

Environment and Trade Matters under GATT Article XX

ABSTRACT

The relationship of trade with environment is not direct; however article XX of the GATT have served as a guardian of environment. However, only article XX in GATT is not termed as sufficient for the furtherance of this cause. Thus the issue of environmental protection through trade embargoes on the defaulter states is contentious. The Pre-WTO approach was different from the Post-WTO approach to protect environment. Thus; this article examines the difference of approach towards environmental protection by the Pre and Post WTO panels. Different cases in this regard are examined; analysing these issues gives us an idea of how environment and trade matters are addressed by GATT and WTO panels and the suitability of Article XX of GATT in this regard.

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Introduction:

Environmental issues have been debated since long. Many bilateral and multilateral treaties have been signed to cope with the emerging environmental issues. Any violation of an agreed environmental norm is addressed according to the concerned agreement or convention. However, any domestic laws made in furtherance of any environmental protection agreement may demand a trade embargo to achieve the ascertained environmental policy. This act of a state which involves a trade issue is dealt by the General Agreement on Trade and Tariffs (GATT 1994) under the World Trade Organisation (WTO). The GATT does not specifically mention the environmental problems. Nevertheless the GATT addresses the environmental issues in paragraphs (b) and (g) of Article XX (General Exceptions) as well as in its (Article XX's) preamble. Thus the environmental issues involving trade matters have been tried to address by interpreting the above mentioned clauses. Since 1989 seven reports on environmental issues have been issued by the GATT and WTO panels.¹ The environmentalists have been critical of the different panel reports. The question arises that, is Article XX of the GATT is sufficient to address the issues of environment and trade simultaneously? The approach of the pre WTO and post WTO panels is different in this regard. The effect of the preamble of WTO which advocates protecting the environment is evident in the post WTO panel reports. We will examine the environmental issue with trade perspective i.e. under Article XX (b) and (g) of the GATT. We will analyse how the pre WTO panels interpreted the Article XX and its provisions in two decisions i.e. Tuna/Dolphin I and Tuna/Dolphin II. Then more importantly we will discuss the status of environmental issues under the WTO especially discussing the panel and appellate body reports in Shrimp/Turtle case. Analysing these issues will give us an idea of how environment and trade matters are addressed by GATT and WTO panels and the suitability of Article XX of GATT in this issue.

Article XX (b) and (g):

¹ C Wofford, 'A Greener Future At The WTO: The Refinement of WTO Jurisprudence On Environmental Exceptions To GATT', 24 (2000) *Harvard Environmental Law Review*, at p. 563.

Article XX of GATT sets out circumstances in which an act that is otherwise inconsistent with the agreement can be legally employed. A few cases have arisen whereby states have taken measures to restrict trade because of environmental reasons under article XX. For determining the environmental cases, a logical approach is adopted by the appellate body under article XX, whereby first it is found out whether the action taken is admissible under articles XX (b) and (g) and then it is considered whether it satisfies the introductory proviso of article XX, referred as the “chapeau”.² Article XX(b) of the GATT mentions the measures “necessary” to protect human, animal or plant life or health. An act is termed as “necessary” if there is no alternative available which is consistent with the GATT, and the act is least inconsistent with the other GATT provisions.³ Article XX(g) of the GATT mentions measures “relating to the conservation of exhaustible natural resources” if made in concurrence with domestic production or consumption. The introductory proviso (chapeau) of Article XX specifies that the mentioned measures should not be applied in a manner which would be discriminatory against countries where the same condition exists, or is an undue restriction on international trade. The panel in *United States (Imports of certain automotive spring assemblies)* said that “The preamble of article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined”.⁴ Furthermore the appellate panel in *Gasoline* case said that “it is important to underscore that purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions”.⁵ Furthermore the appellate body adhering to the actual text of the Article XX’s chapeau said that the main purpose of the chapeau is to avoid any abuse of the exceptions laid down in the article.⁶ So simple analysis of Article XX (b) and (g) would reveal that environmental protection have been given importance but not at the cost of discrimination or arbitrary use of the clauses.⁷ Thus environmental policies of a state which involve trade restrictions can only be achieved through Article XX (b) and (g) if the provisions of the other articles of the GATT are not violated simultaneously. This phenomenon is evident in the cases discussed below.

² U.S. – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996) (Appellate Body), at p. 22 and U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS/AB/R (Oct. 12, 1998) (Appellate Body), at paras. 118–122.

³ EC - Measures Affecting Asbestos and Asbestos Containing Product, WT/DS135/AB/R (2001), at paras. 155-75.

