Chapter 2
Trade and Environment: Issues and Concerns
In the last 50 years, rapid advances in communication and information technologies, coupled with reduced barriers to trade and foreign investment, have led to a more integrated world economy. Transaction costs of international commerce have reduced substantially, in turn stimulating trade to the extent that there is a 14-fold increase in trade since 1950. This growth in world economy, and more specifically in the quantum of world trade, has been accompanied by environmental degradation, manifested in *inter alia* increased deforestation, loss of biodiversity, fisheries depletion, global warming, air pollution, ozone layer depletion, etc. The growing strain on the world environment has lead to a widespread demand that the current trend of trade liberalization be tested for sustainability. It is in the backdrop of this basic concern that the trade-environment debate emerged. Recent decades have seen the rapid development of law and policy in respect of environmental conservation and international trade. The recognition of the inevitable interface between the two spheres of law- and policy-making has led to the growth of the trade-environment debate to its present dimensions.

Because of the differing perspectives, claims, counter-claims and extreme positions of various players, the trade-environment debate has been shrouded in confusion. An analysis of the terms of the debate is essential in determining the legal implications of the components of the debate. In that sense, this chapter provides a background for the subsequent chapters of this study that deal specifically with issues of law and policy. This chapter is divided into five main sections. Section 1 describes the emergence and evolution of the trade-environment debate and identifies the main players in the debate. Section 2 deals with the trade-environment interface, delimiting the boundaries of the interaction between international trade and environmental protection. Section 3 discusses in detail some of the policy issues that have emerged as pivotal to the trade-environment debate. While the third section focuses on the impact of *trade* on the environment, the fourth one deals with the interaction of *trade rules* with the environment. Section 4 explores the political divisions over trade-

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1. Emergence and Evolution of the Debate

Concerns at the international level over the environmental impact of economic growth have been around since the 1970s, when the international environmental movement took off in a big way. One of the earliest reports to have questioned the sustainability of economic growth was *Limits to Growth* authored by the Club of Rome,² which forecasted that key natural resources such as fossil fuels would become increasingly scarce and eventually exhausted if economic growth were to continue unregulated. The Report warned that absent some checks on human activities, the earth's environmental 'carrying capacity' would become overburdened leading to a possible collapse. Economic growth and environmental sustainability were thus projected as being on a collision course. Since trade is considered a major engine of economic growth, it was also implicated as bearing a potential negative impact on the environment.

In 1972, at the *UN Conference on the Human Environment* (UNCHE), concern over the impact of trade on the environment was expressed. Participation in UNCHE by the multilateral trading system took the shape of a study contributed by the GATT Secretariat to the Conference.³ The *Group on Environmental Measures and International Trade* (EMIT Group) was earlier set up within the GATT framework in 1971. This group, however, remained inactivated for the next twenty years, until the time when the trade-environment debate picked up momentum at the international level. In 1987, the Brundtland Commission Report, *Our Common Future*, formulated the concept of 'sustainable development', underscoring that the only kind of development that could be desirable was one that was environmentally sustainable.⁴

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³ *Industrial Pollution Control and International Trade* (Document L/3538).
⁴ The Report defines 'sustainable development' as "...development that meets the needs of the present without compromising on the ability of future generations to meet their own needs". See
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The trade-environment debate emerged at the centre of world focus in the early nineties, when "the worlds of international trade and the environment collided somewhat resoundingly". Two high-profile international events – the UN Conference on Environment and Development (UNCED) in 1992 and the completion of the Uruguay Round of trade negotiations in 1994 – brought the issues of environmental protection and international trade to the forefront of international public discussion. Both the Rio Declaration and Agenda 21 adopted at UNCED stressed the need for trade and environmental policies to be mutually supportive.

The Uruguay Round culminated in the setting up of a Committee on Trade and Environment (CTE) within the World Trade Organization (WTO), an incorporation of

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6 Principle 12 of the Rio Declaration reads:
States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.

7 Chapter 2 of Agenda 21: A Blueprint for Action for Global Sustainable Development into the 21st Century includes a section titled 'Making Trade and Environment Mutually Supportive' that reads:

2.19 Environment and trade policies should be mutually supportive. An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment. It thus provides additional resources needed for economic growth and development and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.

2.20 International cooperation in the environmental field is growing, and in a number of cases, trade provisions in multilateral environment agreements have played a role in tackling global environmental challenges. Trade measures have thus been used in certain specific instances, where considered necessary, to enhance the effectiveness of environmental regulations for the protection of the environment. Such regulations should address the root causes of environmental degradation so as not to result in unjustified restrictions on trade. The challenge is to ensure that trade and environment policies are consistent and reinforce the process of sustainable development. However, account should be taken of the fact that environmental standards valid for developed countries may have unwarranted social and economic costs in developing countries. The mutual consistency of trade and environmental rules is also reflected in a number of other provisions of Agenda 21.
the objective of 'sustainable development' in the preamble of the Marrakesh Agreement and the inclusion of other agreements with a potential impact on the environment.\(^8\)

Also, the trade-environment debate became very visible in the U.S. in the wake of the negotiation of the North American Free Trade Agreement (NAFTA). Environmental groups, fearing that a free trade pact in the region would make things worse for the environment, joined traditional protectionist lobbies in opposing NAFTA.\(^9\)

But what really fuelled intense public interest at the international level in trade-environment issues were certain GATT panel rulings on environment-related trade disputes – more specifically, the Tuna Dolphin disputes\(^10\) of 1991 and 1994 – which were viewed as instances of a trade body's unnecessary interference with the enforcement of environmental laws. It was in the context of these cases that the GATT was projected as 'GATTzilla' – a monstrous supranational entity encroaching upon the attempts by sovereign nations to protect the environment.\(^11\) Though concerns about the alleged dangers to the world's environment from liberalization of the world's trade existed previously, it was probably the increasing supervisory role of trade agreements that rekindled interest in the issue in the 1990s.\(^12\)

Since the 1990s, the trade-environment debate has witnessed exponential growth and shows few signs of abating. Charnovitz describes the wide coverage that the trade-environment debate has received:

> During the past few years, the interaction between international trade and the environment has received attention in the GATT, in parliaments, in the press, in new books, in policy conferences, on the Internet and in rap music. It has been considered by the G-7, the United Nations Conference on Trade and

\(^8\) For details, see Chapter 3.
\(^9\) For details, see Chapter 6.
Development (UNCTAD), the World Bank, the Organization for Economic Cooperation and Development (OECD), the GATT Council and Secretariat, the UN Conference on Environment and Development, the Sistema Economico Latinoamericano (SELA) and the United Nations Environment Programme (UNEP).13

To this list can be added a host of powerful environmental NGOs that have been actively involved in advocacy and in producing a large literature on the issue.14 Not to be left behind, are large industry groups that worry about the impact of environmental standards on free trade.15 The issue has also attracted intensive academic debate and theoretical expansions.16 Research organizations and ‘think tanks’ have also researched and contributed to the trade-environment linkage.17 Thus, recent years have witnessed an intensification of the trade-environment debate, and today, the debate is high on the agenda of international and national trade as well as environment fora, governments and non-government organizations, besides attracting the attention of academia, researchers and the media.

Unfortunately, neither trade nor environmental policies are usually selected according to criterion of ‘welfare maximization’; they more often result from political decision-making processes and depend on the interests and varying persuasive power of individual political players. Considering the large number and variety of interests incorporated in the trade-environment debate, each pulling in different directions, the direction of this debate is largely determined by the interplay between the pulls and counter-pulls of the various players in the debate. A clear understanding of the trade-

13 ibid, pp.459-60.
14 For instance, International Centre for Trade and Sustainable Development (ICTSD), International Institute for Sustainable Development (IISD), International Union for the Conservation of Nature and Natural Resources (IUCN), World Wide Fund for Nature – International (WWF), Centre for International Environmental Law (CIEL) and Greenpeace, to name just a few, are active participants in the trade-environment debate. Closer home, Indian NGOs like the Centre for Science and Environment (CSE) and the Consumer Unity and Trust Society (CUTS) have also been involved in the debate.
15 Prominent business groups include the World Economic Forum (WEF), International Chamber of Commerce (ICC) and various commodity associations.
17 For instance, Institute for International Economics (IIE), Royal Institute of International Affairs (RIIA).
environment debate will, therefore, rest on an identification of the ‘players’ in the debate and their relative interests and strengths.

In any liberalization of trade, there are losers, for instance, branches of industry in an inferior competitive position and under pressure from imports, who seek to safeguard their interests through protectionist measures. Such groups are usually successful in asserting their interests as they have in their favour asymmetries in information and organizational costs as well as political influence. At the same time, the use of trade measures for environmental protection is promoted by large environmental NGOs who stress the role of trade measures in environmental protection at the cost of the potential benefits of growth from free trade. In a sense, environmental interest groups generally have common cause with protectionist industrial interests. These NGOs, are increasingly taking a confrontational stance that questions the exclusive state-centric handling of trade-environmental issues in international fora.

Trade-environment issues are at the centre of debate in various international fora. Though a host of international institutions, such as UNCTAD, UNEP and OECD are examining the issue, the debate has been institutionally housed within the CTE. Discussions in the CTE reflect the stand taken by the members of the international community on the trade-environment interface. It is another thing that the debate has made negligible advance toward resolution in this forum.

A significant feature of the debate is the high level of public interest in the issue. The environmental rulings of the WTO panels and ABs have continued to generate wide public interest. Notably, public opinion has tended to support the Western Green lobbies. This is not surprising considering the fact that environmental NGOs play a seminal role in generating public interest in the issue in the first place. “Linking trade and environment...benefits industrialized countries in every way. And,
they will promote their civil society to create a bigger and bigger fuss about it."18 Differences over trade-environment issues were a central factor in derailing international trade talks at Seattle in 1999, which witnessed large-scale public demonstrations over the issue.19

Attempts at reconciliation of the trade-environment debate have stumbled on the misconceptions surrounding and differences over its key components. It is said that the trade-environment debate has, at times, "...generated more heat than light."20 Both, the ‘free traders’ trade and the ‘environmentalists’ indulge in the use of sweeping generalizations and often talk past one another as they have widely varying perceptions on most trade-environment issues. This divergence of views is exacerbated by the fact that underlying economic theories have not yet been able to determine the exact impact of trade on the environment.

