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**THE UNENDING CONUNDRUM OF EXTRA-TERRITORIAL TRADE MEASURES AND THE 'GREEN PROVISIONS' OF THE GATT: DECONSTRUCTING THE EXISTING APPROACHES**

*Utkarsh Kumar Mishra*

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# The Unending Conundrum of Extra-Territorial Trade Measures and the 'Green Provisions' of the GATT: Deconstructing the Existing Approaches

*Utkarsh Kumar Mishra*[*]

## The Background

The World Trade Organisation even though does not regulate 'environment' specifically, yet it oversees the environmental aspects of trade, fulfilling its objective of sustainable cross-border trade.[1] This regulation of trade is aimed at maintaining a balance between the policy measures of trade liberalization and environmental protection.[2] In this light, Article XX (b) and (g) of GATT[3], 1994 become instrumental in upholding the spirit of the aimed balance.[4] It is pertinent to learn that the trade restrictions are allowed under general exceptions[5] in the GATT to protect and preserve the environment, and are not the part of general rules of the GATT. Yet, the green jurisprudence which has developed today with a bunch of Panel and Appellate body reports is remarkable and has been able to balance the interests of both the groups-traders and the environmentalists. But amidst this struggle to achieve a balance that would inform a sustainable trade, the present jurisprudential trend on the green provisions of the GATT seems to have developed some crucial questions that are of serious concern. For example, the requirement in Article XX (b) of GATT that a measure to "protect human, animal or plant life or health" in order to qualify for an exception to the general GATT rules did not create as much controversy as created by the interpretation of this expression by the GATT Panels and the Appellate Body and in the light of those interpretations, the consequences attached to it.

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[*] Teaching Assistant (Law), Himachal Pradesh National Law University, Shimla; Email: utkarshmishra@hpnlu.ac.in

[1] *See*, Preamble to the Marrakesh Agreement Establishing the WTO, 1994.

[2] *See*, John H. Jackson, *World Trade Rules and Environmental Polices: Congruence or Conflict?* 49 WASH. & LEE L. REV. 4, 1227-1278 (1992).

[3] The abbreviation 'GATT' hereinafter refers to 'General Agreement on Tariffs and Trade, 1994' unless otherwise provided.

[4] *See*, John H. Jackson, *supra*, note 2.

[5] General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187, Article XX, 1994.

The issue addressed in this paper pertains to an important question debated in the two un-adopted GATT Panel reports i.e., in Tuna Dolphin I and II is the issue of '*extraterritorial application/extraterritoriality'* of measures under Article XX (b) and (g) which has created an unending debate as to its compatibility with the WTO framework. Albeit, there is no unanimous opinion of the commentators on the meaning of 'Extraterritorial'[6], the author has understood and employed this term in the context of the question as to whether a WTO Member has jurisdiction to impose import restrictions with respect to 'subject matters' 'outside its territory'. And in this backdrop, the subject matters like 'Tuna' and 'Shrimp' have been dealt with in this paper. The first Panel on Tuna issue had completed rejected the argument of extra-territoriality, however the second Tuna Panel gave a different interpretation altogether. But as both the reports remained un-adopted due to the peculiarities of the old GATT system (1947), their interpretations had no meaning in effect. But the same issue again was debated in the Shrimp turtle case where the Appellate Body gave an indication of a new jurisprudence which became a subject of immense contestation and still worries most of the legal experts today. The prime reason is that after the Shrimp turtle case, this issue was not brought to be argued again by any country and hence remains an open debate even today and also vulnerable at the same time.

On one hand, it seems totally justified for a Sovereign nation to frame policies for the protection of environment within its own territory. But a big question mark appears when a sovereign nation's policy on an environmental issue not only governs the transactions within its territory but also has extraterritorial application. In the latter, the question is not simply of respecting the sovereignty of the other nation but also of abuse of such a facility. The developing green jurisprudence has come to a standstill on this point, which has yet not been resolved. In this light, it becomes pertinent to examine analytically the present green jurisprudence of Article XX (b) and (g), GATT, the problem of slippery slope from the logical and consequential viewpoint. The second section of the paper presents a discussion on the current legal framework of Article XX of GATT in general which is important is to understand the debate in a better fashion. The third section of this paper throws light on the development of various approaches in the green jurisprudence on this issue through the instrumentality of various GATT Panel and WTO Appellate body reports, while at the same time insisting on an analysis that shows a trend towards a broader approach of interpretation of Article XX (b) and (g) from a narrow understanding. The fourth section explores the possible practical ramifications that might be created due to such broader interpretation of green provisions. The fifth part analyses the existing approaches on the issue and interpretations done by the Panels and the Appellate Body in the light treaty interpretation principles of international law. The Sixth section tries to finally put at rest this unending debate by clarifying the dynamics of WTO rules vis-à-vis State unilateral action. The last section puts focus on the importance Multilateral Environmental

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[6] For a detailed discussion on the meaning of 'Extraterritoriality', *See*, Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction-The Case of Trade measures for the Protection of Human Rights*, JOURNAL OF WORLD TRADE 36(2): 379-386, (2002).

agreements (MEAs) in the context of the issue of extraterritoriality and GATT obligations.

