

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 6

2024

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Balancing Act: Navigating Unilateral Environmental Measures in International Trade

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ABSTRACT

The issue of unilateral environmental measures in international trade is a significant and complex topic. As countries around the world grapple with environmental challenges, their approaches to addressing these issues vary widely. This diversity becomes particularly contentious in the context of international trade, especially when developed nations engage with developing or least developed countries. Often, in the course of establishing trade relations, developed countries have been known to enforce their environmental standards on their trading partners. These impositions are not always aligned with the multilateral frameworks of the World Trade Organization (WTO) or international environmental law agreements. Instead, they are based on the imposing nation's domestic laws, leading to perceptions of hidden protectionism by the affected countries. While these measures can be seen as overreaching, they also play a crucial role in curbing unchecked environmental degradation and resource exploitation. Therefore, it is vital to explore and understand the complexities and implications of these unilateral environmental actions in the realm of global trade.

Keywords: *International Law, Environmental Law, Unilateral Measures.*

I. INTRODUCTION

In recent decades, the intersection of environmental preservation and the ethos of unrestricted trade has become an increasingly contested arena. This friction is vividly illustrated in the tensions between the developed vis-à-vis developing / least developed nations. While the said power blocs often are found in disagreement over a multiple range of issues, this paper seeks to discuss this divide on the context of imposing unilateral trade measures for the purposes of protection & preservation of environment. The developed bloc also referred to as 'North bloc' have often been accused of disparate environmental policies restricting trade consequently adversely impacting the cross-border trade relations. The practice of enforcing trade-related environmental standards unilaterally has sparked widespread debate. While deemed essential in

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certain critical situations, these measures have consistently encountered resistance from the global community, attributed largely to the economic strain they introduce and the suspicion that they might be leveraged as covert protectionism. Despite ongoing controversies, a complete prohibition of these unilateral measures has not been enacted. This paper delves into the various efforts undertaken to mediate this conflict and scrutinizes WTO jurisprudence to uncover the underlying motivations and implications of these unilateral environmental measures in the realm of international trade.

II. TRADE & ENVIRONMENT – UNDERSTANDING THE INTER PLAY

The landscape of international trade has been a catalyst for remarkable economic expansion across nations, with global GDP experiencing a sixfold increase within the span of fifty years². This surge in economic activity can be attributed to significant advancements in communication and information technology, alongside the liberalization of trade and investment regulations, which have collectively reduced the costs associated with international commercial transactions. This reduction in costs has directly fuelled trade by enabling countries to specialize in distinct sectors. Over the past two decades, the rate of growth in world trade has been impressive, averaging 6 percent annually, outpacing the growth of global output by a factor of two³.

Parallel to the economic dynamism, the imperative of environmental protection has emerged as a critical global concern. Human activities have led to persistent environmental degradation, manifesting in deforestation, climate change, pollution, and other harmful impacts. In response to these challenges, environmental conservation has escalated in priority, evolving into a fundamental issue for the global community. Recognizing the urgency, numerous countries have committed to multilateral agreements aimed at enhancing international collaboration in environmental stewardship⁴. This dual focus underscores the need to navigate the complexities of promoting trade while ensuring the preservation of our planet's ecological integrity.

Trade liberalization and environmental protection stand as two pivotal, albeit distinct, pillars in the realm of global trade governance. While the former has been a driving force behind economic expansion, the latter is deemed crucial for the sustenance of life and the health of our planet. At first glance, trade and environmental concerns might seem to operate within separate

² Wiesmeth, Hans. *Environmental Economics: Theory and Policy in Equilibrium*. 1st ed., Springer-Verlag Berlin and Heidelberg GmbH & Co. K, 2012, <https://doi.org/978-3642245138>.

³ *Ibid*

⁴ Pisupati, Balakrishna. *Role of Multilateral Environmental Agreements (MEAs) in Achieving the Sustainable Development Goals (SDGs)*. UNEP, 2016, <https://doi.org/978-92-807-3558-1>. pp. 9-10.

domains; however, a deeper examination reveals a complex interplay between these two sectors. Recent decades have highlighted the increasing intersections and conflicts between trade liberalization policies and environmental protection measures, giving rise to numerous disputes⁵.