⁴ U.S. – Imports of Certain Automotive Spring Assemblies, GATT B.I.S.D. (30th Supp.), at p. 125, para. 56, adopted on May 26, 1983.

⁵ Supra note 2, *Conventional Gasoline* case at p. 22.

⁶ Ibid, at p.25.

⁷ Supra note 1, at p. 567.

Tuna/Dolphin I⁸:

Dolphins are wounded or drowned in the process of catching Tuna fish by purse seine nets, as Tuna fish is frequently found with Dolphins. Under the US law only incidental killing of Dolphins was allowed (while fishing for Tuna)⁹, and relevant provisions were made to implement such restrictions. Under the US law Yellowfin Tuna would be accepted as imported products from only those countries which have similar regulatory program comparable to US; secondly has an average accidental marine mammal taking rate as comparable to the US.¹⁰ Under the mentioned law the US government imposed a prohibition on imports of Tuna from Mexico and other countries. After a failure of consultations in GATT, Mexico commenced a dispute settlement proceeding under Articles XXIII and XI of the GATT. The USA came up with a defence under Article XX (b) and (g). The panel held that the imports should not be restricted under Article XX(b) only because the life or health protection policy in the exporting country is not identical with the importing country.¹¹ Furthermore it was held that the intention of the framers was to safeguard life or health within the jurisdiction of the importing country.¹² Thus the use of extra jurisdiction was nullified by the panel in this case. Furthermore this principle of jurisdiction was also applicable to Article XX(g).¹³ The conditions laid down by the US for catching Tuna in order to qualify for importing tuna into US were also “unpredictable”.¹⁴ Thus the US action against Mexico was not justified under article XX (b) or (g) and was contrary to Article XI(1) of the GATT. The main finding here was that US could not impose its environmental policy unilaterally upon Mexico by the use of trade embargoes. The panel report was not adopted because no request was submitted for adoption.

Tuna/Dolphin II¹⁵:

The same regulation (in Tuna/Dolphin I) of US was challenged by European Community in 1994. The main focus was on the provision which banned imports of Yellowfin Tuna from any state which could not show that they have not imported such product within last six

⁸ U.S. – Restrictions on Imports of Tuna, BISD 39S/155 (Sept. 3, 1991).

⁹ US Marine Mammal Protection Act 1972.

¹⁰ Ibid, as amended in 1984.

¹¹ Supra note 8, at paragraph 5.25 – 5.29.

¹² Ibid, at paragraph 5.26.

¹³ Ibid, at para. 5.32.

¹⁴ Ibid, at para. 5.33.

¹⁵ U.S. – Restriction on Imports of Tuna, DS29/R (June 16, 1994).

months from a state which is directly banned by the US in the previous six months.¹⁶ In this case the second GATT panel focused more on Article XX(g) rather than XX(b). It was accepted that a “policy to conserve dolphins was a policy to conserve an exhaustible natural resource”.¹⁷ Unlike the Tuna/Dolphin I, the panel declared that Article XX(b) does not mention any limitation on the location of the living things to be protected.¹⁸ The panel acclaimed the argument made in the previous case (Tuna/Dolphin I) that states are not excluded from “regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside their territory”.¹⁹ Thereby the provision of Article XX(g) also applies to the policies of conservation of exhaustible natural resources outside the territory of the state who is invoking this provision.²⁰ Thus the US policy of conservation of Dolphin was pursued within its jurisdiction over its nationals and vessels and fell within Article XX(g).²¹ The extraterritorial jurisdiction was thus admitted until it is exercised upon the state’s own property or personnel.²² The implementation of Article XX is thus allowed outside the territory of a state as long as it is within its personal jurisdiction.²³ But a state cannot force another state to comply with a specific environmental policy which it desires or have adopted.²⁴ The US in this case primarily aimed at changing the policy of the other states regarding environment.²⁵ The aim of Article XX (b) and (g) according to the panel was to conserve the environment and not controlling other countries.²⁶ Thus it was held that, the US import prohibitions were against Article III and XI(1) of the GATT, and are not covered by any exception under article XX. The panel accepted the extraterritoriality of the provisions albeit it rejected the US defence under article XX. The panel also accepted the conservation of Dolphins as conservation of a natural resource under Article XX(g).

Shrimp/Turtle:

In 1997 India, Malaysia, Pakistan and Thailand brought a complaint against a ban on importation of Shrimp products by USA. The ban was imposed by US because in the process

¹⁶ Supra note 9.

¹⁷ Supra note 15, at para. 5.13.

¹⁸ Ibid, at para. 5.31.