## The Legal Framework of Article XX of GATT, 1994

The Panel in US-Section 337 Tariff Act case[7] had noted that Article XX is invoked by a member only when a measure adopted by that member country is inconsistent with the other general provisions of the GATT and hence in simple terms, the provision provides a justification for the inconsistency. This provision however only provides for a limited and conditional exception from the general obligations under GATT.[8] When it is said that the exceptions are limited, it simply means that list of exceptions under Article XX is exhaustive in nature and the term 'conditional' refers to the qualification that the enjoyment of an exceptional measure is subject to the fulfilment of certain conditions. So, for example, the concern for environmental matters focuses on paragraphs (b) and (g) of the Article XX[9]:

> (b) necessary to protect human, animal or plant life or health...
> (g) relating to conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption..."

The availability of these exceptions is subject to some important qualifications which are essentially two-fold. The first of these concerns fulfilling the requirements under the specific exception claimed for the measure in issue and the second being the requirements under the beginning paragraph of Article XX which is also called the 'Chapeau' of Article XX. To a large extent, these provisions observed together provide a softened measure of National Treatment and MFN obligations and they require governments that take measures which arguably qualify for the exceptions of Article XX to do so in such a way as to minimize the impacts mentioned in the Chapeau.[10] This is also called a two-tier test for justifying a measure which is otherwise inconsistent with the GATT. [11] The requirements to be fulfilled under a claimed exception under Article XX depend upon the elements of that exception and its interpretation thereto. However, the requirements of Chapeau are uniformly examined as it is a general part of the Article XX applying to all exceptions.

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7 Panel Report, US-Section 337 Tariff Act (1989), para 5.9.

8 *Id*.

9 *See*, Jackson and Davey, *Legal Problems of International Economic relations* (documents supplement, 1989), 514; and US Congress Office of Technology assessment, *Trade and Environment: Conflicts and opportunities*, 32.

10 *See*, John H. Jackson, *World Trade rules and Environmental polices: Congruence or Conflict?* 49 WASH. & LEE L. REV. 4, 1227-1278 (1992).

11 Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (1996) [Hereinafter referred to as 'US-Gasoline'], at 22; Appellate Body report, Brazil-Retreated Tyres (2007), para 139.

The discussion on the jurisprudence of the Chapeau for the first time was undertaken in the US-Gasoline Case. The Appellate Body in the Gasoline case clearly laid down the three essential elements of the Chapeau as[12]:

A. Arbitrary discrimination (between the countries where same conditions prevail);
B. Unjustifiable discrimination (between the countries where same conditions prevail) or;
C. Disguised restriction on international trade.

The Appellate Body also stated that these expressions can be read side by side as they impart meaning to each other and most importantly these expressions must be read in the light of the purpose and the object of avoiding abuse or illegitimate usage of the exceptions just to circumvent the measure at issue.[13]

The Appellate Body in the US-Shrimp case further analysed and interpreted the requirements under Chapeau and stated that the Chapeau seeks to balance the rights of a member country which is invoking the exception and the rights of the other member countries which might be affected as a result of the exercise of the exception by the former. [14] However, the specific exceptions set out in paragraphs (a) to (j) in Article XX are in the nature of differing legitimate state policies or interests outside the realm of trade liberalization.[15] On reading the specific exceptions under Article XX from (a) to (j), one would find the use of common terms like 'necessary' in paras (a), (b) and (d); 'relating to' in paras (c), (e) and (g) etc. The Appellate Body clearly stated that it would not be reasonable to interpret these common expressions in a same fashion in all the concerned exceptions as it would depend heavily on the relation between the state policy and the measure at issue. [16] Hence all the specific exceptions will have different interpretations will have different interpretations and would require separate analysis. This observation of the Appellate body has clearly debunked the opinions by some trade experts in the favour of appreciating a common interpretation for the purpose of regulating foreign harms. [17] All in all, it must be understood that any measure claimed as an exception must go through a two-stage process. Firstly, it should qualify for the specific requirements under the specific exception claimed and secondly it should qualify for the requirements under the Chapeau of Article XX.

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[12] Appellate Body Report, US-Gasoline, (1996).