A significant point of contention arises from the era of unregulated economic activities prior to the establishment of robust environmental protections. During this period, there was no comprehensive environmental framework to safeguard ecological values or to mediate the divergent objectives of trade expansion and environmental preservation. Consequently, economic growth has often been accompanied by environmental degradation, manifesting in forms such as deforestation, biodiversity loss, global warming, air pollution, and the depletion of the ozone layer. Economic endeavours, regardless of their scale, invariably impact the natural environment.

The advent of globalization and the liberalization of economies under the framework of the World Trade Organization have further exacerbated environmental challenges⁶. This has led to a heightened urgency to reconcile the seemingly divergent goals of economic liberalization and environmental conservation, acknowledging that sustainable development necessitates the harmonization of these two essential objectives.

In the aftermath of the World Wars and during the era of rapid decolonization, the global landscape was characterized by a significant surge in population and a fervent push towards economic revival⁷. This period marked intense economic activities and swift industrialization, bolstered by groundbreaking scientific and technological advancements. Nations increasingly equated economic dominance with global supremacy, igniting a relentless pursuit of economic advantage. Amidst this race, environmental preservation and protection were relegated to the sidelines, not seen as immediate priorities.

However, the continuous and unchecked environmental degradation eventually prompted a shift in perspective. The realization dawned that the pursuit of development and economic growth, if left unregulated, could lead to irreversible ecological damage. This led to a collective re-

⁵ Spence, Marvin. "Trade Liberalization and Environmental Protection." *E-International Relations*, 2011, <https://doi.org/ISSN 2053-8626>. Accessed 8 Jan. 2024; UN. *Trade Liberalisation and the Environment: Lessons Learned from Bangladesh, Chile, India, Philippines, Romania and Uganda* -. United Nations, 1999, <https://doi.org/UNEP/99/7>;

⁶ Ahmed, Farhan, et al. "The Environmental Impact of Industrialization and Foreign Direct Investment: Empirical Evidence from Asia-Pacific Region." *Environmental Science and Pollution Research*, 2022, <https://doi.org/10.1007/s11356-021-17560-w>. Accessed 7 Jan. 2022.

⁷ Thomas, Martin, and Andrew Thompson. "Empire and Globalisation: From 'High Imperialism' to Decolonisation." *The International History Review*, vol. 36, no. 1, 2014, pp. 142-170, <https://doi.org/https://www.jstor.org/stable/24701312>. Accessed 6 Dec. 2023.

evaluation across various economic and developmental sectors, with a growing consensus on the need for sustainable development strategies that would ensure long-term viability without compromising the planet's health.

Within the realm of international trade, this shift in understanding brought about the acceptance of trade restrictive measures aimed at environmental protection. These measures, designed to safeguard plant, animal, and human life and health, were recognized as essential, albeit subject to certain conditions. This acknowledgment marked a significant departure from previous attitudes, underlining the imperative to balance economic activities with environmental stewardship in the context of global trade dynamics.

III. ECO-IMPERIALISM: A GROWING CONCERN

In their pursuit of maintaining high environmental standards, developed countries often stipulate and in many instances insist that these criteria are met in their trade engagements with other nations. This leads to the imposition of trade-related environmental measures on countries in the Global South, actions that have stirred considerable debate. Unlike general obligations under the General Agreement on Tariffs and Trade of 1947 or commitments within multilateral environmental agreements, these measures are frequently unilateral. Developed nations, driven by heightened environmental sensitivities, endeavour to ensure that their trade policies reflect these concerns, insisting on their integration into international trade agreements.

A quintessential example of such a scheme was seen in the US Tuna-Dolphin dispute, where the US implemented measures aimed specifically at dolphin protection⁸. Such unilateral environmental actions have been critically termed *Eco-Imperialism*, a concept introduced by Paul Driessen⁹. This term encapsulates the criticism that developed nations, under the guise of environmental stewardship, exert undue influence over less economically developed partners, imposing environmental standards that may not align with the latter's capacities or priorities. These practices highlight the complex interplay between environmental advocacy and the power dynamics inherent in international trade relationships.

