

Make your own notes.
NEVER underline or
write in a book.



RHODES UNIVERSITY
Where leaders learn

TR 07-91

INTERNATIONAL TRADE AND ENVIRONMENTAL DISPUTES

An Analysis of Article XX of the General Agreement on
Tariffs and Trade (1994) and Environmental Policies of
the Developing and Developed World

A Thesis Submitted in Fulfilment of the Requirements of the Degree of

MASTER OF LAWS

of

RHODES UNIVERSITY

by

FAITH TENDAYI MANJORO

JUNE 2006

DECLARATION

Except for references specifically indicated and acknowledged in the text, this thesis is wholly my own work and has not been submitted for degree purposes at any other university.

F T MANJORO

GRAHAMSTOWN

JUNE 2006

ABSTRACT

A major problem emanating from the trade/environment conflict is the use of trade measures, such as restrictions and sanctions, as tools for environmental protection. Proponents of free trade argue that the use of these measures is tantamount to abuse of environmental standards for protectionist ends. This is particularly so if the imposition of the standard amounts to a unilateral act which blocks the entry of a specified product into the market of another member state for reasons other than environmental protection. Environmentalists at the same time argue that free trade will lead to environmental degradation and therefore advocate for the use of trade-restrictive measures to safeguard against the destruction of the environment.

The GATT has proved problematic when it comes to the resolution of trade/environment conflicts. The GATT aims at trade liberalisation yet most environmental policies are enforced through trade-restrictive devices like quotas and licences. Article XX of the GATT is anomalous: it does not explicitly mention the environment, yet member states rely on it as an environmental protection clause. This thesis discusses the various issues emanating from the trade/environmental debate. The history of Article XX is reviewed and the issues that arise in the adjudication of Articles XX (b) and (g) in a trade/environment context are analysed in light of the decisions by the GATT/WTO dispute settlement bodies.

The role played by Multilateral Environmental Agreements (MEAs) in protecting the environment is discussed. However, the relationship between MEAs and the WTO is also scrutinised as these rule-making bodies often come into conflict: firstly, because they serve two differing interests — on the one hand, MEAs allow for the use of trade-restrictive measures in environmental agreements and on the other, the WTO calls for unrestricted trade unless exceptional circumstances exist; and secondly, member states that are party to both the WTO and MEAs are often forced to subscribe to international trade rules that are incompatible with those in environmental agreements.

The trade/environmental debate is important to both the developed and developing worlds. The developed world is in favour of environmental policies which protect the

environment from degradation. On the other hand, the developing world is in desperate need of the benefits of trade liberalisation so as to cater for high unemployment rates and poor economic growth. The question thus arises as to whether, when environmental issues are promoted, developing countries will not suffer at the expense of developed nations which may engage in protectionist measures under the pretext of environmental conservation.

The divide between developed and developing countries is illustrated in Chapter 5 through case studies on coal mining in the USA and South Africa. The conclusion reached is that total co-operation is essential between developed and developing states for success in safeguarding the environment from degradation. Accordingly, the trade/environmental debate cannot be isolated from the conflicting approaches in developed and developing countries.

The conclusions in the final chapter seek to strike a balance between trade liberalisation and environmental protection. Recommendations are made on how the trade/environmental challenges could be dealt with and the regulation of trade-restrictive devices to exclude, or at least limit, protectionism.

DEDICATION

This piece of work is dedicated to a loving sister, Bertha Manjoro, who never lived long enough to witness the joys of today but will always remain an inspiration in my life.

ACKNOWLEDGEMENTS

I would like to express my heartfelt gratitude to Rhodes University and Mr John Gillam for believing in my ability and awarding me the Andrew Mellon Scholarship that has afforded me the opportunity to study at Rhodes University. To Professor R Midgley, my supervisor, I say thank you for the continuous and excellent supervision without which this work could have come to nothing. Gratitude goes to Mr M Lehloenya, who assisted me with specific international trade law issues and without whom I would have been lost. Thanks to Jill Otto and Sylvia January for granting me unlimited assistance and access to the law library. Special thanks also go to my family who stood by me when the road became weary and tiresome. I would like to thank my long time friend Mr C T Chiyangwa for being loyal and supportive at all times and helping me pull through the difficult times: without your support I would have given up. Last but not least, praise goes to the Almighty Father, for this work could not have been complete without your grace and will.