[13] *Id*.

[14] Appellate Body Report, US-Shrimp (1998).

[15] *Id*, at 17-18.

[16] *Id*.

[17] *See*, Roger Alford, *Extraterritorial Regulation of Human Rights and the Environment Under the WTO General Exceptions,* Opinio Juris, (Nov. 2, 2010), http://opiniojuris.org/2010/11/02/extraterritorial-regulation-of-human-rights-and-the-environment-under-the-wto-general-exceptions/

## Shift in the Green Jurisprudence: Birth of a Broader Perspective?

As observed in the preceding part, as the interpretation of Chapeau is uniform for the purposes of measuring the general justification for inconsistency required under Article XX of GATT and that of the other specific exceptions has to be done independently, the development of the 'green' jurisprudence has been majorly influenced by the later. Hence, it is pertinent to see how the interpretation of the concerned provisions (Article XX (b) and (g)) has been remarkable shift from a narrower to broader interpretation. This has been made clear by following discussions on Tuna Approach and Post Tuna Approach.

### *The Tuna Approaches: The 'Extra-jurisdictionality' and the 'Extraterritoriality' Interpretations*

Before the transition of the old GATT (i.e. GATT 1947 era) to the new GATT system (1994), there were two environment related disputes that came to the limelight. The Panels in Tuna Dolphin I and Tuna Dolphin II attracted the attention both the learned blocs[18] and some academics have even tagged these cases as a false start[19] of the green jurisprudence. In the Tuna Dolphin I[20], the GATT Panel decided that a US Embargo on tuna caught by fishing methods causing high dolphin mortality was illegal. The US Marine Mammal Protection Act had set standards of protection for the domestic American fishing fleet and for those countries whose fishing boats catch yellow fin tuna in the eastern part of the Pacific Ocean. Effectively, if a country exporting Tuna to the US is unable to prove that it complies with the standards of protection embodies in the above-mentioned US law, the US can embargo the exports from that country. The decision of the Panel was against the US and the Panel held that US could not embargo imports from Mexico simply because the Mexico did not meet US standards of protection as set out in the US law. More importantly, the Panel also held that US cannot force its domestic environmental regulations beyond its territory. The GATT Panel employed the drafting history and purpose of Article XX(b) to reach a conclusion that "extra-jurisdictional protection of life and health" did not extend to restricting imports whenever the life or health protection policies in the exporting country were not identical with those in the importing country.[21] The Panel in Tuna I basically adopted a functionalist approach and analysed the issue through the lens of consequentialism. It said:

> The Panel considered that if ... each contracting party could unilaterally determine the life or health protection policies from which other contracting

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[18] *See*, Steve Charnovitz, *Free Trade, fair trade, Green trade: Defogging the debate*, 27 CORNELL INT. L. J. 459 (1994); Jagdish Bhagwati, *Trade and Environment: The False Conflict?* in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY 159 (1993).

[19] Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY (2d ed. 2006).

[20] GATT Panel Report, *United States-Restrictions on Imports of Tuna*, DS21/R, GATT B.I.S.D. (39th Supp.) at 155 (1991) [It is hereinafter referred to as Tuna Dolphin I].

[21] *Id*., at para 5.25-5.29.

> parties could not deviate without jeopardizing their rights under the General Agreement ..., [the] General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[22]

As it can be seen in the above observation made by the Panel, there is an unequivocal resistance from the Panel to accept the idea of unilateral trade measures in the garb of protection of the environmental concerns. This holding against US was reiterated in the second GATT Panel in the Tuna Dolphin II, which involved the legality of the secondary embargo of tuna products from the countries that processed tuna, caught by the offending countries.[23] Both the Panels concluded that US Embargo was not justified in either of the provisions i.e. Article XX (b) and (g). The GATT Panels interpreted the word 'necessary' and the expression 'relating to' and 'in conjunction with' appearing in clauses (b) and (g) of Article XX respectively. The term 'necessary' was interpreted as 'no option of any other reasonable alternative' as opposed to 'needed' as argued by the US.[24] The measure encompassing a policy of enforcing an environmental regulation on other countries as it was only way to realize that policy effectively was not considered 'necessary' by both the panels. [25] On the similar note, it was found that Article XX (g) was not applicable as the terms 'related to' and 'in conjunction with' in this provision have to be given the meaning of 'primarily aimed at' and so the US's policy to force other countries to change their environmental policies did not fulfil this litmus test.[26]

But both the Panels could not agree with each other on the issue of Extraterritoriality or Extra-jurisdictionality. The Panel in Tuna Dolphin I concluded that exceptions in clauses (b) and (g) could be claimed for maintaining standards only within the domestic jurisdiction of the country concerned.[27] While in the Tuna Dolphin II, the Panel recollected that under the principles of Public International Law, States are not barred from regulating the conduct of its nationals with respect to persons, plants, animals etc. located outside their territory. [28]So, even though it was held that a country can enforce the regulations "extraterritorially" only against its own nationals and vessels, at the same time, it was opined that there was no valid reason to support the conclusion that

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[22] *Id*., at para 5.27.