Developing and least developed countries frequently express opposition and suspicion towards the trade-related environmental measures imposed by more developed nations. Their scepticism is grounded in several justifications. Firstly, there's a concern that such measures may serve as a facade for protectionism. This apprehension is supported by landmark trade and

⁸ Report of the Panel, United States-Restriction on the Import of Tuna, (Mexico) DS21/R – 39S/155 (September 3, 1991)

⁹ Driessen, Paul. *Eco-Imperialism: Green Power Black Death*. Merril Press, 2010, <https://doi.org/978-0939571239>.

environmental disputes, such as the US Tuna-Dolphin, US Gasoline, and US Shrimp-Turtle cases. In these instances, even though the environmental protection intentions were recognized, the United States was ultimately barred from enforcing the measures due to their discriminatory implementation, which resembled disguised protectionism¹⁰.

Secondly, these environmental stipulations often entail significant financial burdens for the exporting countries. For example, if a measure mandates a specific production method, the exporting nation may need to acquire new technologies, incurring additional costs that inflate the product's price¹¹. This financial strain can be especially challenging for countries with limited resources.

Thirdly, the imposition of unilateral trade sanctions typically originates from economically stronger nations, leveraging their position to enforce sanctions on weaker counterparts. The history of such sanctions reveals that they are predominantly enacted by powerful entities like the United States and the European Union¹². Smaller nations, such as Bangladesh, are hesitant to initiate similar actions against formidable countries like the US due to the potential for severe economic repercussions in the event of retaliation. The rarity of unilateral measures taken by smaller countries underscores the imbalance of power in international trade relations, highlighting the challenges faced by less developed nations in navigating the demands of environmental protection within the global trade system.

Supporters of unilateral environmental measures acknowledge the value of international consensus but express reservations about engaging in multilateral negotiations during times of urgency. They argue that immediate action is necessary to mitigate pressing environmental threats and that initiating international discussions can be a lengthy process without assurance of reaching a fair and mutually beneficial outcome, especially when countries might prioritize their own interests. Proponents also contend that unilateral actions have historically played a role in advancing international law and setting global environmental standards. For example, the UK's decision to bomb the Torrey Canyon in 1967 to prevent an oil spill led to the 1969 Intervention Convention, which affirmed coastal states' rights to take independent actions

¹⁰ Report of the Panel, United States-Restriction on the Import of Tuna, (Mexico) DS21/R – 39S/155 (September 3, 1991); Report of the Appellate Body, United States-Standards for Reformulated and Conventional Gasoline, (Venezuela, Brazil) WT/DS2/AB/R (April 29, 1999); Report of the Appellate Body, United States-Import Prohibition Of Certain Shrimp And Shrimp Products, (Malaysia, Thailand, India, Pakistan) WT/DS58/AB/R (October 12, 1998)

¹¹ Srivastava, Jayati, and Rajeev Ahuja. "Shrimp-Turtle Decision in WTO: Economic and Systemic Implication for Developing Countries." *Economic and Political Weekly*, vol. 37, no. 33, 2002, pp. 3445-3455, <https://doi.org/https://www.jstor.org/stable/4412492>. Accessed 16 Jan. 2024.

¹² *Supra* Note 9

against oil pollution threats¹³. Furthermore, such measures can inspire other nations to adopt similar environmental protections, potentially establishing new customary norms or at least influencing state practice, as seen in the development of the continental shelf doctrine and the exclusive economic zone following unilateral national jurisdiction extensions.

IV. STEPS TAKEN TO ADDRESS THE ISSUE OF UNILATERAL MEASURES

Efforts to reconcile trade and environmental concerns have been numerous, yet initiatives specifically targeting the issue of unilateral environmental actions are relatively few. A key milestone in addressing environmental challenges on a global scale was the Stockholm Conference, which marked the first significant questioning of Earth's ability to sustain a rapidly increasing population¹⁴. This conference led to the adoption of crucial principles aimed at environmental protection. Notably, it introduced the concept of state responsibility for environmental harm extending beyond a state's territorial and national boundaries. Additionally, the declaration emphasized the importance of international cooperation in evolving legal frameworks for liability and compensation for victims of pollution and environmental damage that occurs outside the jurisdiction of individual states.

