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## **Environment and liberalization of trade: Is the debate still on?**

**Ashwani Sharma**

Associate Professor, Department of Political Science, Satyawati College, University of Delhi, Delhi, India

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### **Abstract**

The increasing salience of environmental issues since the early 1990s and the intensification of the processes of economic globalization triggered a debate on trade, globalization and the environment. Broadly, the focus of the debate was the extent to which liberalization of trade harmed the environment. The debate revolved around two specific issues: first, whether the GATT/WTO rules could override domestic environmental regulations, and second, the possibility of WTO trade regime, considered more powerful than environmental regimes, superseding Multilateral Environmental Agreements (MEAs). The evidence of the 1990s suggests that the GATT as well as the WTO trade regimes successfully overruled domestic environmental regulations in defense of the world trading system based on free-trade approach. The supersession of MEAs by the WTO rules remains a theoretical possibility as no case involving MEAs had been brought before the WTO disputes settlement panel until 2020. The debate on trade-environment is still on. In reality, there is an interplay of many complex factors in global political economy to persuasively predict the future of the debate.

**Keywords:** environment and trade, GATT and WTO trade regimes and environment, globalization-trade-environment debate

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### **Introduction**

No reference was made to environment when the post-war multilateral institutions of international economic governance were in the making: the General Agreement on Tariffs and Trade (GATT), the World Bank and the International Monetary Fund (IMF). Although environmentalism or concern with the environment has a long history <sup>[1]</sup>, the general perception of policy makers was that economic growth, development, and free trade are not linked to the environment. When the forty-five Allied countries met at Bretton Woods in 1944 to discuss the post-war economic order, the focus was on providing an institutional framework for reconstruction of Europe devastated by World War Two, economic growth and development, free trade, and international financial stability. The International Bank for Reconstruction and Development (IBRD), known as World Bank now, was created to make funds available for reconstruction. Later on, development of the newly independent countries was added. The IMF was to assist countries with severe balance of payment crisis, and maintain stability of the new financial system. As the proposed International Trade Organization did not come through, the GATT created in 1947 became the cornerstone of the post-war trading system and the underlying principle guiding the institution was the free trade approach.

Except one article of the GATT, the founding documents of the three institutions did not contain any mention of the environment. GATT continued to be the guiding principle for international trade for the next forty-seven years. It was replaced by a formal and stronger multilateral economic institution, the World Trade Organization (WTO), in 1995. The WTO created strong institutional mechanism for promoting trade liberalization and economic integration.

The mainstreaming of environment and environmental concerns in global politics in the early 1990s sparked off a debate on trade, globalization and the environment. The focus of the debate was the extent to which liberalized trade harmed the environmental quality. The debate then progressed to the larger issue of whether or not the rules of the GATT/WTO regime could undermine domestic environmental regulations. Recently, analysts have raised the possibility of rules associated with environmental regimes could conflict with WTO rules. This raises the possibility of WTO trade regime, considered more powerful than environmental regimes, override the gains so far achieved through Multilateral Environmental Agreements (MEA) <sup>[2]</sup>.

Environmentalists perceive an inherent conflict between trade liberalization and environmental protection. And exponents of free-trade approach are seriously concerned about unrestrained environmentalism. There were two developments which brought this debate or even conflict between environmentalists and free-trade exponents to the fore in global politics. The first was the intensification of the processes of economic globalization. The debt crisis led the IMF and World Bank to impose structural adjustment and liberalization across more than hundred developing countries. These countries of the South had to liberalize their economies and thereby integrate into global economy. Replacement of GATT with the WTO led to institutionalization of free trade approach in a more rigorous legal framework. Analysts are still debating whether environmental protection and globalization are at odds with one another or reconcilable or even mutually supportive. There are three distinctive approaches in the debate over globalization, free trade and the environment. First, the free trade environmentalists highlight the economic and environmental benefits of trade

liberalization, and argue for elimination of trade barriers to accelerate economic growth. Higher economic growth would generate more resources to be devoted to environmental protection. Second, detractors of globalization argue that it promotes growth that is unregulated growth at the expense of the environment. Globalization deprives national and local authorities of their control over their own choices and purposes, and therefore would lead to growth that relies on highly polluting activities that no longer remain attractive to industrialized societies. Third, moderates adopt an approach that falls between the two approaches. Unlike the critics of globalization, they are not opposed to globalization and foresee a continued role for trade liberalization and globalization. However, they question the argument of the free trade environmentalists that accelerated economic growth would automatically contribute to a better environment. They argue that the accelerated economic growth impelled by globalization is contributing to environmental progress in a manner that is partial, highly selective, and late. Therefore, they seek the international institutional mechanisms to address mitigation of the potential of environmental degradation arising from free trade and globalization<sup>[3]</sup>.