[23] GATT Panel Report, *United States-Restrictions on Imports of Tuna*, DS29/R, 16 June, 1994 [It is hereinafter referred to as Tuna Dolphin II].

[24] Tuna Dolphin I, Supra, note 20, para 5.27; Tuna Dolphin II, *Id*., at para 5.35.

[25] Tuna Dolphin I, *supra* note 20, at para 5.27; Tuna Dolphin II, *supra* note 23, at para 5.36-5.38.

[26] Tuna Dolphin I, *supra* note 20, at para 5.33; Tuna Dolphin II, *supra* note 23, at para 5.26.

[27] Tuna Dolphin I, *supra* note 20, at paras 5.26, 5.31.

[28] Tuna Dolphin II, *supra* note 23, at para 5.32.

he exceptions had only domestic application. [29] But both the Panel reports remained un-adopted.[30]

Some writers and trade experts have characterized these two decisions as differing in terms of their approaches particularly. As per them, Tuna I focussed on an angle of 'Extra-jurisdictionality' i.e. in essence keeping absolute prohibition on the importing country to indirectly regulate the domestic policies of the exporting nation. While the Tuna II case has been categorically remarked as one stressing on "Extraterritoriality" i.e. the right of the importing nations to governs its 'nationals' with respect to persons, plants, animals etc. located outside its territory with a rider that Article XX exceptions would apply only to the extent that policy measures are implemented within a government's personal jurisdiction to affect a direct conservation or protective result.[31] However, the Tuna Dolphin II was also very clear with a qualification attached with the permitted extra-territoriality, that coercive measures forcing the other country to change its policies etc. could not be appreciated under the multilateral trading system, in following words:

> If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If, however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.[32]

### *Post-Tuna Approach: Towards a Broader Extraterritoriality Doctrine?*

Under the new GATT system (GATT, 1994), much of the reasoning in the Tuna cases was effectively overruled.[33] Under the new system, three environmental disputes created a turning point in the history of the green jurisprudence of Article XX (b) and

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[29] Tuna Dolphin II, *supra* note 23, at para 5.20.

[30] Tuna Dolphin I panel report could not be adopted in the old GATT system as Mexico decided to not pursue the matter and Tuna Dolphin II report could not be adopted as no consensus was reached to adopted the report which was a requirement under the old GATT system.

[31] Tuna Dolphin II, *supra*, note 23, at para 5.33, 5.39.

[32] *Id*., at para 5.26.

[33] *Supra* note 19, at 797-780.

(g): The Shrimp/Turtle Case[34], US-Reformulated Gasoline[35] and the EC-Asbestos decision[36].

The Shrimp turtle case involved a measure similar to that in the Tuna case where, a ban on imported shrimp from countries that did not require their fishing community to use turtle excluder devices in their nets so that no threat is posed to sea turtles, was in question.[37] The Appellate Body in Shrimp turtle and Gasoline cases focussed primarily on the interpretation of certain expressions in the claimed exceptions in order to develop a new jurisprudence.

Firstly, the term 'resource' occurring in Article XX (g) was interpreted broadly to include living or non-living resource which also need not be rare or potentially exhaustible in nature. [38] So, under this kind of umbrella, virtually any living or non-living resource and even those included by multilateral environmental agreements would qualify for exception. Secondly, the expression 'made effective in conjunction with restrictions on domestic production or consumption' occurring in Article XX (g) was given a purposive and broader interpretation in both the Shrimp turtle and Gasoline cases. The Appellate Body in Gasoline case held that this expression must be interpreted to require a certain amount of even-handedness, but not identical treatment and hence restrictions even on domestic production will suffice for fulfilling this criterion of even-handedness. [39] Similarly, in Shrimp turtle case, the Appellate Body noted that the design of the measure or means used in the import ban on shrimp was intricately related to the end of the protection of sea turtles. [40] So, the conclusion was that if the US was requiring all the Shrimp trawlers including the domestic ones to use the turtle excluder devices for the protection of sea turtles, then the measure was valid. So, the US had lost the case in fact as it gave technical and financial assistance along with longer transition periods to the fishermen of other countries in the Caribbean, it did not give the same advantages to the complainant countries and instead put a direct ban. The Appellate Body said:

> What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX [i.e. 20] of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for

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[34] Appellate Body Report, *United States-Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, November 6, 1998 [It is hereinafter referred to as Shrimp/Turtle case].