The Rio Summit further advanced the commitment to environmental stewardship by emphasizing state obligations towards safeguarding the environment. The resulting Rio Declaration, also known as the Earth Charter, outlined twenty-seven principles designed to steer nations towards adopting sustainable development practices that are environmentally friendly. This declaration highlighted the necessity of state collaboration in fostering an inclusive and open international economic system that would contribute to both economic growth and sustainable development globally, thereby enhancing efforts to combat environmental degradation¹⁵. Moreover, it stipulated that trade policies aimed at environmental protection should avoid causing discriminatory, unilateral, arbitrary, or unjustifiable impediments to international trade. It also emphasized that environmental measures addressing cross-border environmental concerns should be founded on international consensus, ensuring a cooperative approach to global environmental challenges.

The conversation around unilateral environmental trade restrictions would be incomplete without acknowledging Agenda 21. This comprehensive plan of action, developed during the

¹³ Sheail, John. "'Torrey Canyon': The Political Dimension." *Journal of Contemporary History*, vol. 42, no. 3, 2007, pp. 485-504, <https://doi.org/https://www.jstor.org/stable/30036459>. Accessed 10 Oct. 2023.

¹⁴ Declaration of United Nations Convention on Human Environment, Principle 21, June 16, 1972, available at <http://www.unep.org/documents.Multilingual/Default.asp?documentid=97> (Last Visited, 3rd April 2013)

¹⁵ United Nations Conference on Environment and Development, Principle 12, June 3-14, 1992, Rio Declaration on Environment and Development, UN Doc. A/Conf.151/26 (16th June 1992)

Earth Summit, includes a principle that calls on state parties to motivate entities such as the General Agreement on Tariffs and Trade, the United Nations Conference on Trade and Development, and other pertinent international or regional economic bodies to review and consider propositions and principles concerning unilateral environmental trade restrictions, with an aim to mitigate them¹⁶. Moreover, it emphasizes that if such measures are deemed absolutely necessary, they should only be implemented following the achievement of an international consensus on the issue. This directive underscores the importance of collaborative decision-making and consensus in addressing environmental challenges through trade policies.

During the WTO meeting in November 2001 in Doha, the Declaration emphasized the principles outlined in the WTO Agreement's preamble and previous ministerial conferences, including those in Marrakesh, Singapore, and Geneva, while making certain concessions to developing countries¹⁷. It directed the Committee on Trade and Environment to investigate the potential misuse of trade-related environmental measures (TREMAs) as a form of protectionism. The Committee acknowledged the risk of TREMAs being used as disguised protectionism and highlighted the need for a balance between market access and environmental protection. It proposed three strategies to achieve this balance.

Furthermore, the GATT Report on Trade and Environment recommended prioritizing multilateral environmental agreements over unilateral trade restrictions to address environmental policy issues¹⁸. It emphasized that while adopting environmental policies supported by the global community is permissible, efforts by a single or a few countries to enforce environmental policies in others through market access restrictions are problematic. The report advocated for intergovernmental cooperation and multilateral agreements as the most orderly approach to influencing environmental policies internationally. Such cooperation is seen as enhancing the likelihood of finding universally acceptable solutions, directly addressing the issue at hand, and minimizing the risk of protectionist abuses. The report also noted that consensus on a problem leading to multilateral agreements might necessitate addressing how trade policies can ensure compliance by non-parties to these agreements.