¹⁹ Ibid, at para 5.32.

²⁰ Ibid, at 5.20.

²¹ Ibid.

²² D Ahn, ‘Environmental Disputes In The GATT/WTO: Before And After US – Shrimp Case’, 20 (1999) *Michigan Journal of International Law*, at p. 831.

²³ Supra note 15, at paras. 5.33 and 5.39.

²⁴ Supra note 22, at p. 832.

²⁵ Supra 15, at para. 5.27.

²⁶ Id.

of harvesting Shrimp, Sea Turtles were killed. The US laws, *inter alia*, mentioned that the Shrimp harvested in a manner which adversely affect certain Sea Turtles may not be imported to US.²⁷ In other words if a state impose laws upon their fisherman which complies with the US approved way of harvesting Shrimp, then they were allowed to import Shrimp products to US. The US law required “Turtle Excluder Devices” (TED) to be used in nets while fishing in areas where there is possibility of finding Sea Turtles. It was argued that the US law was discriminatory and was not justified under Article XX(g). The law was discriminatory because some countries were given 3 years in order to comply with the measures to protect turtles while harvesting Shrimp; whereas the complaining states were given only 4 months to comply. The Dispute Settlement Body (DSB) established panels by the request of Pakistan, Malaysia and Thailand; later another panel was requested by India which was consolidated with the panels already established. The panel report stated that the US embargo threatened multilateral trading system and was not justifiable under Article XX.²⁸ The panel said that the unilateral environmental policy should not be completely restrictive of trade.²⁹ Unlike the other two mentioned cases the US could appeal to an appellate body under the WTO; it did appeal on the ground that its acts were not unjustifiable discrimination under the *chapeau* of Article XX.³⁰ The Appellate Body held that the US embargo was against Article XX.³¹ However the appellate body disagreed or overruled the panel’s reasoning for decision. The matter in dispute was accepted as an environmental matter under Article XX(g), but the manner in which it was applied by the US was discriminatory and against the *chapeau* of Article XX.³² Moreover it was termed unacceptable to use an economic embargo in order to compel another state to adopt a same policy, as that of the other member, without taking into consideration the different conditions of the other state.³³ The Appellate body unlike the other panels said that the unilateral environmental policies are a common aspect and is to be expected; this was a positive point for the environmentalists.³⁴ The question whether the “Exhaustible Natural Resources” as mentioned in Article XX(g) could be applied to living, non mineral resources was addressed by the appellate body. Noting the acknowledgement of different environmental concerns by the international community, It was said that Article

²⁷ Section 609 of US Public Law (1989).

²⁸ U.S. – Import Prohibition of Certain Shrimp and Shrimp Products (Panel report), WT/DS58/R, at paras. 7.44-7.62.

²⁹ Ibid, at para. 7.45

³⁰ Supra note 2, Shrimp case, at para. 16.

³¹ Ibid, at para.187.

³² Ibid, at para. 186.

³³ Ibid, at para. 164.

³⁴ Supra note 1, at p. 581.

XX(g) shall be read according to contemporary needs.³⁵ Thus Sea Turtles which are a living being were acknowledged to be an “Exhaustible Natural Resource”.³⁶ It was decided by the appellate body that the US prohibition on Shrimp was legitimate under Article XX(g), but the application of the prohibition was contrary to the chapeau of the Article XX.³⁷

The impact of the WTO agreement upon the interpretation of the chapeau of Article XX was evident.³⁸ The preamble of the WTO agreement speaks for the maximum usage of natural resources for sustainable development; the impact of which was evident in the Appellate body report.³⁹ If the term “Natural Resources” in article XX(g) is analysed in light of the Preamble of WTO agreement, it is evident that the term is not ‘static’ but rather ‘evolutionary’ by definition.⁴⁰ Thus the broader interpretation of the Article XX could continue to safeguard the environmental issues but still this will not be easy, especially at the cost of unjustifiable trade embargoes under GATT.

The appellate body’s interpretation of Article XX was in compliance with the Vienna convention on the law of Treaties; as it took the textual meaning of the chapeau of the article. This was more in favour of the environmentalists as it brought forward the real text of the Article rather than the reports of previous GATT panels which put hurdles for the environmental policies.⁴¹ The appellate body while interpreting have taken account of article 31(1) of the *Vienna Convention* which says that account may be taken of ‘any relevant rules of international law applicable in the relations between the parties’.⁴² The interpretation given in this context will be evolutionary and not static as these rules develop over time.⁴³ It was also mentioned in the WTO agreement that existing agreements are to be interpreted “in accordance with customary rules of interpretation of public international law”.⁴⁴ Thus it was all these factors as a result of which a much broader interpretation of Article XX was brought forward in this case.