The challenge of reconciling competing views is compounded by the overarching North-South divide over trade-environment issues.21 Many of the potential conflicts in the debate are linked to the wide developmental gaps between industrialized and developing economies. Equity and market access dilemmas involving developing countries have been central to the debate. Reconciliation of the trade-environment debate must therefore not only build bridges between the ‘environmentalists’ and ‘free traders’, but also find a middle ground for the North and the South to meet on. Further, recent years have witnessed an overshadowing of the North-South divide in the face of the more potent clash between two powerful countries of the North, viz. the US and EU on important issues relating to the trade-environment linkage, notably on public health issues.

The central issue in the trade-environment debate, as of now, seems to focus on the appropriateness of environmental issues being handled by the WTO. There has been consistent effort to bring ‘environment’ into the formal negotiating agenda of the WTO, and this effort recently met with a degree of success at the Fourth Ministerial Conference of the WTO held in Doha in November 2001. Some issues relating to environment have been formally included in the negotiating agenda and there is considerable expectation of development on environmental issues within the WTO.\textsuperscript{22}

A more visible component of the debate, however, has been the increasing number of environment-related cases being decided by the WTO dispute settlement system. Many high-profile cases, such as Shrimp Turtle, Hormones and Asbestos, have fuelled intense public debate, leading to more question marks in the entire debate.\textsuperscript{23}

Apart from the WTO, various MEA secretariats are also keenly involved in this debate, especially on the issue of compatibility of trade measures used in MEAs with international trade rules. An increasing number of recently-concluded MEAs are relying on trade measures.\textsuperscript{24} Also, the issue is not limited to IGOs. Many regional organizations, such as the European Union (EU) and the NAFTA, are actively involved in the trade-environment debate.\textsuperscript{25} The growth in number and influence of environmental NGOs has also contributed in retaining the high pitch of the debate.

Recent developments at Doha, rulings on recent trade-environment disputes and the discussion of the issue at the forthcoming World Summit on Sustainable Development (WSSD) indicate that the trade-environment debate is set to be imparted with new direction and dynamism in the coming years.

2. International Trade and Environment

Theoretically, increased international trade should have a positive effect on the world environment because free trade is grounded in the theory of ‘comparative

\textsuperscript{22} For details, see Chapter 3.
\textsuperscript{23} For details, see Chapter 4.
\textsuperscript{24} For details, see Chapter 5.
\textsuperscript{25} For details, see Chapter 6.
advantage’, according to which trade allows a country to specialize in the production of goods and services in which it is relatively most efficient. It follows that trade should therefore be conducive to environmental sustainability as it enables countries to maximize output from a given input of resources.

But trade does not always entail positive environmental effects and in fact has tremendous potential to negatively impact the environment. Economic theory has tended to treat the environment as a free good in plentiful supply and therefore of no significance in determining comparative cost advantages. If environmental externalities are not incorporated into economic prices and decision-making, trade can magnify unsustainable patterns of economic activity, such as increased pollution and resource depletion. Environmental protection efforts have to ensure that the full external costs of production and consumption (for example, environmental costs) are reflected in the price of a product.

In other words, a large portion of the trade-environment linkage fits into the ‘critique of the economic growth’ paradigm, in which international trade has a role to play to the extent that it is expected to promote growth.

This includes the question of whether the effects on growth of the liberalisation of trade primarily result in an extension of the economic subsystem at the expense of the ecological subsystem, by causing the drain on resources to increase and the capacity of the earth’s ecosystem to absorb pollution to be put under extra strain by the rise in production and consumption; or whether this is outweighed by the opposite effect of growing incomes releasing more funds for environmental protection and increasing the preference among the population for a clean environment.

In the national sphere, environmental costs are internalised by measures such as ‘green’ taxes, environmental certificates or official regulations. In the case of transboundary environmental problems, internalisation of environmental costs is sought to be achieved through restrictions to trade in the form of import duties on ‘polluting’ goods. However, transnational pollution duties provide only a second-best option as they may effectively control only the transboundary emissions linked to production for export.


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This section seeks to address this very question: Does international trade negatively impact the world environment?

2.1. Causes of Environmental Degradation

The role of trade in the sustainable development debate can be better understood in the light of the root causes of environmental degradation – market failures and policy failures. Market failures occur when the market forces of supply and demand fail to deliver an optimal outcome for society as a whole. This usually occurs when producers and consumers do not have to bear the full costs of their actions, such as pollution inflicted on third parties (environmental externalities). In such cases, there is a disproportionate investment of resources in polluting activities and very little investment in pollution abatement. Undefined property rights over natural resources are another cause. Unrestricted license to harvest or extract natural resources results in overexploitation, a phenomenon referred to as the ‘tragedy of the commons’.

Environmental economics recommends the correction of market failures by using proper environmental policies to ‘internalize’ the full environmental costs of production and consumption (based on the polluter pays principle). Policy failures result when governments fail to correct market failures by appropriate taxes and regulations. Sometimes, they may even add to the distortions, for example, by subsidizing energy, agriculture, and fishing, thereby aggravating pollution problems and resource degradation rather than solving them.

In sum, market failures could be corrected at source by appropriate taxes and regulations, and policy failures could be removed, including subsidization of polluting and resource degrading activities. In such a case, trade liberalization would raise welfare. But as this does not always happen, trade liberalization could potentially magnify the negative effect of poor environmental policies.

2.2. Effects of Trade on the Environment

The primary fallout of international trade is the relocation of goods across borders, with potential environmental effects, both direct and indirect. As discussed below, though the potential negative direct effects of trade are not disputed, the indirect effects of trade are still theoretically ambiguous and contested by different interest groups.

2.2.1. Direct Effects of Trade

These refer to the effects of the increased transportation required for trading goods and the nature of the traded goods.

2.2.1.1. Transportation of Traded Goods

One direct effect of trade involves the transportation of goods. Trade liberalization will increase transport, and thereby exacerbate the environmental damages associated with these activities. Increased energy consumption, exacerbated air pollution from burning fossil fuels for transportation, pollution of ports and possibility of hazardous spills en route are potential adverse environmental effects of transportation. The effects of trade liberalization on transportation have been thus summarized:

It seems safe to conclude that international trade liberalization will necessitate some increase in the output of the transport sector .... Furthermore, it may lead to a shift in the mode of transport away from the relatively benign sea and rail transportation towards the more deleterious road and air transport. For these reasons, the implications of trade liberalization for the transport sector and the environment need careful attention, and offsetting environmental protection measures may need to accompany trade liberalization measures.

2.2.1.2. Nature of Traded Goods

The other direct effect is the locational effect caused by the relocated good itself. For example, imported meat, fruit or vegetable may allow a potentially

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31 Charnovitz, n.12, p.462-3.

hazardous pest or a hazardous non-indigenous species to enter a country. Also, a hazardous substance or waste may be transported to a country that is unable to handle or dispose of it properly.

2.2.2. Indirect Effects

These are the broader effects of the relocation of goods. Economic theory models on trade and environment show that environmental repercussions of economic integration depend on three interacting elements: a composition effect, a scale effect and a technique effect.33

2.2.2.1. Composition Effect

The composition effect (also known as the structural effect) refers to the industrial restructuring that takes place as a country increasingly integrates itself with the world market. The repercussions on the local environment will be positive if its expanding export sectors are less environmentally harmful than its importing sectors, and negative if its export sectors are more polluting than its importing sectors. An example of trade engendering environmentally harmful production is the large-scale ivory export from Africa to markets in the rest of the world. Since one country’s exportables are another country’s importables, all countries cannot specialize in clean industries. Trade therefore leads to a relocation of pollution sources in the world.

2.2.2.2. Scale Effect

The scale effect results from the increased economic activity stimulated by trade. Economic growth accelerated by trade could be harmful for the environment unless production became cleaner and less resource consuming, and consumers became more willing to recycle waste. An example of the scale effect is the increased pollution in Mexico resulting from liberalized trade.

33 Nordstrom, n.1, p.29.
2.2.2.3. Technique Effect

The income growth associated with the scale effect could drive a countervailing demand for a cleaner environment. Provided that governments respond to public demands, the environmental policies will be upgraded as income grows, thereby offsetting or even more than offsetting the scale effect. This effect is called the technique effect (also known as the income effect).

2.2.2.4. EKC Hypothesis

Closely related to the income effect is the EKC Hypothesis, which links lagging environmental protection efforts to low incomes. Low-income countries may simply not afford to set aside resources for environmental protection. Economic growth allows countries to focus on long run sustainability issues along with their priority for addressing more immediate concerns. Some empirical evidence suggests that pollution increases at the early stages of development but decreases after a certain income level has been reached. This inverted U pattern of environmental degradation that follows development has come to be known as the Environmental Kuznets Curve (EKC). At first, as countries increase in wealth, the environment gets dirtier, followed by a period in which it gets cleaner. This seems to imply that economic growth provides a route to environmental protection.

However, this interpretation is subject to various qualifications. Income growth may be necessary for allowing countries to include in their attention long term sustainability issues along with immediate concerns, but it is not sufficient in itself to reverse environmental degradation. Environmental degradation will not automatically turn around with increasing income but must be accompanied by suitable environmental policies. In other words, the shape of the EKC is largely policy-

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35 Evidence suggests that the EKC hypothesis holds true only for certain local pollutants and not for pollutants of a more global nature. Countries seem more prone to act on pollutants that affect their own backyard than pollutants that degrade the global environment. Also, increasing developing country emissions may outweigh decreasing developed country emissions. Finally, such relationships are seen not to be stable across studies.
determined. EKC relationship is not so much dependent on income levels *per se* but rather on institutional and democratic reforms that tend to accompany increased income, and which are necessary for allowing ordinary citizens to articulate their preferences for environmental quality and influence the political decision-making process. In short, the environmental Kuznets curve may not have a 'natural' turning point – it will turn when necessary policies to address environmental degradation are put in place, possibly as a result of the demands of a high-income public.36

2.3. *Perceptions of the Environmentalists*

Environmentalists view international trade as "...the worst villain in the destruction of the environment..." and "...a diabolical polluter...."37 They assert that there is consensus that economic growth, and free trade in particular, can cause significant environmental damage. The issue is not whether, but *how much, how long* it can be sustained and *how governments* can make the relationship a more positive one.38

Environmentalists point out that there is no denying that trade entails increased transportation, resulting in increased pollution. They also worry about the increasing cross-border movements of hazardous goods and wastes caused by trade. Further, they cite the negative *composition effects* of international trade. Unless sufficient environmental safeguards are in place, international trade may magnify the effects of poor environmental policies in the world. For example, demand from the world market may magnify the problem of over-fishing or harvesting of endangered species. They also fear the negative *scale effect* resulting from the increased economic activity stimulated by trade. While some environmentalists oppose economic growth in itself because of its negative impacts such as increased production, consumption and pollution, other are willing to accept economic growth as long as adequate environmental protection measures are put in place in order to ensure sustainability.