Multilateral environmental agreements have emerged as a prominent strategy to circumvent unilateral environmental trade restrictions, promoting global cooperation in environmental

¹⁶ *Ibid*, Agenda 21

¹⁷ Doha WTO Ministerial 2001 : Ministerial Declaration, WT/MIN(01)/DEC/1 , November 20, 2001

¹⁸ WTO Committee on Trade and Environment, Environmental requirements and market access: preventing 'green protectionism' available at http://www.wto.org/english/tratop_e/envir_e/envir_req_e.htm (Last Visited 5th April 2013)

protection and conservation¹⁹. These agreements, which now number over three hundred, embody commitments among nations to collectively address ecological challenges. Many of these conventions offer financial and technical support to nations that lack the resources to adopt green technologies, adhering to the principle of common but differentiated responsibilities. This principle acknowledges that while all countries share the obligation to protect the environment, their responsibilities vary due to differences in economic capabilities. Consequently, developing countries advocate for a sustainable development approach that considers existing global inequalities and the needs of both current and future generations, ensuring that environmental initiatives are both fair and inclusive.

V. JURISPRUDENCE DEVELOPED BY WTO DISPUTE SETTLEMENT BODIES

The paper will now trace three of the most important cases that defined the relationship of trade and environment which is in existence today and in particular their ruling on the unilateral issue. These cases are analysed with the primary aim of identifying the WTO jurisprudence with respect to the environmental unilateralism.

(A) US Restrictions on the Import of Tuna²⁰

The Regulation in dispute was the US Marine Mammal Protection Act (MMPA) of 1972 aimed to safeguard marine mammals from harmful fishing practices by banning the import of tuna and related products caught with purse-seine nets in the Eastern tropical Pacific Ocean (ETP) to minimize marine mammal casualties. The Act mandated strict protection standards for marine mammals, particularly impacting foreign fishermen by requiring them to have comparable marine mammal protection programs for importing yellowfin tuna. In 1990, the US enforced an embargo on yellowfin tuna and its products from the ETP, affecting countries like Mexico and Ecuador, among others. This was followed by additional embargoes, including on intermediary nations, which had to prove they did not import tuna from the embargoed countries²¹.

The challenge to the measure centered on its violation of the GATT's National Treatment Principle under Article III, with the US defending its stance under Article XX (b) of the General Exception provisions. The US argued that the embargo was crucial for dolphin conservation, asserting there was no alternative means to safeguard dolphin life and health beyond its borders

¹⁹ Wold, Chris. "Multilateral Environmental Agreements and the GATT: Conflict and Resolution?" *Environmental Law*, vol. 26, no. 3, 1996, pp. 841-921, <https://doi.org/https://www.jstor.org/stable/43266504>. Accessed 10 Oct. 2023.

²⁰ Report of the Panel, United States-Restriction on the Import of Tuna, (Mexico) DS21/R – 39S/155 (September 3, 1991);

²¹ *Ibid*, Paragraph 2.3

other than prohibiting the import of tuna harvested through detrimental fishing practices²². The emphasis was on the indispensability of the embargo for ensuring the welfare of dolphins, highlighting the measure's intent to protect marine life within the framework of international trade regulations.

Mexico argued that the provisions of Article XX(b) were intended to apply solely within a nation's jurisdiction, not to impose extraterritorial constraints. They maintained that the U.S.'s import ban, due to its extraterritorial effects, was in violation of legal norms. As an alternative, Mexico proposed promoting international collaboration among countries engaged in tuna fishing as a means to ensure dolphin protection, challenging the necessity and legality of the U.S. embargo under existing international trade agreements.

The Panel concluded that environmental measures should not be applied beyond a nation's borders, relying on the drafting history of Article XX(b) to assert that it was not designed for extraterritorial use²³. The Panel warned that a wide interpretation might undermine the stability of the global trade system.

“A country can control production or consumption of certain products only within their jurisdiction. Had that been the intention of the drafters, then such a broad interpretation of Article XX (b) would mean that every country or contracting party could unilaterally determine the life and health protection policies from which other contracting parties would not deviate. The exporting country would have to choose between the dictates of importing countries or suffering severe trade damage. This sort of extraterritorial behaviour would jeopardise the multilateral trade order.”

It suggested that international treaties offer a viable method for dolphin conservation, contending that the U.S. embargo was unwarranted given the existence of alternative avenues for collaboration on environmental protection. Additionally, the Panel highlighted the challenges faced by Mexican fishermen, who struggled with the MMPA's variable standards, rendering compliance with U.S. dolphin safety regulations unfeasible²⁴.