[35] Appellate Body Report, *United States-Standards for Conventional and Reformulated Gasoline*, WT/DS2/AB/R, May 20, 1996.

[36] Appellate Body Report, *European Communities-Measures affecting Asbestos and asbestos containing products*, WT/DS135/AB/R, April 5, 2001 [It is hereinafter referred to as EC-Asbestos Case]

[37] Shrimp/ Turtle case, *supra*, note 34.

[38] *Id*., at para 127.

[39] US-Gasoline, at para 21.

[40] Shrimp/turtle case, para 138.

> the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States — Gasoline [adopted 20 May 1996, WT/DS2/AB/R, p. 30], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfil their obligations and respect the rights of other Members under the WTO Agreement.[41]

The Appellate body in furtherance of this discussion also came up with the "sufficient nexus test" and through this test diluted the very controversy of Jurisdictional limitation. It said:

> '... sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas ... The sea turtle species here at stake ... are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the Appellees claim any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat—the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature and extent of that limitation. We note only that...there is a **sufficient nexus** between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).'[42]

A systematic criterion for applying this test was not discussed by the Appellate body and the same has become a major bone of contestation for future environmental disputes. The Appellate body also remarked that just because the importing country requires the compliance of certain policies by the exporting nation, it does not mean the very requirement on the part of importing country would become prima facie invalid or unjustified or incapable of justification under Article XX exceptions. [43] So, in Shrimp Turtle decision, as opposed to the cases in Tuna Dolphin I and II, the Appellate Body had already satisfied itself that the US had jurisdiction to protect the migratory species of the turtles and was only concerned with the wrong fashion in which the US exercised this jurisdiction.

Moreover, a new, broad, yet a liberal interpretation of the word 'necessary' occurring in Article XX (b) was done by the Appellate Body in the EC-Asbestos Case. The case involved analysing the French ban on the manufacture, sale and import of all the Asbestos products, subject to limited exceptions where no substitute product exists. The

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[41] Appellate Body report, Shrimp/turtle, at para 186.

[42] *Id*., at para 7.53.

[43] *Id*., at para 121.

Appellate Body did a more flexible interpretation of the word 'necessary' giving more flexibility to governments in bringing measures that were intended to protect health and environment. [44]Under GATT, 1947 regime, the criteria of necessity were interpreted very restrictively. [45] However, the Appellate Body in this case interpreted the word 'necessary' to mean 'reasonably available' and held that where there is scientifically proven risk to health, WTO members had the right to make the determination of the level of protection that they considered appropriate for the purpose. [46] This determination could be in based either on the quality of the risk at hand or on the quantity of the risk. Hence, if there are very vital interests of commons at stake and there are no alternative means of eliminating the risk, the measure could be considered 'necessary'. All in all, the idea was to bring in a "balancing analysis". [47]

Although, it can be said for the sake of the argument that it is an accepted principle of interpretation of exceptions under the Customary international law rules that exceptions are to be interpreted narrowly[48], however, the Appellate Body seem to have had adopted a different approach altogether[49]. With these broad interpretations, the new GATT regime could easily allow countries to regulate the environmental policies not only in their domestic jurisdiction but also outside their territories. The analysis made above also reflects the transition in Appellate Body's approach and interpretation from a narrower and restrictive approach to a much broader one.

## The Possible Functionalist Impacts of the Tuna-Shrimp Journey

The analysis of the paradigm shift from the old GATT system to the new GATT order in the previous section shows that the Appellate Body was largely concerned with the issue of environmental protection and also with balancing the environment-trade clash. However, in this bid to achieve a larger goal, the Appellate body has ended up creating lot of other problems that would have a serious impact on trade itself. If the Shrimp approach is not revisited and revised, there can be some huge practical and immediate ramifications for the multilateral trading system as such.

With a liberal interpretation of the necessity test in the new GATT regime, it is quite possible for a country to justify any measure taken by it for the purpose of environmental protection. And since the Shrimp/turtle case clearly gave an extraterritorial scope to Article XX (g), it is very much a possibility that countries can use this loophole to justify any measure which is motivated by protectionist considerations.

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[44] Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY (2d ed. 2006).

[45] *Id*., at 800; *Also see* Tuna Dolphin II, para 5.29.

[46] Appellate Body report, EC-Asbestos, para 172.

[47] *Supra* note 44, at 800.

[48] This interpretation principle is found in the maxim '*Singularia non sunt extendenda*'.