38 Fergusen, n.34, p.28.
Environmentalists are also skeptical about the EKC hypothesis, which projects economic growth and free trade as providing a route to environmental protection. They point at the methodological inadequacies and limitations of the hypothesis and stress the fact that the nature of the relationship between incomes and environment ultimately lies in the hands of policy makers.39

2.4. Perceptions of the Free Traders

Free traders offer various responses to these critiques. According to Bhagwati, "The fear is widespread among environmentalists that free trade increases economic growth and that growth harms the environment. That fear is misplaced...In short, environmentalists are in error".40

Proponents of free trade acknowledge that not all kinds of growth are equally benign for the environment. But, trade could play an important role in facilitating the diffusion of environment-friendly products, services and production technologies around the world. They also cite learning and norm-building that occurs through crossborder exchanges of goods, services, capital and ideas. Further, trade liberalization can help to remove distortionary subsidies and pricing policies and improve the efficiency of resource allocation.

While environmentalists focus on the negative impacts of the scale effect, trade theorists counter the argument by stressing the income effect. First, continued trade-restrictiveness might have produced equally serious environmental problems along with lower living standards.41 Second, as poor countries grow richer because of increased trade, their environmental standards will rise. This observation is premised on the view that 'environment' is a luxury good. The higher income resulting from trade can help generate the financial resources, technological capabilities and institutions to manage environmental problems. Income gain associated with trade

39 Ferguson, n.34, p.28.

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could in principle pay for the necessary abatement costs and still leave an economic surplus.\textsuperscript{42}

Free traders are thus more sympathetic to the EKC hypothesis than are environmentalists. They are more confident of a progression from free trade to economic growth to environmental protection efforts. They assert that by combining trade and environment reforms, one can find ways to raise consumption without compromising on the natural environment. The conflict between trade and environment arises as a result of the failure of political institutions to address environmental problems, especially those of a global nature that require a global nature effort to resolve.

2.5. \textit{Lack of Consensus}

As is evident from the above discussion, there is little consensus on the relationship between trade liberalization and the environment. The outcome of the elements in the interaction between trade and environment is still theoretically ambiguous. This has led to a situation where both ‘environmentalists’ and ‘free traders’ are armed with economic theories that support their respective claims. There is no conclusive evidence that international trade and environmental protection goals are \textit{necessarily} antithetical. Economic growth does not \textit{have to} damage the environment, and if appropriate regulations are in place, it may even facilitate environmental protection. However, there seems to be agreement over the fact that growth in trade, \textit{minus environmental safeguards}, is likely to negatively impact the environment.

The traditional economic approach to the trade-environment relationship states that it is not trade \textit{per se} that damages the environment but rather, it is when trade occurs in the presence of \textit{market} and \textit{policy} failures (externalities) that the environment is harmed. Accordingly, the first best solution to environmental problems

\textsuperscript{42} Repetto points out that while this proposition is true in theory, few countries that have experienced a rapid growth spurt fuelled by trade liberalization have adequately invested in environmental management or established effective regulations. See Repetto n.41.
is to tackle the externalities directly, rather than seeking alterations in the multilateral trading system. In other words, *externalities*, such as environmental costs should be *internalised*. However, since it is not easy to implement 'internalization', the first best policy has not made much progress. So, attention has naturally turned to issues and policies relating to world trade.\(^{43}\)

The sharp divergence of views of the environmentalists and the free traders on the impact of free trade on the environment is also reflected in issues relating to the interaction between trade *rules* and environmental protection. These are discussed in the next section.

### 3. Trade and Environment Policy Interaction

'Trade' and 'Environment' come into conflict because of the fact that environmental policies differ from country to country, providing different levels of environmental protection. Some of the specific policy concerns that arise from the linkage between trade and environment are centered on the following questions. How are commercial 'protectionist measures' to be distinguished from legitimate environmental protection measures? Should governments be allowed to impose their own environmental standards and policies on other countries? Should an international organization (read WTO) have the power to override national sovereignty in environmental matters? How do international trade rules relate to international environmental laws and where do they fit into the hierarchy of international law? If international trade rules interfere with environmental protection, how should they be amended? What forms of adjudication are appropriate for disputes with environmental dimensions? How can the differing perspectives on trade-environment issues between the North and the South be accommodated?

Before proceeding to an examination of the issues, it may be stated that identified issues have been grouped mainly for the sake of convenience. In practical application, most of these issues are inextricably interlinked. Also, many of the issues

\(^{43}\) Cole, n.30, p.185.
are necessarily discussed cursorily in view of the fact that they come up for more detailed discussion in subsequent chapters.

3.1. Free Trade and Environmental Policy: The Inherent Contradiction

The underlying ethos of GATT is *proscriptive* – states must *not* erect barriers to the free flow of goods. This principle is said to contradict the necessarily *prescriptive* nature of environmental protection, which generally requires particular actions on the part of governments. Charnovitz, holding a contrary view, refutes the *regulation* (environmental policies) – *deregulation* (trade policies) dichotomy and the argument that environmental regulation is inconsistent with liberal trade, claiming that the obvious need for government intervention for genuine environmental issues is not in question. He asserts that trade policy-makers do not single-mindedly focus on lowering trade barriers and that free trade does not mean the absence of *all* regulation of commerce. However, the central question that remains is precisely *how much regulation* required for environmental objectives is acceptable to trade policy.

Economic integration, and WTO rules in particular, is perceived to have diminished the regulatory power of individual nations relating to environmental policies. The restrictions on national environmental laws that the GATT imposes could interfere with many existing laws that rely on trade measures. Further, the GATT’s few constraints are rapidly tightening. For instance, the insistence that a permissible environmental measure must be ‘least-GATT restrictive’ leaves open the scope for GATT panels second-guessing national laws. Virtually any trade measure could be replaced by a labeling requirement on the grounds that ‘consumer choice’ is less GATT-inconsistent. Introduction of a third hurdle for environmental trade measures – a ‘least trade restrictive’ test would further tighten GATT’s discipline. Similarly, under the SPS Agreement, a WTO panel would be able to rule against a health requirement, forcing a country to change its law.

44 Charnovitz, n.12, pp.471-2.
Environmentalists claim that the WTO limits the implementation of environmental legislation at the national level. Charnovitz states that the real danger of 'eco-imperialism' comes not from nations trying to impose domestic environmental standards on other countries through trade measures but from WTO dispute settlement. He points out that the fact that nearly every trade treaty in this century has included an exception for health measures demonstrates the unwillingness of nations to yield sovereignty in this area. It must be recognized that Article XX does not create or confer rights to restrict trade. It acknowledges such rights. The categories in Article XX are not potential exemptions to GATT discipline; they are exceptions to GATT dominion. Thus, a central concern in the trade-environment debate is that trade rules should not decrease the regulatory power of nations to implement environmental policies that they deem fit.

3.2. Trade-related Environmental Measures

As mentioned above, international trade rules, while generally prohibiting trade restrictions in any form, do allow for the conditional use of certain trade restrictions in the pursuit of environmental protection, commonly referred to as trade-related environment measures (TREMs).

Environmentalists are generally in favour of the use of TREMs in order to address environmental problems. They point out that governments have found trade measures a useful mechanism both for encouraging participation in and enforcement of multilateral environmental agreements in some instances, and for attempting to modify the behaviour of foreign governments in others.

Trade theorists, on the other hand, assert that environmental problems are best addressed at the source, through appropriate environmental regulations, policies or

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45 See Charnovitz, n. 12.
46 Article XX of GATT. For details, see Chapter 3.
infrastructure investments. Tackling the problem by targeting an indirect linkage, such as imports or exports, may divert attention from the underlying problems and in some cases, may even aggravate the problems.\(^4\) The use of trade measures sidesteps the first-best principle of environmental policy – policies directed at the source of the problem – thus imposing unnecessary costs on the society. The use of trade measures could thus put the multilateral trading system at risk.

A 1992 Report by the GATT Secretariat\(^4\) stated that the use of trade measures to influence environmental policies in other countries violates the GATT. Charnovitz questions this assertion that any environmental standard that influences foreign behaviour may be GATT-inconsistent. He points out that there is no consistent way to draw a line between standards that seek to influence and standards that don’t, as virtually every environmental regulation or standard can influence foreign exporters. Further, if trade measures used to achieve environmental aims are illegal, then trade measures used for other aims, such as anti-dumping duties and countervailing duties, should also be questioned.\(^5\) TREMs are more specifically open to the following criticisms, loosely based on the intent, character and scope of TREMs.

3.2.1. Green Protectionism

One problem with TREMs is with that the intent behind a TREM is difficult to determine. Is a trade measure truly being imposed in order to attain an environmental benefit or is it a protectionist measure merely using an environmental justification? TREMs run the risk of capture by protectionist interests using environmental justification as a disguise, a phenomenon popularly referred to as ‘green

\(^4\) For example, trade barriers to forest products may increase deforestation pressure by forcing people to convert land into alternative sources of employment, such as agriculture and ranching.

\(^5\) GATT, “Trade and the Environment” in GATT, *International Trade 90-91*, Vol. I, Part III, 1992. According to this Report, the use of trade measures to influence environmental policies in other countries, whether in the form of laws that seek ‘to change another’s environmental behaviour’or that ‘attempt to force other countries to adopt domestically-flavoured practices and policies’, violate the GATT.

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Developing countries are particularly concerned that such measures could, in fact, be counterproductive in a world of sovereign states that could be motivated by the need to maintain competitive advantage.\textsuperscript{52} In a bid to address the threat of ‘green protectionism’, the CTE has suggested transparency requirements for TREMs and the SPS and TBT Agreements incorporate requirements for prompt notification of such measures.\textsuperscript{53}

3.2.2. Unilateralism

A second problem with TREMs could be related to the character of the TREM. All TREMs fall in one of two categories – those taken pursuant to an MEA and those adopted unilaterally. The real problem area covers the latter kind of TREMs.