The second was the ending of the cold-war which provided political space for important issue to be brought on to the agenda of global politics. Global environment had by then already become one of the central themes in global politics alongside security and economic issues. Also, the traditional concept of security with emphasis on military security was expanded to include human security. The environmental degradation impacts security as well. Inter-state disputes on fresh water supplies from shared rivers are increasing<sup>[4]</sup>, and the degradation of the environment is negatively impacting many aspects of human security, such as water security, food security, health, and poverty alleviation.

### Post world-war two trading system: the GATT

The debates on the issue of trade, globalization and environment tend to focus on the activities of the GATT and the WTO. The background to the origins of the WTO can be located to the meeting of fourteen western countries called by the United States in 1945 to initiate discussion on liberalization of international trade. There were two approaches in the course of negotiations. The first emphasized the creation of an International Trade Organization to enable facilitation of trade, and the second underlined the speedy implementation of an agreement to reduce tariffs. As the ITO would have taken time to be worked out, the agreement for reduction of tariffs on trade was signed in 1947 in the form of GATT, and came into effect in 1948. The underlying understanding was that in the course of time the ITO would replace GATT, the interim agreement.

The draft of the ITO was prepared in Havana in 1948, also known as Havana Charter, and contained provisions which went much beyond the GATT in liberalizing trade. However, the draft failed to get the approval of the US senate mainly on the ground that it was not liberal enough and could obstruct progress towards a free trade system. The US administration instead got the approval of the US Congress to continue with GATT. Thus, the international trading system was created based on four key principles: non-discrimination, reciprocity, transparency, and multilateral cooperation<sup>[5]</sup>. Although GATT focused on the goal of liberalization on a non-discriminatory basis through

multilateralism, it made major exceptions to the rules for textiles, agriculture, regional trading groups, developing countries and safeguards to prevent serious damage to domestic producers. Effectively, it struck a balance between domestic interests and liberalization of trade. The process of trade liberalization under GATT mainly relied on the gradual reduction and ultimate abolition of tariffs and duties imposed by an importing country on the exports of other countries. The dispute settlement mechanism of the GATT was weak compared to that of the WTO. The first incident that alarmed the environmentalists was the ban imposed by US on imports of Tuna from Mexico and Venezuela on the premise that their fleets failed to meet the US national standards for minimizing dolphin kills in tuna fishing. Dolphin-unsafe fishing practices had been banned in the US waters under the 1972 Marine Mammals Protection Act (MMPA) in response to the pressure generated by the environmental groups. The GATT declared in 1991 that the ban was illegal under the rules of international trade. The GATT panel argued that the US had unfairly discriminated between products: the process of producing goods is irrelevant as long as the product is similar. The decision reinforced the product-process distinction. This created considerable disquiet amongst the US environmentalists for the reason that national environmental law could be invalidated by the GATT. The issue of *domestic environmental law versus international law of trade* led the environmentalists to take up the issue of environmental implications of trade seriously<sup>[6]</sup>.

The Mexican tuna-dolphin incident became a major factor in shaping the future course of the politics of trade and environment. The dispute provided the developing countries political opportunity to raise their genuine concern for enacting international rules against what they perceived as unfair trade pressures. It also prompted environmental groups to press for changes in the GATT, particularly the provisions for Environmental Trade Measures (ETMs) to cover issues beyond the jurisdiction of the importing country<sup>[7]</sup>. A similar complaint was filed by the European Union (EU) in 1994 against the US tuna ban in the GATT dispute panel to secure resolution on the principle of extraterritorial unilateral actions. The GATT panel found the US ban conflicting with the GATT articles. However, it accepted two positions of the environmentalists against the GATT. First, the panel ruled against the EU plea that dolphins are not an exhaustible resource, and second, that GATT rules apply only to the protection of resources located within the territory of the country applying trade measures in question.