[49] The interpretation done by the Appellate Body seems to be in contrast with the accepted principles of interpretation under the Customary International Law which the Panel and Appellate body are bound to observe as under Article 3.2 of the DSU.

This problem has been termed as the problem of Slippery slope by John H. Jackson.[50] Some scholars have gone to the extent of tagging this problem as one of eco-imperialism[51] as they see this problem as one where developed nations might be able to press upon their policies over the third world or least developing nations and hence making them subject to their rules and indirect governance. The most glaring example of slippery slope can be seen in the case of Packaging and recycling laws. [52]These laws have become part of a mainstream trend in many industrial nations to consider the environmental impacts of products throughout their lifecycles to the point of their ultimate disposal. It is pertinent to mention that such laws have immense potential to affect international trade in negative sense of the term. Some scholars are of the opinion that such laws may have protectionist effect. More importantly, there are associated problems with such a slippery slope. Since a country can make environmental regulations which also might have an extraterritorial impact in relation to trade, another fear is that the proliferation of such laws might create lot of inconsistencies and confusions. This is indeed dangerous especially in the present trading system where the growth of regional trading agreements is on its peak.

The second and one of the most glaring of immediate impacts is the problem of product vs. Process, which was also discussed in the Tuna Dolphin case. On one hand, the Appellate Body in Shrimp turtle had interpreted Article XX (g) to not deny an extraterritorial operation. On the top of this, if even the characteristics of process like using the turtle excluder devices etc. are brought under the ambit of the exception along with the 'products' per se, it will open a Pandora's box of problems. It will substantially undermine the policy objectives of trade liberalization process. Appellate Body in Shrimp turtle and to some extent in Gasoline case had developed a principled way of permitting environment based PPMs (process and production methods) under the GATT article XX i.e. if that PPM is able to pass the tests to meet the criteria of Article XX (both the Chapeau and the concerned exception) then that PPM trade restriction would be valid.[53] But this is not our concern because, even though these PPM based restrictions might be principally right but from the pragmatic point of view, they are detrimental to trade.

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[50] John H. Jackson, *World Trade rules and Environmental policies: Congruence or Conflict?* 49 WASH. & LEE L. REV. 4, 1227-1278 (1992).

[51] Gijs M. DeVries, *How to banish Eco-imperialism*? JOURNAL OF COMMERCE, April 30, (1992).

[52] It must be noted that such laws are allowed under GATT Article III as long as they apply equally to all domestic and foreign producers.

[53] Steve Charnovitz, *The law of Environmental PPMs in the WTO: Debunking the myth of illegality*, 27 YALE INT. L. J. 59 (2000).

## Contradictions with the Treaty Interpretation principles

First of all, it is pertinent to mention the relevance of international law rules in GATT interpretation. Article 3.2 of the Dispute Settlement Understanding (DSU)[54] embodies the rule in Article 31(3) (c) of the Vienna Convention on the Law of Treaties[55] that, for the function of interpreting an agreement, then as part of the context "any relevant rules of international law applicable in the relations between the parties"[56] must be taken into consideration. This rule is also presented in the Appellate Body's report in the Gasoline case. [57] Hence, any discussion on GATT interpretation is incomplete without looking at the rules of customary international law. Although, the Vienna Convention on the Law of treaties (VCLT) does not specifically talk about the principles of interpreting the exceptions like Article XX of the GATT, however, the general principles of interpretation in the VCLT are also fundamental in interpreting the exceptions and understanding their nature. One of the popular Latin maxims generally referred in the interpretation of the exceptions is '***Exceptio Est Strictissimae applicationis***' which means that exceptions to treaty obligations must be interpreted restrictively and narrowly. [58] And this practice of interpreting the exceptions restrictively has not been overruled even after the EC-Tariff Preferences case where the Appellate Body had only held that mere characterisation of a provision as an exception does not by itself invoke the application of restrictive interpretation principle. [59] And in a scenario where the commonly accepted principle of interpretation under customary international law is that exceptions are to be interpreted narrowly, what Appellate Body has in fact done is against the rule and the obligation of the Appellate Body laid down in Article 3.2 of the DSU. Secondly, scholars like Steve Charnovitz have claimed that the principle of extraterritoriality is valid also because of the fact that the drafting history of GATT i.e. its *travaux preparatoires* supported such kind of interpretation. [60] In this context, it must be noted that under the international law especially under the Vienna Convention on the law of Treaties, preparatory work history is considered to be just an ancillary means of interpretation.

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[54] *See*, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization, reprinted at 33 ILM 1226 (1994).

[55] Vienna Convention on the Law of Treaties opened for signature 23 May 1969, 1155 U.N.T.S. 331.