One of the major foundations of WTO rules is hostility to unilateral action on the part of Contracting Parties (CPs). Unilateral trade measures have been denounced in various fora such as UNCTAD, UNCED and by the GATT/WTO Secretariat.\textsuperscript{54} Such action has been variously characterized as ‘eco-imperialism’, ‘gunboat environmentalism’, economic ‘righteousness’ or ‘green vigilantism’.

A strong defense of the use of unilateral trade measures comes from Charnovitz who argues that unilateralism is potentially good for the environment for the following reasons:\textsuperscript{55}

1. Unilateralism assists sovereign nations in achieving their ecological goals. Each country must be allowed to fashion its own standards for what its citizens produce.

\begin{itemize}
\item The following distinctions have been identified: an environmental measure benefits the environment, without affecting trade; a TREM protects the environment while also affecting trade; a green protectionist trade measure protects a domestic industry while claiming to aim at environmental gain. See Charlie Arden-Clarke, Green Protectionism, Discussion Paper, WWF-International, Gland, 1994.
\item Anil Agarwal and Ors., Green Politics: Global Environmental Negotiations 1 (New Delhi: CSE, 1999), p. 267.
\item For details, see Chapter 3.
\item An UNCTAD resolution adopted in 1992 states that “Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided”. The Rio Declaration repeats this statement.
\item Charnovitz, n.12, pp.493-98.
\end{itemize}
and consume. Outlawing unilateral measures would depress environmental standards to the 'lowest common denominator'.

2. National trade measures have long been used to bring about environmentally sensitive actions in areas beyond national territorial borders.\(^{56}\)

3. Unilateralism often leads to international agreement and may even be a precondition for multilateralism. Various examples from practice in the past century point to instances where unilateral measures have led to the adoption of international environmental agreements.\(^{57}\)

4. Even within an international agreement, national action can be useful in spurring parties to act.\(^{58}\)

5. Even when unilateral action does not engender multilateral agreements, it may be constructive in promoting other unilateral action.\(^{59}\)

Charnovitz’s justification of unilateral measures seems to be premised on the assertion the larger countries should be given the lead role in deciding and imposing their environmental preferences. Obviously, this view is not acceptable to the smaller nations. A strong objection to unilateralism is made by the developing countries on the grounds that only large nations can act unilaterally. Allowing unilateral trade measures would undermine one of the principal objectives of the multilateral trading regime: predictability. “At worst, unilateralism would drown the solution to environmental problems in a confusion of tit-for-tat measures”.

Multilateral action is proposed as the solution to the controversial legal status of unilateral trade measures. There is no disagreement over the fact that multilateral

\(^{56}\) For instance, in 1906, the US banned the landing and sale of sponges from the Gulf of Mexico gathered by certain harmful methods. In 1921, Great Britain prohibited the importation of plumage of any bird, in order to stem the widespread destruction of birds due to the feather trade.

\(^{57}\) For eg., the US ban of 1897 on fur seal imports led to the international treaty on seals and sea otters of 1911. The US ban of 1969 on the importation of endangered species – along with similar action by other countries – spurred the adoption of CITES in 1973.

\(^{58}\) CITES banned all international commercial traffic in ivory in 1989 following such bans implemented by US and other countries.

\(^{59}\) In 1908, Britain considered a law banning the sale of imported birds or plumage. The bill did not pass. But two years later, Australia banned such products, followed by US and Canada. Britain acted in 1921.
action is obviously preferable to unilateral action taken to address transboundary and
global environmental problems.

By offering each country the opportunity to explain and defend its view of the
problem, the negotiating process increases the chances of uncovering solutions
acceptable to all affected parties. Co-operative efforts also offer the best
chance of ensuring that the policy changes deal directly with the problem at
hand and that they provide minimum scope for protectionist abuses... 60

But measures adopted pursuant to a multilateral agreement may also be
problematic; when such measures are imposed on a non-party, that country is likely to
view the measure as unilateral. 61 More significantly, negotiating multilateral
agreements is a difficult and time-consuming process. Unilateral measures are often
resorted to in the face of a choice between doing nothing (while waiting for an
international consensus) and taking action. One opinion held is that the use of
unilateral measures should be allowed, but only as a last resort. 62 Another view is that
trade rules should be amended to deal with the case of urgent environmental threats or
emergencies, where it is not feasible to wait for multilateral agreement on the issue, if
there is proof that serious damage is taking place at a dangerous rate. Yet another
solution offered, which has found endorsement in the recent rulings of the Shrimp
Turtle compliance panel and AB reports, 63 is to allow unilateral measures temporarily
while negotiations for multilateral agreements are ongoing.

61 Charnovitz, n.12, pp. 497-98.
62 The Winnipeg Principles suggest a series of steps called for before justifying unilateral action. A
diversity of national standards is not only acceptable but also sensible, given international
variations in ecological realities and differences in priorities assigned the issues. This is a strong
stand for domestic sovereignty on the management of domestic environment and against unilateral
action aimed at changing that management. Domestic sovereignty is less supported by this
principle, however, as the environmental problem in question becomes international. The first-best
solution is multilateral agreement to address the issue in question. Such agreements should reflect
the principle of equity. If there is no movement from the offending country after best efforts in
seeking international agreement, unilateral action may be an option. Any such actions, however,
should take place within the context of multilaterally agreed rules of play. There should be agreed
possibilities for unilateral action for specific types of unilateral action, depending on the problem
at hand. Such action must be regarded as a last resort. See IIISD, Trade and Sustainable
Development Principles (Winnipeg, 1994).
63 For details, see Chapter 4.
3.2.3. Extrajurisdictionality

Another issue of contention relates to the scope of TREMs. It is true that trade rules permit TREMs for legitimate goals such as environmental protection. The issue is whether domestic environmental measures can be implemented for achieving environmental objectives outside the jurisdiction of the implementing country. For instance, can the US impose a measure on Mexico dictating it to more effectively conserve its dolphin population? ‘Extrajurisdictionality’ \(^{64}\) refers to a measure controlling activities that occur outside one’s country.

The Tuna Dolphin I panel determined that ‘extrajurisdictional’ trade restrictions were not included within the scope of the environmental exceptions of GATT Article XX. But in Tuna Dolphin II, the panel made a distinction between ‘territory’ and ‘jurisdiction’ and ruled that Article XX(g) did not spell out any limitations on the location of the exhaustible natural resources to be conserved, pointing out that in international law, states are not barred from regulating the conduct of their nationals outside their territory. It ruled, however that if Article XX(b) or (g) are interpreted to permit CPs to impose trade embargoes so as to force other countries to change their policies within their jurisdiction the objectives of GATT would be seriously impaired. However, this verdict was watered down in the Shrimp Turtle case where the trade measure of the US was permitted even though the action was clearly extra-jurisdictional, on the grounds that turtles were migratory and therefore could have been under US jurisdiction at some time or the other.

The issue of extrajurisdictionality is further divided into measures aiming at environmental objectives outside a country and located within another country and

\(^{64}\) The GATT Tuna-dolphin panel introduced the concept of ‘extrajurisdictionality’ but did not define the term. It is not clear whether the term covers a law applying simultaneously to domestic and non-domestic activities. Also unclear is the exact boundary of a ‘domestic’ or ‘jurisdictional’ objective. However, extrajurisdictionality does not mean ‘extraterritoriality’. Extraterritorial laws impose domestic standards on transactions occurring in foreign countries. Also, laws that regulate foreign use of domestic-origin goods or the behaviour of domestic corporations abroad are extraterritorial.
those not located in any country, i.e. the global commons. Environmentalists offer reasons to reject jurisdictionality as a trade principle, as it is unhelpful in dealing with resources in the global commons or migratory resources. In fact, they go further to argue that even when living organisms lie within the territory of a particular country, other countries ought to be able to ensure that their own actions do not indirectly harm endangered plants and animals.

Precedents are cited to claim that trade treaties have provided exceptions for the protection of humans, animals, and plants since the late 19th century and these exceptions were understood as applying to extrajurisdictional laws. One view suggests that contrary to the view that GATT authors never contemplated extrajurisdictional use, it is probable that they understood that Article XX(b) would apply to extrajurisdictional measures, but considered that point so obvious that it did not engender debate.\(^65\)

Some trade officials have proposed a broader version of extrajurisdictionality. It should be accepted under Article XX(b) (i) to cover any production (no matter where it is located) that directly affects the life or health of people in a country, (ii) to cover any production in a country (even when exported), or (iii) to cover living organisms in the global commons. This alternative would still entail disagreements as to what directly affects the people of a country.

The developing countries are strongly opposed to the concept of 'extrajurisdictionality'. "Given the fact that trade is a lever of power mainly in the hands of the North, this [acceptance of the idea of extraterritorial environmental intervention through trade measures] will greatly erode the sovereignty of Southern nations...."\(^66\)

### 3.3. Product-related Issues

International trade rules regulate trade in products, permitting some discrimination while prohibiting others.

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\(^{65}\) Chamovitz, n.50.

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3.3.1. ‘Like’ Products

While environmental policy relies on discrimination between environment-friendly and environment-damaging products, GATT is based on the principle of non-discrimination. For example, an environmental trade measure might distinguish between fish caught in a drift net and those caught with a regular net but GATT rules would not permit such discrimination.

However, GATT’s non-discrimination rules apply only to ‘like’ products. Defining ‘like’ products has proved to be a very complicated task. Some criteria that are used in determining whether two products are ‘like’ include end-uses, consumers’ tastes and habits; the products’ properties, nature and quality; and tariff classifications. The recent WTO ruling in Asbestos held that a toxic product could not be considered ‘like’ another product that is non-toxic, though the two products may be similar in every other way. If drift net-caught fish is deemed to be ‘unlike’ fish caught using benign techniques, a different treatment meted out to the two products does not amount to discrimination. In other words, discrimination results only from different treatment of ‘like’ products.

3.3.2. Process and Production Methods

PPMs have become ‘one of the most debated sets of letters in trade law history’. Related closely to the issue of ‘like’ product, is the issue of Process and Production Methods (PPMs), which refer to the way in which a product is made. The point of contention is whether two products entailing different PPMs, one environment-friendly and the other environment-damaging, may be considered ‘like’. A PPM is further categorized, on the basis of how it affects the final product, as product-related PPMs (if it has an impact on the final product) and non-product-related PPMs (if it has negligible impact on the final product).

