset.

Efforts are also needed to achieve more coherence in government functioning. The central government agency dealing with trade and environment concerns is the Ministry of Commerce (MOC) of the Government of India. However, among the many WTO-related issues being dealt with within the Ministry, environmental issues seem to have a low priority. The MOC must have its own research cell on trade-environment issues rather than relying on inputs from various research organizations. It must also encourage multi-stakeholder participation, consider inputs from civil
society and work at information dissemination relating to trade-environment issues. Most importantly, it must continuously enhance its skills of participation in both the negotiation processes and the dispute resolution mechanisms of the WTO.

Though trade-environment issues relate to an interface area, the other relevant ministry, i.e. the Ministry of Environment and Forest (MoEF) seems to be making a negligible contribution to the development of a country position on trade-environment issues. The MOC has in place a mechanism for inter-ministry consultation before arriving at a national position, but the efficacy of the mechanism is questionable. The MoEF needs to contribute more effectively to the trade-environment debate in order to prevent the adoption of a skewed national stand on trade-environment issues. Policy coordination should be strengthened at the national level.

Special attention is wanting on issues relating to international environmental standards. India is party to all the three intergovernmental agencies recognized by the SPS Agreement as international standard setting bodies. Yet its participation in standards-setting and levels of awareness of prevailing standards is woefully inadequate. Efforts are needed to move from mere representation to effective participation in the regular meetings of international standards setting organizations. Action is also needed on activities relating to awareness and information dissemination of international environmental standards.

Lastly, it is worth exploring whether there is a case for regional cooperation on trade-environment issues in the South Asian region? Within the region, initiating efforts towards cooperation on these issues amounts to working against the tide, considering the political realities of the region. However, at international fora, a common position on trade-environment issues may help to strengthen a position. The broad agreement among the South Asian countries on trade-environment issues could be enhanced through cooperative consultation, research and information-sharing mechanisms. Such cooperation would result in better opportunities for getting heard the voices and concerns of the developing countries on these issues.
In summary, the following points of action need to be considered in order to provide India with a more meaningful role in the ongoing trade-environment debate at the international level:

- India must be fully tuned to the growing importance of the trade-environment interface at the international level. As a Member of the WTO as well as of most of the significant MEAs, it needs to maintain a consistent stand on trade-environment issues.
- The trade-environment debate needs to be brought alive at the national level, to elicit a clearer understanding of the issues involved among various stakeholders such as the government, industry, NGOs, academicians, researchers, media as well as the general public.
- Active participation in international negotiations and meetings, such as the Conferences of Parties of various MEAs and the Ministerial Conferences of the WTO and a sustained effort to have India’s interests incorporated in international trade and environmental law is of paramount importance.
- A clearer understanding of the implications of the rapidly developing law at the international level will allow a more proactive role for India.
- Research on this area must be encouraged in order to understand better the implications of technical agreements such as the WTO SPS Agreement. Also called for is active participation in international scientific and environmental standard setting bodies.
- There must be a build up of legal expertise in order to utilize effectively the WTO DSS to our advantage. At the same time, India must be prepared to react to the expansion of the WTO’s formal environmental agenda, considering the recent developments.
- There is need for the national level government agencies (Ministry of Commerce and Ministry of Environment and Forests) to work in tandem in order to project a consistent stand at international fora on matters touching on the trade-environment interface.
Regional cooperation at the SAARC level could be directed towards projecting a common stance at international fora on trade-environment issues. As a developing country, it must cooperate with other developing countries in order to promote a better understanding of the stakes of the developing countries in the developments in the trade-environment interface.

6. Concluding Observations

If multilateral trade agreements are to succeed, they must also integrate environmental concerns to some extent. A perception of the WTO as environment-unfriendly will not serve the cause of trade liberalization, considering the strong public belief that the price of liberalization must not outweigh its benefits. Trade agreements that address the environment linkage expressly will ultimately be more durable, as they are designed to maximize the net social welfare gains that flow from freer trade. The issue facing the international community now is what form the trade-environment linkage should ideally take.

Reconciliation of the objectives of free trade and environmental protection must be based on the broad understanding that both the international trade regime and the international environmental regime should be geared towards the net enhancement of human welfare. Thus it is essential that the two legal regimes work in tandem, and not at cross-purposes, with each other.