[56] Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 AM. J. INT'L L. 535 at 562, n. 178 (2001).

[57] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 17.

[58] Asif H. Qureshi, INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES, 87-104 (2006).

[59] Asif H. Qureshi, *Id*., at 109.

[60] Steve Charnovitz, *Exploring the environmental exceptions in GATT Article XX*, 25 JOURNAL OF WORLD TRADE 37 at 37-55 (1991).

## Exercise of Extra-territorial jurisdiction: To what extent are unilateral trade measures permitted?

It is undoubtedly settled in the traditional principles of International Law that States as sovereign entities have right to exercise legislative jurisdiction within the territory and on its nationals.[61] However, this exercise of jurisdiction by the State is not unqualified. There are certain limitations on such a power of the State and if the exercise is not proper or unreasonable, it may amount to an international wrong too. [62] In this light, various commentators and legal jurists have come up with their theories in order to justify States' exercise of 'extra-territorial' jurisdiction in certain cases. Some of those prominent ones include "legitimate interest"[63] test and the "meaningful connection or genuine link"[64] tests. The Former test stipulates that States can extra-territorially enforce certain measures if its "legitimate interests" are on stake. The latter one employs the basis similar to the "sufficient nexus" test as taken into account by the Appellate Body in the Shrimp Turtle report. There is no requirement of going into detail about these theories as States' exercise of jurisdiction outside its local limits on any of these grounds (i.e. legitimate interests and close connection with the subject matter) can only be justified if such a facility is compatible with the framework of the WTO mechanism. In essence, it must be ascertained as to whether measures authorized by customary international law rules on legislative jurisdiction (which can be unilateral measures too[65]) can be justified under the WTO framework.

In this light, it must be appreciated that unilateral measures of the nature authorized by Customary International Law on Jurisdiction can still be allowed under Article XX as a matter of 'right' as they are based on customary rules[66]. But sometimes a measure imposed for the direct protection of the non-domestic environment (For instance, a ban on trade in dolphin- unfriendly tuna) can rather qualify as a unilateral counter measure and which is not either treaty based or based on customary rules. Such unilateral counter measures cannot be given the shield of Article XX. This is basically due to the rationale that WTO is a "self-contained regime" which prohibits unilateral counter

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61 F.A. Mann, *The Doctrine of Jurisdiction*, 111 RECUEIL DES COURS 1, 10-11 (1964).

62 *See*, F.A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, 186 RECUEIL DES COURS 3, 21 (1984); *Also see*, Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 318 (4th ed. 1998).

63 Robert Jennings, *Extraterritorial Jurisdiction and the United States Anti-Trust Laws,* 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 146 (1957).

64 *Supra* note 62.

65 Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction-The Case of trade measures for the protection of human rights,* JOURNAL OF WORLD TRADE 36(2): 353–403, 2002 at 391.

66 *Id*.

measures of such nature. [67] Article 23[68] of DSU mandates the WTO members to have recourse to the Dispute Settlement Understanding (DSU) in order to address the breach of WTO obligations including various rules and procedures for the purposes of the authorization and imposition of the counter measures as provided under Article 21 and 22 of the DSU. The only way out for unilateral counter measures to be allowed can be when they are multilaterally authorized or approved by the WTO.[69]

Also, in applying Article 31(3) (c) of the VCLT to Article XX, it is important to recognize that one WTO Member's obligation under international law does not necessarily imply another WTO Member's right to enforce that obligation by counter-measures in the form of trade measures. In the context of Article XX, it is therefore important that, under international law, States are not always entitled to impose counter-measures in the form of trade measures in order to enforce another State's obligations even when they have a legal interest in the performance of these obligations.[70] Article 31(3)(c) can therefore only be applied to Article XX in those cases in which a WTO Member has a right under international law to impose trade measures for a particular purpose.[71]

## Conclusion: The Way Forward

The debate of extraterritoriality or extra-jurisdictionality is a conceptual one with pragmatic consequences. It must be understood that there is, in principle, no possibility

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[67] *See*, Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules Toward a More Collective Approach*, 94 AM. J. INT'L L. 2 (2000); *Also see*, Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 E. J. INT'L. L. 4, 763 (2000).

[68] Article 23 of the DSU provides- "*1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding. 2. In such cases, Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding; (b) follow the procedures set forth in Section 21 of this Understanding to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and (c) follow the procedures set forth in Section 22 of the Understanding to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".*

[69] Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 E. J. INT'L. L. 4, 766 (2000).

[70] Richard J McLaughlin, *Sovereignty, Utility, and Fairness: Using US Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV., 855, 919 (1999).