67 The GATT allows for discrimination on some grounds. It permits countervailing and anti-dumping duties, preferences for developing countries, General exceptions under Article XX and national security exceptions.
69 For details, see Chapter 4.
WTO permits some discrimination based on PPMs, for example, in the TRIPS regime. But GATT, though it permits discrimination based on product-related PPMs, prohibits non-product-related PPM-based discriminatory measures. Thus, it is non-product-related PPMs that are really the object of controversy. Environmental regulations based on PPMs cause complex interactions with trade.

PPM-based measures are, however, becoming increasingly important as strategies for environmental sustainability. Many scholars and environmentalists feel that the trade regime will and should continue to move to include PPM considerations, as the ability to distinguish between sustainably and unsustainably produced goods in international trade is vital to ensuring that trade liberalization does not undermine environmental protection. According to von Moltke, “It is difficult to conceive of a trade regime that will contribute to the promotion of sustainability unless it can distinguish between like products on the basis of the sustainability of their production methods.”

PPM-based trade measures are, however, difficult to justify. Different parts of the world have varying ‘carrying capacities’, differing widely in their ability to assimilate pollution, based on factors such as climate, population density, existing levels of pollution and risk preferences. Enforcing similarity of PPMs could deny the very basis of comparative advantage, which rests on the proposition that countries possess different cost structures for the production of various goods. Further, there are problems of practicability with PPMs. Non product-related PPMs cannot be generally determined by inspection of the product. Importers applying PPM-based controls

71 Under the TRIPS Agreement, products with IPRs, trademarks or brand names are distinguished from other like products. Consequently, even if a good is ‘directly substitutable’, but counterfeit, it is treated differently.

72 This distinction is also expressed in terms of externalities as follows: The WTO maintains a distinction between consumption externalities and production externalities. While the former may result in environmental harm or injury while consumption, the latter results in harm during production, i.e. outside the territory of the consuming state. See Cole, n.30, p.192.

73 Quoted in Green Politics, n.52, p.256.

74 A contrary view is held by Repetto, who points out that the distinction between product and process standards is becoming less sharp. Since sensitive tests of the product can recognize minute residual amounts of materials used in the processing, regulations banning those trace chemicals can force exporters to alter their production methods. He claims that international differences in
must therefore depend on the cooperation of the exporting country in certifying how the goods are produced.

In terms of trade measures, a further distinction is drawn between PPMs that cause pollution that is restricted to the country of production and those that cause pollution that is transboundary or global. It is argued that while the former type of PPMs should be excluded, the latter type could be subjected to requirements. Inclusion of PPM-based trade measures in MEAs may provide a solution.

OECD has called for the development of verification and certification systems and for the mutual recognition of such systems. A number of participants in the CTE debate have called for trade rules to be amended to set out objective criteria under which trade measures directed against PPMs could be taken, subject to challenge. This issue is likely to feature increasingly in trade disputes. The Shrimp Turtle dispute, for instance, by accepting that shrimps can be differentiated on the basis of the manner in which they are caught, opened the doors to new trade disputes based on PPMs. Developing countries are vary of the increased risk of disguised protectionism resulting from the introduction of PPMs.

3.3.3. Product Regulations and Standards

International trade rules place hardly any constraints on a country's right to protect its own environment by means of non-discriminatory product regulations on domestic, imported or exported goods. Product requirements include regulations and/or voluntary agreements governing labeling, packaging, recycling and recycled content.

process standards will have small competitiveness impacts in world trade. Compared to other competitive factors in international trade, such as differences in labour, transportation and materials costs, differences in productivity and product quality, or differences in brand recognition and marketing ability, differential environmental process standards are unlikely to be noticeable, let alone decisive. See Repetto, n.41.
Such requirements are increasingly being based on life-cycle assessments of the product’s environmental impact during production, consumption and disposal. Although these can be valuable instruments of environmental policy, the application of such requirements to imported products can pose significant practical difficulties.\(^75\)

The TBT Agreement aims to ensure that regulations and standards such as these do not create unnecessary obstacles to international trade. It requires that all such measures should be as transparent as possible and based on international standards where feasible. The OECD has proposed a series of steps to minimize disruption to trade, including transparency; transitional adaptation periods; sensitivity to non-domestic conditions and particularly to the special needs of developing countries; greater harmonization of life-cycles methodologies; and a requirement for genuine environmental justification for all such measures.\(^76\)

### 3.3.4. Domestically Prohibited Goods

An issue related to trade in products, and of specific concern to developing countries, is the export of ‘domestically prohibited goods’. Goods that are restricted in domestic markets may often be legally exported. Importing country may then face problems such as lack of information on whether and why the product is banned, false declarations by exporters, lack of adequate production testing facilities, etc. As with many other trade-environment topics, transparency of measures and the provision of technical assistance to developing countries are key issues.

### 3.4. Competitiveness

When firms compete for trade, those that use cleaner and healthier manufacturing techniques may put themselves in a competitive disadvantage. Firms operating in developing economies, where environmental standards are less stringent

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\(^75\) For example, information may be partially or wholly lacking. Characteristics chosen for labelling may reflect domestic environmental priorities, and criteria used in different national schemes may vary widely. Schemes focusing on a particular product may create artificial advantages for other products whose consumption and production may also have environmental impacts.

\(^76\) Report on *Trade and Environment* to the OECD Council at Ministerial Level (Paris: OECD, 1995).
or less strictly enforced derive an advantage in the marketplace from lower compliance costs. It has been pointed out that "...free competition between different cost-internalizing regimes is utterly unfair." In other words, absent international environmental regulation, there is a lack of a 'level playing field' for the players of international trade.

The competitiveness effect is disputed by free traders, who claim it is overstated. A study by Jaffe et al. concludes that the effect of environmental regulations on international competitiveness in relatively small. For most industries, the cost of environmental measures is just a small percentage of overall production costs. Further, multinationals will not generally exploit major differences in environmental standards, either for fear of accidents which may harm their image or because of the benefits of standardized production technologies. Also, firms that accord ISO standards seem to enjoy certain competitive advantages, including lower liability insurance, less regulatory oversight, and increased access to customers that care about their own environmental reputation. While the public debate has focused on the cost side, studies that have compared the profitability of firms in the same industry negate the claim that environmental leaders pay a price in terms of reduced profitability. Environmental leaders can often recoup costs in the marketplace as a growing number of consumers are willing to pay a premium for 'green labels'.

Also, there are positive aspects of competitiveness. The 'Porter Hypothesis' underscores the dynamic aspect of innovation, holding that competitive pressure encourages industrial innovations that make production leaner and cleaner, thereby offsetting the direct compliance costs. International trade could raise product standards as producers meet market demand for greener products and greater competition could

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77 Herman E. Daly, "Perils of Free Trade", quoted in Charnovitz, n.12, p.464.
78 Nordstrom, n.1, pp.36-8.
80 Repetto, n.41.
force firms to look for more efficient production methods, resulting in better pollution-control technology. Thus, environmental measures resulting from a carefully thought-out environmental policy will actually increase the competitiveness of home industry rather than reduce it. Since a list of examples to the contrary could just as easily be assembled, showing net costs for businesses resulting from environmental standards, it can be stated that empirical evidence only partly supports this hypothesis. Competitiveness concerns may translate into the problematic phenomena of industrial flight, race-to-the-bottom and regulatory chill.

3.4.1. Industrial Flight

It is alleged that polluting industries are likely to migrate from developed to developing countries (pollution havens) to take advantage of lax regulations, thereby shifting the pollution problems from richer to poorer countries. According to Baumol and Oates, countries that do not contain pollution emissions when other countries do, will become the repositories of the world’s dirty industries. In the context of the EKC hypothesis, this would mean that the turning point of developed countries is partly due to migration of polluting industries to developing countries. If this is so, then it would become more difficult for the next generation of countries to pass the peak of the EKC, and more difficult still for the least developed countries that may land up with the most polluting end of production.

According to trade theorists, the theory of ‘industrial flight’ to ‘pollution havens’ is not supported by empirical evidence. Pollution abatement costs in developed countries are no more than 1% of production costs for the average industry,

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82 To the question of why industry does not exploit the potential for profit from environmental measures except under external pressure, Helm points to the ‘mental block’ which always views environmental measures as an additional expense. However, he stresses that any cost-savings for producers can only be viewed as a welcome side-effect and not as a necessary justification of a strict environmental policy, the central task of which is to protect the environment. See, Helm, n.28, p.103.

rising to perhaps 5% for the worst polluters. It is questionable if a regulatory cost-
disadvantage of a few percentage points can turn comparative advantage around.
According to Repetto, "The idea that a country will bother to move its production only
to save pollution control costs totaling less than 2% of sales strains credulity."84
Empirical studies completed in the last two decades seem to reject the assertion that
polluting industries are migrating from developed to developing countries, although
there may be exceptions.85 Environmental regulations are, at most, of secondary
importance for international investment decisions.86 In fact, Repetto suggests that lax
environmental standards can act as a deterrent to foreign direct investment. For
example, western firms have been unwilling to buy industrial plants in some heavily
polluted regions of Eastern Europe at any price, because the potential liability for
clean-up costs outweighs any reasonable expectation of profit.

3.4.2. Race-to-the-bottom

International trade rules prevent countries from responding to competitive
pressure from the world market by direct restriction of its market access through
increased tariffs. In this scenario, governments may be tempted to restrict access by
reducing standards in its import-competing sectors. This watering down of
environmental standards to a 'least common denominator' is referred to as the 'race-
to-the-bottom' problem.

84 Repetto, n.41.
85 ibid, "Developed countries' share of polluting industries has remained constant at around 75-80
percent in recent decades and has even increased marginally in the 1990s. To the extent developed
countries are exporting their industries, they are exporting them to each other, not to less
developed economies. While it is true that developing countries are the net recipients of foreign
direct investment, the composition of investments they receive is not biased towards polluting
industries, but rather to labour-intensive industries that are less polluting on average."
86 ibid, "...the location of polluting industries should not be overemphasized in the case of global
environmental problems. Even if a larger share of polluting industries is located in developed
countries with tougher environmental regulations, global emissions will not necessarily decline.
While countries are often willing to control emissions that primarily harm themselves (SO2 and
NOx) emissions, they are not always equally ready to accept the costs of reducing carbon dioxide
and other emissions with a global reach. Global environmental problems thus need to be
controlled with a concerted effect to cut emissions, regardless of the location of the polluting
industries."
The fear of a ‘race to the bottom’ is dismissed on the grounds that there is no economic incentive for a large country to enter a ‘race to the bottom’. Nations would not need to lower environmental standards, as the loss of competitiveness associated with environmental regulation is in effect minimal, and hence, so too is the pressure to lower standards. Empirical studies throw little light on whether a ‘race to the bottom’ is actually occurring.