(B) United States-Standards for Reformulated and Conventional Gasoline²⁵

In 1995, the US Environmental Protection Agency (EPA) introduced gasoline regulations under the Clean Air Act, targeting a reduction in harmful emissions from vehicles by regulating gasoline components. The Act distinguished between Reformulated Gasoline, designed for

²² *Id*, Paragraph 3.33

²³ *Id*, Paragraph 5.25

²⁴ *Id*, Paragraph 5.28

²⁵ *Supra* Note 9

cleaner combustion in areas failing to meet air quality standards and Conventional Gasoline for other regions. The EPA established two baseline categories for gasoline composition as of 1990: individual baselines for specific domestic producers and statutory baselines for the rest, including foreign refiners. Foreign refiners were mandated to adhere to statutory baselines, lacking the opportunity to establish individual baselines due to the impracticality of accessing past data on their gasoline's composition. Venezuela challenged these regulations, arguing they unfairly discriminated against foreign refiners. The US defended the measures under Article XX(b) and (g) of the GATT, claiming the discrimination was a necessary evil due to the logistical challenges of setting individual baselines for foreign entities, despite this constituting a violation of Article III:4.

The Panel determined that the US gasoline regulation was discriminatory, without considering the extent of discrimination. It found the measure unjustifiable under Article XX(b) of the GATT, as the US could not prove the regulation was necessary or the least restrictive means to achieve its goal. The Panel observed no direct link between the discriminatory treatment of imported gasoline and the objective of enhancing air quality in the US, concluding the measure was not primarily aimed at conserving natural resources and thus not essential for this purpose. Furthermore, although Article XX(g) focuses on conserving natural resources, the US's argument that clean air constitutes an environmental necessity was not sufficient to establish that the EPA's regulation was directly related to resource conservation, rendering the measure unjustified under Article XX(g) as well.

The Appellate Body recognized clean air as an exhaustible natural resource, aligning with the WTO Preamble's emphasis on optimal resource utilization for sustainable development. It highlighted evolving state practices and the growing environmental significance, advocating for an expanded interpretation of exhaustible natural resources (ENRs) to include clean air. Despite the Panel's view that there was no direct link between the US's discriminatory treatment of imported gasoline and its clean air objectives, the Appellate Body challenged this by questioning the necessity of a "direct connection" for the measure to be considered related to ENR conservation. It clarified that the establishment of baseline rules aimed to ensure compliance with air quality standards, thereby serving the conservation of clean air as an ENR. However, the Appellate Body found the measure unjustified under the Chapeau of Article XX, critiquing the method of its administration. It argued that the US could have sought international cooperation before presuming other governments' unwillingness to comply with its standards. The assumption of non-cooperation without attempting to establish international agreements was deemed an unjustifiable approach, leading to the conclusion that the EPA's measure, while

related to the conservation of ENRs, failed to meet the broader fairness and non-discrimination standards required by the WTO framework.

(C) US Import Prohibition of certain Shrimp and Shrimp related Products²⁶

The US implemented regulations to protect endangered sea turtles, recognized under the Endangered Species Act of 1973 and the CITES Convention, from incidental harm during shrimp harvesting. Annually, about 150,000 sea turtles die from entanglement in shrimp fishing nets. In 1987, the US mandated Turtle Excluder Devices for its shrimp trawlers, a requirement extended to international waters. Amendments in 1989 demanded negotiations for agreements on sea turtle conservation and certification of foreign nations' comparable protection measures, judged by the incidental capture rate relative to US standards. By 1996, guidelines required foreign trawlers to use TEDs effectively, with the possibility of an embargo for non-compliance. The regulation impacted major shrimp exporters like Thailand, India, China, Bangladesh, and Honduras, giving them four months to adhere to the US standards. Following a legal decision, Western and Caribbean countries were granted a three-year period to implement TEDs. These nations challenged the US ban at the WTO, arguing it infringed upon their sovereignty and imposed US environmental standards internationally, violating Articles I, XI, and XIII of the GATT. The US defended its actions under Article XX (b) & (g), citing environmental protection and conservation of natural resources as justifications.