³⁵ Supra note 27, at para. 130.

³⁶ Ibid, at para. 128.

³⁷ Ibid, at para. 119.

³⁸ WTO, Interpretation of GATT, *Article XX*, at para. 527, available at <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20> (last visited on 10th July, 2011).

³⁹ Ibid.

⁴⁰ Ibid, at para. 556.

⁴¹ Supra note 1, at p. 575.

⁴² Sands, ‘International Law and Sustainable Development’ (Oxford, 1999), by Boyle and Freestone, CH: 3.

⁴³ T J Schoenbaum, ‘International Trade and Environmental Protection’ in P Birnie and A Boyle, *International Law and the Environment* (Oxford 2001; 2nd Ed.), Ch: 14.

⁴⁴ WTO, Dispute Settlement Understanding (DSU), Article 3(2).

Regarding the non-discrimination the stance of the Appellate body is very clear. In *Gasoline* case it questioned the aim of US for putting an embargo on the Gasoline trade with Venezuela. It questioned whether the aim of the embargo was conservation of “natural resources” or “Clean Air” within the meaning of Article XX. It was held that the aim of US rules were not aimed at conservation of clean air in United States for the purpose of Article XX(g).⁴⁵ The non discrimination test was not passed by US in this case as well. It is thus evident from these cases that the implementation of the policies was defective, and not in accordance with the GATT. Thus the environmental goals may be achieved if the implementation of policies is in compliance with the ‘chapeau’ of Article XX of GATT.

Conclusion:

The implementation of Environmental exceptions of Article XX has been an evolutionary process. The panels in the Tuna/Dolphin cases depended on the ‘chapeau’ of the Article XX and didn’t emphasise upon the text of the Article. The principle laid down in the Panel reports is though visible, it will be unacceptable to impose one’s own environmental policies unilaterally on another state. The use of the general exceptions under Article XX will have to go through the strict principle of non discrimination under the ‘chapeau’ of the Article XX. Thus a policy may be lawful under the article XX (b) and (g) but if its implementation is not consistent with the ‘chapeau’ then it will not be acceptable. The environmental matters on the other hand are covered by the Article XX (b) and (g) albeit it was not a concern at the time of the drafting of the GATT. The acceptance of Dolphins and Shrimps as an ‘exhaustible natural resources’ certifies the acceptance of the environmental issues under Article XX(g). Moreover the much broader interpretation of the Article XX by the appellate body in the Shrimp/Turtle case shows that the article have the capability to address the environmental issues under GATT. Especially the admittance of complying with the rules of interpretation laid down in *Vienna Convention* and other customary international law broadens the horizon for environmental matters under the GATT. By adopting this broad approach, keeping a parity between trade and environmental matters will be utmost important. The ‘chapeau’ of article XX has an utmost importance in this regard; a state should not be allowed to exceed its legal limitation with regard to trade while implementing its environmental policies. Thus Article XX has the capacity to address the trade and environmental issues simultaneously; but in order to invoke these exceptions a state must come with clean hands.

⁴⁵ Supra note 2, *Gasoline* case, at p. 19.

Bibliography

C Wofford, 'A Greener Future At The WTO: The Refinement of WTO Jurisprudence On Environmental Exceptions To GATT', 24 (2000) *Harvard Environmental Law Review*.

U.S. – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996) (Appellate Body).

U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS/AB/R (Oct. 12, 1998) (Appellate Body).

EC - Measures Affecting Asbestos and Asbestos Containing Product, WT/DS135/AB/R (2001).

U.S. – Imports of Certain Automotive Spring Assemblies, GATT B.I.S.D. (30th Supp.), adopted on May 26, 1983.

U.S. – Restrictions on Imports of Tuna, BISD 39S/155 (Sept. 3, 1991).

U.S. – Restriction on Imports of Tuna, DS29/R (June 16, 1994).

D Ahn, 'Environmental Disputes In The GATT/WTO: Before And After US – Shrimp Case', 20 (1999) *Michigan Journal of International Law*.

WTO, Interpretation of GATT, *Article XX*, available at <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20> (last visited on 23rd March, 2008).

Sands, 'International Law and Sustainable Development' (Oxford, 1999), by Boyle and Freestone, CH: 3.

T J Schoenbaum, 'International Trade and Environmental Protection' in P Birnie and A Boyle, *International Law and the Environment* (Oxford 2001; 2nd Ed.), Ch: 14.

WTO, Dispute Settlement Understanding (DSU).