3.4.3. Regulatory Chill

Another response to competitiveness concerns is that governments might refrain from raising environmental standards (or taxes) in an import-competing industry since this would result in some benefits to foreign exporters. This blocking of any move toward an upgradation of environmental standards is referred to as the ‘regulatory chill’. Thus, competitive pressure may prevent environmental standards from being upgraded to turn around the pollution path. Growth driven by liberalization of the world economy may then defeat the mechanisms that in principle could generate an EKC.

The positive side of the phenomenon of ‘regulatory chill’ could be that governments, finding it difficult to act individually for political reasons, may be more open to seeking multilateral solutions to environmental problems. The growing number of MEAs may be one indication in that direction. The lasting effect of the ‘regulatory chill’ may then be replaced with initiative shifting from the national to the supranational level.

3.5. Tools for Addressing Environmental Concerns

Various tools have been suggested that may be used by trade policy to address environmental policy concerns.

3.5.1. Harmonization

Harmonization of environmental policies is seen as one solution to competitiveness, industrial flight, regulatory chill and ‘race to the bottom’ problems.

Cole, n.30, p.190.
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There is some opposition to the option of harmonization based on the fear that harmonization may take place at the 'lowest common baseline'. Further, different environmental standards are a reflection of different national priorities and needs.

[T]he principle of state sovereignty, on which international law and the multilateral trading system are founded, 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. 88

There is no automatic scale of environmental protection that can be applied universally. Local pollution problems are arguably best addressed by standards targeted to the specifications of the local conditions. Also, harmonized standards will result in a loss of comparative advantage that nations possess due to their high assimilative capacity. Although it would be irrational for developing countries to resist reasonable controls, it would be equally irrational to expect developing countries to adopt the same process standards as OECD countries.

One view is that economic efficiency requires that policies to address global environmental problems should be harmonized across nations, while policies to tackle local environmental externalities should not be harmonized. 89 This view is not, however, acceptable to the proponents of complete harmonization of environmental standards, who argue that different production, packaging and disposal regulations in each country result in competitiveness concerns.

3.5.2. Balancing

It is not easy to decide when there is an ulterior motive attached to a health or environmental measure. In recent years, there have been many efforts to develop principles for the GATT/WTO to use to determine whether a country can apply its environmental and health measures to imports. Some new rules that are being devised

include criteria such as trade-restrictiveness and scientific evidence, but they would also include other considerations like 'proportionality' and 'legitimacy'. 'Proportionality' means that trade impact and cost of a measure should bear a *reasonable relationship* to the importance of the social objective it is designed to achieve. The European Court of Justice (ECJ) has used the principle of proportionality to 'balance interests between the free movement of goods and environmental protection...'. The concept of weighing commercial versus environmental objectives is gaining influence among trade policy specialists.

'Legitimacy' means that the purpose of the measure should be widely recognized as a legitimate concern of the government imposing the measure. It has been proposed that the balancing done in ECJ adjudication, based on trade-restrictiveness, proportionality and legitimacy, should be adopted by GATT. But others feel that the requirements in the Article XX *chapeau* – namely non-discrimination and no disguised restrictions – would, if properly implemented, be enough to weed out illegitimate use of environmental trade measures and no additional tests, such as proportionality, are needed.

3.5.3. *Economic Instruments*

The use of economic instruments is gaining popularity as tools for achieving environmental objectives. Economic instruments – taxes and charges, tradeable permits, deposit refund systems and subsidies – aim to ensure that environmental externalities are incorporated in decision-making. These instruments are more efficient and more transparent than regulatory measures. WTO members are permitted to adjust tax rates at the border – i.e. to impose taxes on imports and rebate taxes on exports so that domestic producers and exporters do not face a disadvantage as compared to foreign producers.\(^9\) This is restricted to traded products and although GATT is not

\(^9\) The purpose of a BTA is to load an internal tax onto an imported product or to unload an internal tax from an exported product. The motivation in both cases is commercial parity, i.e. to provide a 'level playing field'. BTA problem arises because countries do not maintain similar tax systems. So, imported products would have an advantage in domestic markets if a domestic sales tax were not applied. Similarly, exported products could be disadvantaged in foreign markets if they carried sales tax.
completely clear on this, it would appear that taxes and charges related to processes and production methods cannot be so adjusted.

There are however severe problems involved with the practicalities of border tax adjustments, including the valuation of the appropriate level of tax and the difficulty of verifying PPM-based damage from an inspection of products. The BTA issue becomes significant for the environment when internal taxes are levied for environmental purposes. Under existing GATT rules and jurisprudence, 'product' taxes and charges can be adjusted at the border but 'process' taxes and charges by and large cannot. The permissibility of border adjustments for certain environmental taxes remains uncertain. Also, exempting exports from such internalization taxes might be viewed as antithetical to environmental principles.

3.6. Environmental Principles in the Trade-environment Debate

3.6.1. Precautionary Principle

The links between scientific data of environmental change, risk assessment and the role of the 'precautionary principle' have increasingly gained importance in the trade-environment debate, especially in settling environment-related trade disputes. It has been suggested that the trading system should separate true environmental issues from governmental choices reflecting values. This view is problematic. A desire to save a particular species from extinction is based on a value judgement and science cannot tell us what species to save. The GATT does not endorse the value of saving all species. Consequently, disputants could bring totally different values into dispute settlement. In such a case, application of science may be of little help to a panel. Although science can provide an estimate of the risk from a substance, it cannot tell the panel whether a country should bear or want to bear that risk. A difficult case

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91 For example, a domestic tax on fuel can be applied to imported fuel. But a tax on the energy consumed in producing a ton of steel cannot be applied to imported steel, even if it is charged to domestically produced steel.

92 The Rio Declaration incorporates the precautionary principle, stating "...where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing effective measures to prevent environmental degradation". See Rio Declaration on Environment and Development, 1992.
would be when notwithstanding a risk that is extremely small or zero, a country wants to ban the substance anyway. While science cannot dictate a value, it can be used to determine whether the same value can be achieved by alternative methods. Many trade-environment conflicts arise from differences in values, as it is asserted that the choice of the appropriate level of protection is a social value judgement and does not require a scientific basis. 93

3.6.2. Polluter Pays Principle

The Polluter Pays Principle (PPP) is a doctrine bridging environmental and trade policies. 94 It is interpreted in two ways, both impacting trade as well as the environment. This principle is about cost internalization, i.e. ensuring that costs of production include the full incremental costs of production including environmental costs. 95 In this sense, it implies that polluting firms should bear the costs of pollution control. The PPP is also about cost allocation, i.e. an allocation between the government and the private sector of the costs of environmental protection. In this sense, it implies a principle of non-subsidization of polluters that prohibits governments from distorting investment and trade decisions through environmental subsidies.

The PPP is manifested in the problem of environmental subsidies. Environmental subsidies have the potential to be misused as disguised aids to less competitive sectors of industry. While environmental subsidies in the industrial sector are covered by the SCM Agreement, subsidies in the agricultural and natural resources sector are covered by the Agreement on Agriculture.

There is some opposition to the use of environmental subsidies based on the argument that environmental costs should be considered as one cost of doing business

93 Chamovitz, n.12, pp.487-92.
94 Though the PPP was adopted by the OECD in 1972 and became a part of EC law in 1975, it has not found worldwide acceptance. The principle is not explicit in WTO rules and GATT/WTO language and practice relating to PPP is less than clear.
and the ability to cover these costs as a factor in industry competitiveness. In so far that government assistance for pollution control gives an unfair advantage to certain firms and sectors, environmental subsidies are trade-distorting. Firms in non-subsidizing countries suffer a disadvantage when competing with firms in subsidizing countries.

Cost internalization (through environmental taxation or regulation) is proceeding at different speeds in different countries. International trade rules fail to allow for such differences in national efforts at environmental sustainability. Polluting firms should bear the costs of pollution control and should not benefit from environmental subsidies or import duties that distort trade. Stevens explains the PPP in the trade and environment context as follows:

As applied by environmentalists, the principle means that polluters (and countries) who do not pay for the costs of their domestic pollution (i.e. those who do not internalize these costs) should be liable for trade penalties. As applied by trade liberalizers, the principle means that polluters (and countries) should pay for the costs of domestic pollution as dictated by national environmental regulations and not by the trading system.96

Environmentalists hold the trading system responsible for discouraging effective cost internalization, claiming that the competitive conditions of the international trading system prevent full cost internalization because of the fear of lost market share. They thus advocate that the trading system itself should encourage governments to ensure that environmental costs are internalized. 'Free traders' also emphasize the importance of internalizing environmental costs through domestic environmental policies so that the prices of traded products can reflect these costs.97

A difficult question is that of cost internalization and allocation of the costs of addressing degradation of environments which are shared among countries. PPP offers little guidance for transboundary environmental damage. While some believe that government intervention into free trade may be needed to internalize costs for shared


97 ibid, p.585.
environmental degradation, others question the usefulness of using the PPP through the trading system as an enforcement machine for transnational and global environmental threats.

3.7. Multilateral Environmental Agreements

Multilateral Environmental Agreements (MEAs) often use potentially WTO-inconsistent trade measures to realize their objectives, more specifically, to prevent 'free riders' from undermining the effectiveness of the Agreement. As yet, no complaint has arisen within the GATT/WTO with respect to trade measures taken pursuant to an MEA. In instances such as the Montreal Protocol, trade provisions have been so successful in encouraging participation that there are virtually no non-parties left against whom trade measures could be taken. The CTE has recognized that

Trade measures based on specifically agreed-upon provisions can also be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem. They have played an important role in some MEAs in the past, and they may be needed to play a similarly important role in certain cases in the future.

Although a multilateral treaty is unlikely to violate WTO rules, action by parties to implement such a treaty could be inconsistent with WTO obligations. Several approaches have been suggested for how environmental treaties might be reconciled with WTO rules. These include an exception similar to Article XX(h), GATT waiver, GATT amendment and overriding treaties.