[71] *See*, Thomas J Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L. L., 268, 280 (1997)

of legally allowing a unilateral trade measure by an importing country which is of the nature of a counter measure to impact other nation's policies under the WTO mechanism unless the measure itself is authorized by the WTO as Petros Mavroidis argues. If not authorized or permitted by the WTO, such trade measures can cause the breakdown of the whole multilateral trading system, leading to the possibility of protectionist tendencies in the countries which will significantly affect the spirit of trade liberalization agenda. In this backdrop, if at all, countries are allowed to enforce extraterritorial obligations, then they can be allowed to do so when the trade measure is itself authorized by customary international law and compatible with WTO DSU mechanism and when it is treaty based. In this respect, the importance of Multilateral Environmental Agreements must be appreciated.

It is understood that in case two countries have signed an international environmental agreement/Multilateral Environment Agreement (MEA) and one of the country deviates from maintaining the standards of protection relating to the environment as enshrined in the agreement, it is reasonable that the complainant country can take any action as per the agreed terms and that is not WTO's concern. In fact, the appropriate forum in that case would also be the dispute resolution system established under the said international agreement. But the question arises when one country which is a party to a MEA and also a member of the WTO, takes an action against a country which is not a party to that agreement but is a WTO member. In this case, there is currently no rule to govern as such a kind of dispute was never brought before WTO. There are around 200 international agreements (MEAs) operating outside the WTO but between the WTO members. So, it is a possibility that such a situation may arise or may be has arisen but never came to notice as the dispute was not brought to the WTO. According to Gabrielle Marceau, if the trade measure taken by a country under an MEA relates to the violation of a rule recognized under customary international law, then the measure taken by the complainant country would be justified under Article XX. [72] However, if there is no applicable rule of customary international law, then a non-party to that international agreement would be immune from the application of Article XX.

Secondly, MEAs can also be powerful instruments to address the issues relating to environmental PPMs. As per the Appellate Body report in Shrimp turtle case, environmental PPMs would be valid if they pass the test of Article XX i.e the criteria of the concerned exception as well as the requirements of the Chapeau. But as it was argued earlier, practically speaking, allowing environmental PPMs might lead to distortion in trade as we saw in the case of packaging laws. But the presence of some of the MEAs like the Montreal protocol concerning the ozone layer depletion, calls for letting the environmental PPMs operate because most of these agreements like the Montreal protocol itself provides a potent future authorization of trade sanction measures against even non-signatories for processes and not product characteristics, that are in violation of the terms of the treaty. So, if at all, it is argued that PPMs not be allowed as they distort trade, the effect would be to bring most of the MEAs in contrast

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[72] Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against Clinical Isolation in WTO Dispute Settlement*, 33 J.W.T. 5 (1999)

with the GATT obligations. Similarly, the definition of 'patents' given under the TRIPS agreement, which is a covered agreement under the WTO has been also criticized by many jurists as being contrary to the objectives enshrined in the convention on the Biological diversity, Protection of the rights of the indigenous people etc.[73] So the situation is complex and needs a reformative overhaul. Even though there are many possibilities of conflicts between the WTO agreements and the MEAs, there is a great consensus among all the WTO members regarding the efficiency of the MEAs with respect to the co-ordination and management of the cross border environmental problems. [74]

The importance of MEAs can also been seen in the light of the Shrimp turtle case also. The whole issue of extraterritoriality could have been avoided if there was an MEA regarding the protection of the species of the Sea Turtles. Obviously even in the event of the existence of an MEA regarding sea turtles, WTO would have had jurisdiction if the measure at issue was a trade related measure. But then the seed of extraterritoriality and the Appellate Body interpreting the purpose and the object of Article XX so broadly would not have had happened. The point of concern to be noted here is that MEAs can provide for a better environmental management system than any other system as such if they are in consonance with WTO obligations and a proper demarcation of jurisdiction and matters relating to environment are made by the international comity.

All in all, it must be appreciated that the Tuna-Shrimp journey has been quite a roller coaster ride in terms of ascertaining the conceptual clarity over the extraterritoriality syndrome which started spreading since the Tuna I report. The existing policy space as allowed for a member country under WTO DSU framework is very clear about the limits of the functioning of WTO members with respect to taking trade measures and at the same time respecting the rights of the other WTO members. In this light, the Shrimp Turtle Report cannot be considered a good decision. For a self-contained regime like WTO, there is no need for finding rules outside the WTO when there a clear rule-based system in place. DSU is truly the crown jewel of the WTO.

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[73] *See* Gary P. Sampson, *Effective Multilateral Environment Agreements and why the WTO needs them*, in THE WTO TRADE AND ENVIRONMENT, 1109-134 (2005).

[74] *Id*., at 1112.