The Appellate Body addressed whether ancient sea turtles qualify as Exhaustible Natural Resources (ENR) under Article XX(g). It concluded that living organisms, due to their vulnerability to depletion and extinction from human activities, fall within the scope of ENRs, extending beyond just minerals or non-living resources. Thus, it affirmed that sea turtles, recognized as exhaustible by CITES, are indeed considered ENRs, highlighting the broad interpretation of conservation efforts under international trade laws²⁷.

The Appellate Body thereafter examined if the disputed measure was related to the preservation of Exhaustible Natural Resources, introducing the '*Ends and Means*' test to assess the relationship between the regulatory means and conservation ends. It found the US regulation, aimed at conserving sea turtles, to be directly connected to the conservation policy, demonstrating a significant link between Section 609 and the objective of protecting an exhaustible and endangered species. The measure's fairness and its effectiveness in conjunction with domestic practices were key to its justification under Article XX(g), suggesting that if

²⁶ Supra Note 9

²⁷ *Ibid*, Paragraph 127

applied equitably, the regulatory means are appropriately aligned with the conservation goals²⁸. The Appellate Body assessed the justifiability of the trade restrictive measure's administration, identifying unjustifiable discrimination. It criticized the blanket requirement for all countries to use Turtle Excluder Devices, ignoring the adverse impacts on developing countries and Least Developed Countries (LDCs) where fishermen might not afford TEDs. The discrimination was seen not only in treating different countries, similarly, disregarding their varied capacities to adopt new technologies, but also in the US's failure to facilitate technology transfer, unlike its commitments under the Inter American Convention. Furthermore, the compliance period set by the US—four months—was contrasted with a three-year phase-in granted to Caribbean and Western Atlantic states following a US court decision, suggesting that a similar extension could have been offered to other nations. Thus, the measure's administration was deemed unjustifiable due to its discriminatory approach and unequal treatment of nations²⁹.

The Appellate Body ruled that the US measure was arbitrary due to its inflexible requirement for all nations to adopt Turtle Excluder Devices (TEDs) except in situations where shrimp and turtle do not interact. The US did not explore alternative standards or methods, indirectly suggesting its own program as the superior method for sea turtle protection without giving any discretion to the certifying authority. Moreover, the process for certification lacked transparency, bestowing arbitrary power on the authority that could potentially be used to hinder trade. This rigidity and lack of openness in the certification process, combined with the presumption that no other viable protective measures exist, rendered the US approach as arbitrary discrimination against international trade³⁰.

VI. CONCLUSION

Trade restrictions imposed unilaterally for environmental protection have consistently been a contentious issue for both the imposing and affected nations. Given the escalating concerns, it has become imperative to confront this issue on a global scale, leading to a succession of international conferences and the creation of various nonbinding legal documents. However, the problem of unilateral environmental measures has not been addressed with the same intensity or commitment as other environmental challenges. This is evident in the absence of any specific conventions or bilateral agreements dedicated to resolving the issue of environmental unilateralism. Although the matter has been incorporated into some binding and nonbinding multilateral conventions, its treatment within these documents is often secondary,

²⁸ *Id.*, Paragraph 115

²⁹ *Id.*, Paragraph 120

³⁰ *Id.*, Paragraph 121

lacking the focus and enforcement necessary to address the complexities of unilateral environmental actions effectively.

The foundational environmental texts, from the Stockholm and Rio Declarations to the 1999 GATT report on trade and environment, consistently advocate for addressing international environmental issues through global consensus and international cooperative efforts. These documents reflect a clear preference for multilateralism over unilateralism when dealing with environmental challenges connected to trade. Notably, while unilateral measures are neither outright prohibited nor fully sanctioned by these instruments, they do not impose a binding obligation on states to seek international consensus for resolving environmental problems. Instead, they promote, rather than mandate, a cooperative international approach, underscoring the importance of consensus-building while leaving room for states to act independently when addressing environmental concerns.