A point of contention is the definition of MEA itself. For instance, how many countries would need to be part of an agreement for it to be considered multilateral? Can a regional agreement with a membership limited to a few countries be multilateral?

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99 Pearson, n.95, p.573.
101 For details, see Chapter 5.
102 The US, for instance, takes the broadest interpretation of what constitutes an MEA, defining even a regional and limited party agreement as multilateral.
Another issue for which trade and environment systems have no ready answer is that of trade measures affecting non-parties to an MEA. What happens if a disputant is a member of the WTO but not of the specific environmental regime under which action is being taken against it? Also to be taken into account is the dynamic nature of MEAs. Environmental agreements are constantly evolving and creating new potential problems for WTO provisions. 103

3.8. Dispute Settlement

Conflicts involving differences between trade liberalization and environmental protection goals are occurring with increasing frequency. Regulations drawn up in pursuit of the objective of environmental sustainability have been challenged as erecting barriers to trade in several GATT/WTO cases. The central issue here is the appropriate forum for settlement of a dispute that has both trade and environmental implications. Though the CTE has been discussing the interaction between WTO and MEA dispute settlement mechanisms, it has been able to reach only very general conclusions.

3.9. Functioning of the Multilateral Trading System

3.9.1. Participation

One big allegation leveled against the WTO is that it is a trade body with a one-point agenda of promotion of free trade. Since this agenda overrides any other consideration, the WTO may not be the appropriate forum for handling environmental concerns. Environmentalists worry about who selects and prioritizes environmental problems in the WTO and based upon which set of environmental data and other values. Western conservationists see WTO as the new supranational bureaucrat that undermines the responsibility of democratically elected governments. Various options have been suggested to remedy this situation. For instance, in environment-related disputes, environmental experts could be consulted or even represented on the panels

103 For example, by allowing trade in 'sustainably managed' or 'reared species', CITES accepts the concept of PPMs. In this case, trade would differentiate between all other ivory and ivory from selected elephant populations in special geographical areas that are 'sustainably managed'.

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or AB. Also, the WTO should increase cooperation with MEA secretariats and work in tandem with them.

3.9.2. Openness: Role of Civil Society

A major issue in the trade-environment debate today is the issue of openness of trade-policy formulation. It is contended that no international trade rules should be adopted unless the rule-making procedures are open and participatory. Voices of all people, and not just those of special interest groups should be heard and all decision-making should be open. Dispute resolution procedures should respect standards of due process.

Civil society groups have been demanding increased access to and participation in WTO functions to ensure the representation of all interests. The wealth of knowledge, resources and analytical capacity in the NGO's area of expertise, it is pointed out, would greatly enhance the quest for optimal policies. Also, NGOs can play an important role in disseminating information at the national level and could ensure broader public support and understanding for trade liberalization as well as the WTO.

There is resistance within the WTO to greater NGO involvement, with Members highlighting the intergovernmental nature of the organization. India, for one, has consistently opposed increased NGO participation in the WTO. This stand is explained by the fears of the South that NGO participation would essentially translate into increased power for the large Northern NGOs, who have tremendous resources and expertise to get themselves heard. The Southern civil society, in comparison, would be at a relative disadvantage.

3.9.3. Transparency

Transparency concerns are about the visibility of the functioning of the WTO. In practical terms, this issue relates to the demand for derestriction of WTO documents and participation in meetings by non-state entities as well.
The above discussion elaborates some of the important areas of trade and environment policy interaction. As is evident, the trade-environment debate is a mesh of issues, each with innumerable perspectives and points of view. Attempting to unravel this mesh is what the international community is grappling with. So far, there seems to be little consensus on most issues of policy interaction. The dichotomy of North-South perspectives on most issues further complicates any attempts at reconciliation of policy objectives.

4. The North South Divide over Trade-environment Issues

The trade-environment debate has been sharply divided along North-South lines and the divergent perspectives of the North and the South have coloured the development of the debate. Developing countries view themselves as ‘unequal, vulnerable partners in the global game’, wherein the North is promoting its own agenda through the initiative to integrate environmental issues with trade.

4.1. Reasons behind the North-South Divide

4.1.1. Environment versus Development

The trade-environment polarization is better understood when viewed within the broader political and economic context of the issue. The trade-environment debate falls squarely into the ‘development versus environment’ model of problems that have always been a strain in North-South relations. The fundamental suspicion of the South that the North is trying to “…pull up the ladder of development behind them” applies also to the trade-environment debate.

Developing countries have certain expectations of economic benefits from trade liberalization through the existing trade rules. “The protection offered to smaller countries by a multilateral rules system is far from perfect, but it is certainly greater than that available from the interplay among more powerful international actors

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104 It must be stated at the outset that making generalizations about a common position of the countries of the South may be risky, considering the important economic and other divergences among the nations of the South.

105 Agarwal, n.66, p.102.
pursuing their own interests in a world without rules".\textsuperscript{106} The move to amend trade rules to accommodate environmental concerns is thus seen by the developing countries as a potential threat to their economic growth and is viewed with considerable caution. As Uimonen and Whalley note:

Developing countries see themselves as being asked to restrict their trade, thereby truncating their growth and development, as the mechanism to deal with a developed-country-created problem, and one which is being given higher priority by the high-income countries than poverty alleviation and growth in low-income countries.\textsuperscript{107}

Also central to this argument is the feeling that less developed countries should not be expected to bear environmental abatement costs disproportionate to their historical contributions to global environmental problems. Account must be taken of the fact that it is the developed countries who have caused today’s environmental problems through unchecked industrialization over the last two hundred years.\textsuperscript{108} If the developing countries are now asked to retard their growth on account of developed-country environmental concerns, they should be compensated in some way rather than be faced with trade threats. Thus any move towards the ‘greening’ of trade rules must be accompanied with commitments by the North to provided financial and technological assistance to the South.

Developing countries approve of Principle 12 of the Rio declaration because it links the economic benefits of trade liberalization with environmental protection. Attempts to ‘leapfrog’ the development-environment sequence, whereby environmental priorities are put ahead of development gains, are either rejected totally or else are viewed as acceptable only if accompanied with developed country obligations to assist developing countries.\textsuperscript{109}

\textsuperscript{108} ibid, p.67.
4.1.2. Past Experience

One of the primary reasons for the lack of enthusiasm of the developing countries to participate in the trade-environment debate is that past experience in the field of environmental cooperation has left them with a feeling of having been shortchanged. The 1992 Rio Earth Summit was polarized between two distinct agendas – the ‘northern’ agenda focussing on global environmental problems such as climate change, biodiversity and forestry and the ‘southern’ agenda with a more developmental tilt comprising poverty alleviation, trade, market access, technology transfer and development assistance. Developing countries were cautious during UNCED negotiations, fearing that the North would impose additional, environmental constraints on their development, increasing the number of conditions attached to their access to industrial country markets as well as to aid.

At Rio, the friction created by the dichotomy between the agendas of the North and South was temporarily diffused through the Rio bargain on ‘common but differentiated responsibilities’. But developing countries soon discovered that they had been forced to make ‘real concessions in exchange for unfulfilled promises from the North’. Instead of securing additional funds to cover incremental costs, Southern countries saw ODA funds drop substantially after Rio. “There appears to be a lack of commitment on the part of the crucial industrial countries to provide the means for a transfer of resources to aid developing countries to meet their new international environmental objectives.”¹¹⁰ In the absence of moves towards tangible assistance to the South through additional financing, technology transfer, increased ODA and other initiatives to promote sustainable development, developing countries feel that their larger trading partners have done little to pass on benefits, agreed through difficult negotiations in the 1990s. Consequently, the South naturally remains deeply vary of taking on new obligations resulting from the ‘greening’ of trade rules.

The Rio Declaration reflected a wariness on the part of the developing countries with respect to international attempts to limit the use of natural resources or

¹¹⁰ Uimonen and Whalley, n.107, p.62.
to harmonize environmental standards and obligations. Developing countries were insistent on disciplining the use of trade restrictions for environmental purposes. *Agenda 21* also reflected the efforts of developing countries to ensure that they not be obligated to sacrifice future development prospects.\(^{111}\)

Uimonen and Whalley point out how the language related to trade policies in the *Rio Declaration* and *Agenda 21* broadly reflects the interests of developing countries and concerns about the potential for the growing use of environmentally motivated trade restrictions. The policy context of UNCED related to trade and environment can be characterized thus: (i) trade measures, particularly unilateral trade measures associated with environmental protection are discouraged; (ii) the special needs of developing countries are explicitly recognized; (iii) national environmental standards and laws should be allowed to differ and may reflect different stages of economic development; and (iv) capacity-building by technology transfer and development assistance is part of the process of achieving sustainable development.\(^{112}\)

The developing countries do not want to lose out on the trade-related gains they achieved at Rio.

4.1.3. Lack of Progress on Issues of the South

Another reason for the lethargy of the South in trade-environment linkage issues is that not much progress is visible on issues of particular concern to them. For instance, "[s]ome Third World governments have tried to put trade in toxic wastes onto the agenda of GATT, but this has been ignored by the developed countries."\(^{113}\) The CTE has so far been unable to deal with the issues of DPGs. There has also been little progress on market access, which covers environmentally damaging trade barriers. So, developing countries view the situation as one where the North hijacks discussions and negotiations, focusing on the issue of interest to them while ignoring the concerns of the South.

\(^{111}\) ibid, p.58.  
\(^{112}\) Vaughan, n.109, p.596.  
\(^{113}\) Interview with Khor Kok Peng, Consumers’ association of Penang, Malaysia, in Agarwal, n.66, p.95.
4.2. Issues of Concern

4.2.1. Green Protectionism

For developing countries, the primary perceived benefit from international trade is ensured market access to industrial country markets. Their biggest worry arising from trade and environment linkages is the potential threat of 'green protectionism'. In other words, ostensibly environmental standards may actually be standards designed to favour domestic producers over foreign competitors. The fear that incorporating environmental considerations in trade rules will be an open invitation for green protectionist measures is the primary reason for the South's objection to any move towards a trade-environment linkage.

In the Marrakesh Ministerial Meeting in April 1994, the developing countries pointed out that environmental issues "...are now clearly being used to promote protectionist motives, particularly to keep out imports from countries which have a better competitive edge and comparative advantage". Developing countries suspect that much of what was promised in the Uruguay Round may be circumvented by alliances between protectionist interests and 'green' lobbies. Thus, any linking of trade and the environment may prove to be the 'edge of the wedge', opening the door to a flood of GATT-acceptable protectionist measures.