### World trading system: from GATT to WTO

The growing dissatisfaction of the major trading states with the lack of ability of GATT to provide a strong foundation for a world trading system led to the Uruguay Round of negotiations from 1986 to 1994 for a new organization to reconstruct the world system of trade. The multilateral negotiations ending in the Marrakesh Ministerial Meeting in 1994 led to the establishment of WTO in January, 1995 as a successor organization to GATT. WTO provided a strong legal and institutional foundation to the world trading system. Critics of liberal trade are apprehensive of the liberalizing mission of the WTO. Analysts delineate three fundamental differences between GATT and WTO. First, the creation of WTO represents a shift from trade liberalization based on tariff concessions to discussions of domestic policies,

institutional practices and regulations. Second, it expanded the agenda to include services, trade-related intellectual property rights, foreign investment, competition policy, and domestic (non-trade) policies, and changed the nature of negotiations with a shift in focus from bargaining over products to negotiations over policies that shape the conditions of competition. Third, it initiated a movement towards policy harmonization across the issue areas of the expanded agenda <sup>[8]</sup>.

The establishment of WTO represents a shift from liberalism embedded in GATT to neoliberalism, the guiding principle of economic globalization. By extending the agenda of the GATT into new issue areas of trade and non-trade (intellectual property rights), establishing a strong and effective dispute settlement mechanism, and the stipulation of the Trade Policy Review Mechanism (TPRM), WTO restructured the relationship between national governments and the new world trading system. The TPRM has been devised as a mechanism to periodically scrutinize the policies of the national governments for deviations from the stipulated rules and regulations of the WTO. Liberalization of trade is compelling states, particularly the developing countries, to enact laws and formulate policies in consonance with the rules and regulations of the WTO. This has been a source of concern for the environmentalists because they perceive that the power of the national governments to take crucial decisions has been gradually eroded by the overriding power of a supranational organization.

During the Uruguay round of negotiations, the environmental issues lurked in the background and were not formally discussed. One reason for the missing concern for environment was that the environmental issues were sidelined in the 1980s due to economic recession and the onset of the second cold war in the late 1970s. The ending of the cold war and the holding of the United Nations Conference on Environment and Development (UNCED) raised the political profile of environmental issues and that of the linkage between trade and environment. As the negotiations for the WTO progressed into the early 1990s, it was expected that the new organization would have to discuss environment. However, the concerted opposition to include environment as a core issue in the negotiations for a new trading system remained undiluted. The only success that the environmental groups could achieve to integrate environment into the organizational infrastructure was the creation of the Committee on Trade and Environment. By the time the WTO was being given a final shape in the first half of the 1990s, the paradigm of sustainable development had acquired wide acceptance as well as salience in global politics and therefore could not be ignored in the process of negotiations for a new trading system. Importantly, sustainable development paradigm had already been integrated into the working of the United Nations as well as the World Bank. The negotiators for the new trade organization were therefore compelled to give some consideration to the environmental concerns. Although it is debatable whether the preamble is part of main legal agreement for the establishment of the WTO or not, it does mention that trade liberalization policies will be pursued “while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means to do so ....” <sup>[9]</sup> Finally, the Marrakesh ministerial meeting of 1994 decided to create the Committee on Trade and Environment (CTE). The

CTE was mandated to study (a) the relationship between trade measures and sustainable development; (b) the impacts of environmental policies on trade, and (c) make appropriate recommendation to the organization for modification of the multilateral trading system. CTE was conceived not as a regulatory or a policy making body but as a deliberative body. It was given two years to fulfill its mandate but it could deliberate only on the relationship between trade and environment during the period. The committee was allowed to continue its function beyond its two-years mandate. The environmental groups were critical of the CTE for its inability to make any substantive progress on the main issue of trade and environment.