It can be concluded that a significant latitude remains for states to adopt unilateral actions to confront environmental issues if efforts to reach international consensus are unsuccessful. The existing provisions serve as qualifiers or conditions for the unilateral implementation of environmental measures. Thus, according to these provisions, unilateralism is not the first recourse but a secondary path that can be taken when multilateralism does not yield the desired agreement on environmental action. This suggests that the journey towards unilateral measures should ideally commence with, and possibly stem from, attempts at collaborative, multilateral solutions.

The evolution of World Trade Organization jurisprudence lends further support to the notion that unilateral environmental measures can be a legitimate recourse when multilateral consensus cannot be achieved. The progression seen in key cases reflects a nuanced shift in the stance of both GATT and the subsequent WTO Panel and Appellate Body regarding such measures. The US Tuna Dolphin case marked the first significant examination of environmental unilateralism, where the Panel's initial position not only discouraged unilateral measures in the absence of multilateral negotiations but also rejected their extraterritorial application. Although this judgment was not officially adopted, it received widespread criticism, particularly from environmental advocates and countries with robust environmental agendas, often located in the global North.

Over time, the rigid stance on unilateral environmental measures and their extraterritorial application began to evolve within the WTO's jurisprudence. The US Gasoline case marked a turning point, establishing that such measures could indeed have extraterritorial implications.

While the US Shrimp Turtle case brought up the issue of extraterritoriality again, the Appellate Body did not address it as definitively as some commentators expected. The argument posits that if the Appellate Body had intended to unequivocally prohibit extraterritorial unilateral measures, it would have explicitly stated so, especially in light of the precedent set in the US Gasoline case.

The trajectory of WTO Dispute Settlement Body opinions has shown a discernible shift from the Tuna Dolphin case to the Shrimp Turtle case. Initially, unilateral actions were categorically disallowed unless all efforts at achieving an international consensus on an environmental issue had been exhausted. This reflects a gradual softening in the approach to unilateral measures, acknowledging them as a potentially valid, albeit last-resort, strategy for addressing environmental challenges when multilateral efforts fail. Gradually with evolving jurisprudence coupled with revolutionized institutional framework there has indeed been a perceptible shift regarding unilateral environmental measures, as evidenced cases discussed above, where such measures are not strictly prohibited but are certainly discouraged. The standard for evaluating unilateral actions has transitioned from an outright ban to a more nuanced stance of discouragement, with the caveat that international consensus should be pursued initially.

This evolution is evident from the fact that, in all three landmark cases, the failure to engage in international cooperative efforts was a significant factor in the measures being deemed unjustifiable under either Article XX(b), Article XX(g), or the chapeau of Article XX. The measures were largely rejected because the states did not first seek to address their environmental concerns through collective international agreements. While there are various reasons why nations may resort to unilateral measures, a multilateral approach continues to be the preferred course of action. This preference is due largely to the inherent scepticism that unilateral measures attract, often being perceived as a disguise for protectionism or as impositions of one nation's standards on others. Therefore, despite the softening stance, the GATT regime still upholds the principle that international cooperation is the most favourable route for resolving environmental issues in the context of trade.

A measure born out of international consensus inherently carries greater legitimacy and is more widely accepted, as it bears the endorsement of a larger collective of nations. Conversely, unilateral measures, even those enacted with the best environmental intentions, are often met with scepticism due to concerns over underlying motives, such as veiled protectionism. An extensive review of arguments, measures, and pivotal legal cases leads to the conclusion that the prevailing international practice favors the pursuit of multilateral agreements and the resulting consensus when addressing environmental issues that span multiple countries.

Environmental unilateralism is thus considered an exception to this rule, a path to be taken only when efforts to forge a consensus have been exhausted without success, or when existing agreements fail to achieve their intended outcomes. Unless it can be demonstrated that one of these conditions has been met, unilateral environmental measures are likely to be scrutinized and questioned, regardless of the intent behind their implementation. This reflects the broader principle that in the realm of international environmental policy, cooperative, collective action is the standard, with unilateralism as a secondary recourse under specific circumstances.