Though 'green protectionism' is acknowledged as a real threat, many in the North view these fears of the South as 'exaggerated'. According to Repetto, green protectionism undoubtedly exists, but concern over potential protectionist barriers created by environmental product standards is excessive, and diverts attention from much more critical trade issues.

4.2.2. Unilateralism

The South characterizes the use of unilateral trade measures for ensuring environmental compliance as 'eco-imperialism' and a violation of their sovereignty. It

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115 Repetto, n.41.
objects to unilateralism as an attempt by industrial countries to impose their higher standards on them and fear that, in reality, only the larger powers such as US and EU can effectively employ unilateral trade measures. "[O]nly economically powerful nations can impose effective trade sanctions against less economically powerful nations. This tool for bringing environmentally-errant nations to task cannot be used by less economically powerful nations against the global economic powers, howsoever bad their environmental track record might be."\(^{116}\)

Paradoxically (because the developing countries also oppose incorporation of environmental issues in the WTO), it is pointed out that if the WTO fails to make significant progress in incorporating environmental concerns into the trading system, the list of unilateral actions is likely to grow as environmental groups lose faith in the ability of the multilateral system to resolve these problems.

4.2.3. Process and Production Methods

Developing countries are worried about the possibility of PPMs becoming non-tariff barriers to trade. So far, cases involving PPMs have mainly concerned species protection rather than industrial production. The prospect of the entry of PPMs in the industrial sector as well is much more worrisome for the developing countries.\(^{117}\) They have strongly resisted any expansion of the PPM regime on the grounds that it would restrict their ability to develop their own domestic environmental regimes to suit their own economic, environmental and social conditions.\(^{118}\)

4.2.4. Harmonization

Developing countries are wary of attempts at harmonization that might limit their own ability to compete. Firms in developing countries fear that if they are forced to meet environmental standards as strict as those of the OECD countries, then they will be unable to compete in the marketplace because of higher production costs.


\(^{117}\) Vaughan, n.109, p.594.

Developing countries strongly oppose the contention that countries of the North and South should have comparable standards to protect the environment, health and safety. In the light of differing economic situations, development needs and consumption patterns of the North and South, developing countries view universal standards as an unacceptable way of linking trade and environment. The South asserts that countries must have the right to make their own judgements on the standards that they apply.

UNCED endorsed relative as opposed to internationally harmonized standards. The South perceives Northern attempts to focus the international environmental protection debate on the upward harmonization of standards to be an effort to ignore the commitments made at UNCED to respect the development needs of individual countries.

4.2.5. Voluntary Standards

Although ecolabels relate to PPMs, they do not pose a problem under the WTO, as long as they remain voluntary. Developing countries worry that the practice will become more widespread and will result in market segmentation, as more and more consumers base their procurement choices on ecolabels. Consumer boycotts from Northern countries have reinforced in the minds of many in the developing countries that the trade-environment issue is being driven by northern environmentalists and their allies at the expense of the sovereign rights of Southern countries to manage their own resources.

More and more companies and governments are basing their procurement policies on ecolabels. Because each of the labels has different requirements, products from developing countries may find it difficult to comply. Although the ISO 14000 process is open to all countries, it has proven to be dominated by European and North American industry. The cost in terms of personnel and money of attending all the consultative meetings has proven to be too high for most developing countries. And many do not have the technical capacity to participate actively in any event. Further, while large enterprises in developing countries have little difficulty in complying with
new regulations in the North, small and medium enterprises face real problems even acquiring information about these requirements, let alone complying with them. It seems certain that Southern enterprises will be much slower to take up ISO certification than their Northern counterparts, especially small and medium enterprises. As has been stressed:

It is naïve to believe that voluntary ecolabelling has minimal impact on trade. Standards can be set artificially high in order to benefit certain products, and depending on the importance of continuing export, developing countries will be forced to reorient their domestic environment policies to conform to the requirements of major importers.¹¹⁹

Thus, labelling acts as a barrier to free trade and a declining export market threatens the livelihood of small producers in developing countries.

4.3. Elements of a Consensus

The Northern demand to link environment to trade was rejected by ministers from the Group of 15 (G15), a subset of the G77 coalition of developing countries, who met in Bangalore, India in August 1999, to decide a common negotiating strategy for the Seattle meeting. The ministers maintained that environment is a non-trade issue, and were wary of trade protectionism in the garb of environmental concern. They called on the world trading system to recognize that environmental standards differ across countries, and the only solution lies in mutual recognition, not in setting one global standard.¹²⁰

4.3.1. Market Access Concerns

The position of the South is premised on the underlying reality that making the transition to sustainable development will be expensive. For developing countries, much of the new capital will have to come from increased trade revenues. The developed world will need to take serious note of and make substantial additional progress on market access concerns of developing countries.

¹¹⁹ ibid., p.22.
¹²⁰ Agarwal, n.42, p.251.
4.3.2. Enabling Measures

Further, the developed world must make more resources available to the South. It must be ensured that those concessions which have already been promised are actually fulfilled. Trade and environment issues cannot move forward in isolation from the wider development commitments previously made at UNCED. Such commitments include technology transfer, additional and concessional financing and other initiatives associated with sustainable development.

There is an urgent need for capacity-building to help developing country companies adjust to the changing regulatory climate in their export markets. Few countries have the analytical skills necessary to bring trade and environment positions together in the formulation of a position. There is need for initiatives to help develop the capacity for analysis and negotiation.

4.3.3. Protection from Protectionism

Solutions will have to be found to the threat of protectionism. This threat is exacerbated manifold by the recent trend towards legitimization of the use of unilateral trade measures for environmental purposes. Policies to combat protectionism must begin with openness and greater transparency in the formulation of national regulations and standards is essential.

4.3.4. Enhancing MEAs

Since MEAs are better tools for addressing international environmental problems, it is in the interest of both developed and developing countries that MEAs be more widely used and to greater effect. Since developing country priorities would not normally dictate full and active participation in MEAs, efforts have to be made to provide them a greater stake in MEAs. For this, capacity building, financial and technology transfer and initiatives to foster increased local R&D are essential.

4.4. A New Political Divide

A new perspective in the political divide over trade-environment issues is the emergence of a US-EU divide over trade and environment issues. The simple North-
South characterization masks some important areas of agreement on issues between developed and developing countries. These areas of agreement could be creatively built into a reform agenda for the WTO.\textsuperscript{121} The impact of this new political divide on the pre-existing North South divide, which still prevails, needs to be carefully analyzed.

Addressing the North-south divide is essential if any headway is to be made towards resolving the trade-environment debate. Klaus Toepfer, executive director of UNEP, sums up:

Trade and environment must be linked to development and not in a way that hurts the poor. We will never get our trade or environment policies right until the policies adequately address the economic constraints facing the developing countries. We cannot isolate trade and environmental policy from the need to alleviate poverty.\textsuperscript{122}

New approaches must be found to build sustainable trade policies. The debate needs to be shifted from an ‘environment versus development’ context to one that examines means to achieve economic and environmental benefits of sustainable development.

5. Concluding Observations

The trade-environment debate is here to stay and is likely to grow in magnitude and impact along with the inevitable growth in trade coupled with heightened concern over the accelerating environmental degradation. As brought out in the discussion above, the trade-environment debate is extremely complex. To start with, there seem to be inherent contradictions in the objectives of free trade and environmental protection, though the international community is committed to both. Coupled with this is the fact that the empirical evidence relating to the impact of trade on the environment is inconclusive and economic theories tend to arrive at divergent conclusions on this issue.


\textsuperscript{122} Quoted in N.D. Kitikiti, Special Report, “Unfair Trade”, \textit{Down to Earth}, 30 April 1999, p.22.
Chapter 2: Issues and Concerns

Adding to the confusion is the host of stakeholders or ‘players’ in the debate, with varying perceptions and values. An inherent problem with the debate is that ‘free traders’ and ‘environmentalists’ tend to lack a full understanding and appreciation of each other’s position and the debate is therefore conducted within and rarely between the two communities. Further, the traditional North-South divide over trade-environment issues has been a stumbling block for progress in the debate. It is imperative for the debate to reflect and incorporate the interests and concerns of the South, if it is to make any progress. With the rapidly growing and increasingly powerful ‘civil society’ questioning the exclusively state-centric handling of trade and environment issues, the role of NGOs in the debate also needs to be addressed. However, in addressing the issue of the role of ‘civil society’, it is imperative to keep in mind the North bias of ‘civil society’ as it exists today, especially in the field of environment.

An analysis of most trade-environment issues highlights the above-mentioned differences. However, there are indications of agreement, albeit limited, on some matters. For instance, there seems to be general inclination toward distinguishing between limited environmental harm and transboundary environmental harm. For instance, though the acceptability of PPMs and unilateral measures is still disputed, it is contended that such acceptability should not be contested in cases where the objective is to control transboundary environmental harm. Also, there seems to be a general acceptance towards a potentially WTO-inconsistent TREM if it is taken pursuant to a multilateral environmental agreement. These broad agreements, however, face problems in implementation. For instance, the basic question of how many countries are needed to qualify a measure as ‘multilateral’ remains. Also, in the case of MEAs, the real problem is that of the effect of measures on non-parties to MEAs. In this context, the effective participation of developing countries in the formulation and implementation of MEAs through enabling measures is stressed.

The fears of the developing countries that genuine ‘environmental protection’ is scarcely distinguishable from ‘green protectionism’ are real. The increased linkage
of environmental concerns to trade could mean decreased access to developed country markets. Also the license to use unilateral trade measures for environmental objectives works against the interests of the developing countries, as there is no denying that unilateral measures are effective weapons of the economically powerful countries and do not offer a viable option to the developing countries. A sequencing that places environmental protection concerns before development concerns is worrisome for the developing countries. Thus, there is a need for developing countries to be alive to the debate at the international level and ensure that their interests and concerns are incorporated in any developments in the trade-environment debate.

The interface between the law and policy domains of international trade and environment will depend on the direction taken by the underlying debate and must, therefore, be studied in the light of the terms of this debate. The subsequent chapters in this study focus on the legal implications of some of the basic issues discussed in this chapter. The next chapter deals with the environmental component of the legal regime governing international trade, i.e. the GATT/WTO system.