A case similar to Mexican tuna-dolphin involving US domestic environmental law came up again in 1996 but under the WTO regime. In the ‘Shrimp-Turtle’ case, the US banned the imports of shrimps from many South-East Asian countries on the ground of excessive turtle by-catch. The South-East Asian countries took the issue against the US to the WTO dispute settlement mechanism. In this case also, the dispute settlement panel ruled against the US in 1997 on the ground that the US had not offered the same assistance to South-East Asian countries in implementing turtle-friendly harvesting practices as it did in the case of western countries <sup>[10]</sup>. In another case brought before the WTO in 1997 under the dispute settlement rules, India, Pakistan, Malaysia, and Thailand argued that the US ban on the import of shrimps caught by vessels that killed endangered species of migratory sea turtles contravenes WTO rules that no country can use trade restrictions to influence the rules of other countries. The US counter argument rested on the plea that simple and relatively inexpensive turtle excluder devices (TEDs) can be fixed on shrimp trawlers to save the turtles. The US had installed TEDs on its trawlers since 1994 and argued that if these TEDs are properly installed and operated, it would enable most sea turtles to escape from shrimp trawling nets before they drown. While arguing for trade restrictions, the US stated that the only way to save sea turtles threatened with extinction was through the use of TEDs on shrimp nets.

The WTO dispute panel declared in 1998 that the US ban on import of shrimps was clearly a threat to the multilateral trading system and consequently not within the scope of measures permitted under the Article XX of the WTO <sup>[11]</sup>. The US appealed against the decision and in 1998 the appellate body ruled that the US ban legitimately related to the protection of exhaustible resources and therefore qualified for provisional justification under Article XX (g) <sup>[12]</sup>. The decision in a way represented some success in favor of the use of unilateral trade measures for environmental concerns.

### **Can the WTO regime override Multilateral Environmental Agreements (MEAs)**

Analysts have raised the issue of the possibility of WTO trade regime overriding MEAs in case of conflict with the WTO rules as WTO trade regime is considered more powerful than the MEAs.

Many MEAs have imposed trade restrictions as these restrictions play a critical role in shaping the agreements/protocols. Almost all the MEAs impose trade restrictions to achieve the desired outcome. The Basel Convention on trade in hazardous wastes and the Convention on International Trade in Endangered Species are almost based on trade restrictions. The Ban Amendment to the

Basel Convention bans all imports of hazardous wastes for disposal and recycling by non-OECD members as well as the non-members of the Convention. Business interests and many countries had opposed the ban. The ban could well be challenged and the WTO panel may decide that the ban constitutes restrictive free trade practices. In addition, Montreal Protocol and Cartagena Protocol on the Convention on Biological diversity are also based on trade restrictions. Analysts are concerned that these trade restrictions might conflict with the WTO rules<sup>[13]</sup>.

Although no MEA had been challenged until 2020, it is indeed difficult to predict the outcome if it were to be challenged in future. The WTO is focused on trade laws and environmental issues are secondary to it, and the WTO dispute panel has far more legal and implementation authority compared to that of MEAs so far. Nonetheless, it is argued by analysts that international law has provisions to deal with inter-treaty conflicts. The Vienna Convention on the Law of Treaties of 1969 has such a provision which also guides the WTO disputes settlement procedures<sup>[14]</sup>. However, legal provisions are subject to interpretations. The encouraging developments such as the prominence accorded to trade-environment issues in the Doha Ministerial Meeting of the WTO in 2001 and also at the World Summit on Sustainable Development in 2002 at Johannesburg are positive indicators for coexistence of MEAs and the trade laws.

### Conclusion

The debate on the environmental impacts of liberalization of trade appears to be still on. The increasing salience of environmental issues since the early 1990s coincided with the creation of WTO for a stronger world trading system based on liberalization of trade. The strong legal and institutional basis of the WTO and its liberalizing mission posed a challenge to contemporary environmentalism. The efforts of the United Nations to anchor the paradigm of sustainable development in the contemporary models of economic growth and development have certainly raised the environmental consciousness and helped in mobilizing public opinion as well as the support of the governments. Alongside, there has been an exponential increase in the number of environmental social movements in the developed as well as developing countries. International organizations (IOs) function in a global environment. There is a two-way relationship between the IOs and the environment. IOs influence the global environment and are in turn influenced by the constant changes taking place in the global environment. Therefore, it is expected that the WTO would be more sensitive to environmental concerns in its drive for liberalization of trade. Notwithstanding the expectations, the reality of global political economy is far more too complex to make predictions on the future of the environment-trade debate.

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