TABLE OF CONTENTS

DECLARATION	i
ABSTRACT	ii
DEDICATION	iv
ACKNOWLEDGEMENTS	v
TABLE OF CONTENTS	vi
BIBLIOGRAPHY	xi
ACRONYMS	xxiii

CHAPTER 1

INTRODUCTION

1.1 The Purpose of Study	1
1.2 Scope of Study	3
1.3 Sources and Approach	4
1.4 Structure of Thesis	6

CHAPTER 2

ENVIRONMENTAL DEBATES, ARTICLE XX AND INTERNATIONAL TRADE

2.1 Introduction	8
2.2 Historical Foundations of the Environmental Debate in GATT/WTO	10
2.2.1 Stockholm Conference	10
2.2.2 The United Nations Conference on Environment and Development – Rio “Earth Summit”	15
2.2.3 Trade and Environment in the WTO’s Founding Charter – The Marrakesh Agreement, 1994	16
2.3 GATT and the Environment	18
2.3.1 History of GATT Article XX	20
2.3.1.1 Environmental Policies	21
2.3.1.2 The International Convention	23
2.3.1.3 The International Trade Organisation	24
2.4 Article XX and the Environment	26

2.4.1 Interpreting the Preamble of Article XX	27
2.4.2 Interpreting Article XX (b)	29
2.4.2.1 Necessary Restrictions on Trade	29
2.4.2.2 Availability of Alternative Measures	30
2.4.2.3 Least Degree of Inconsistency with Other GATT Provisions	31
2.4.3 Interpreting Article XX (g)	33
2.4.3.1 Measures Relating to Conservation	33
2.4.3.2 Exhaustible Natural Resources	35
2.4.3.3 Domestic Production or Consumption	36
2.5 The Question of Extra-territoriality	38
2.6 Conclusion	41

CHAPTER 3

THE USE OF TRADE MEASURES IN PROTECTING THE ENVIRONMENT

3.1 Introduction	45
3.2 Trade Measures Commonly Used to Enforce Environmental Standards	47
3.2.1 Sanitary and Phytosanitary Measures	48
3.2.2 Market Transformation Measures	50
3.2.2.1 Subsidies	50
3.2.2.2 Tariffs	53
3.2.2.3 Quotas	55
3.3 Application of Trade Measures under the GATT	56
3.3.1 The Most Favoured Nation Principle	56
3.3.2 The National Treatment Obligation	58
3.4 Protecting the Environment at Domestic Level	59
3.4.1 Problems and Possible Solutions when Protecting the Environment at Domestic Level	61
3.5 Protecting the Environment at International Level	64
3.5.1 Multilateral Environmental Agreements	64
3.5.1.1 The Convention on International Trade on Endangered Species, 1973	65
3.5.1.2 The Basel Convention, 1989	69
3.5.1.3 The Kyoto Protocol, 1997	74

3.5.2 The Relation between Multilateral Environmental Agreements and Trade Restrictions	79
3.5.2.1 Monitoring and Controlling Trade	81
3.5.2.2 Promoting Compliance with MEA Requirements	83
3.5.2.3 Enforcing MEAs	84
3.5.3 Clash of Cultures — Multilateral Environmental Agreements Versus World Trade Organisation	85
3.5.4 Possible Solutions to the Ongoing Conflict between Multilateral Environmental Agreements and the World Trade Organisation	88
3.6 Conclusion	93

CHAPTER 4

CONFLICT BETWEEN FREE TRADE AND ENVIRONMENTAL PROTECTION

4.1 Introduction	95
4.2 Conflicting Opinions and Attitudes to Free Trade and Environmental Protection	97
4.2.1 What is Trade Liberalisation?	97
4.2.2 Environmental Protection	100
4.2.2.1 Regulations on Imports and Exports	101
4.2.2.2 Trade Restrictions to Enforce Environmental Standards in International Agreements	101
4.2.2.3 Trade Restrictions in Response to Perceived Inadequate Environmental Protection Controls in Other Countries	102
4.2.2.4 Controls on the Export of Hazardous Products, Technologies and Waste	102
4.2.3 Conflict between Free Trade and Environmental Protection	103
4.3 Environmental Cases and WTO Rules of Dispute Settlement	109
4.3.1 The Reformulated Gasoline Case	109
4.3.1.1 Facts	109
4.3.1.2 Ruling	110
4.3.1.3 Implementation and Analysis	111
4.3.2 The Shrimp-Turtle Case	113
4.3.2.1 Facts	113
4.3.2.2 Ruling	114
4.3.2.3 Implementation and Analysis	115

4.3.3 The Asbestos Case	116
4.3.3.1 Facts	116
4.3.3.2 Ruling	117
4.3.3.3 Implementation and Analysis	118
4.3.4 The Significance of the Environmental Cases to the Trade/Environmental Debate	119
4.4 Conclusion	125

CHAPTER 5

THE RELATIONSHIP BETWEEN TRADE AND THE ENVIRONMENT IN A DEVELOPING COUNTRY (SOUTH AFRICA) AND A DEVELOPED COUNTRY (UNITED STATES OF AMERICA)

5.1 Introduction	129
5.2 Background to South Africa's Trade and Environmental Issues	132
5.2.1 South Africa, the World Trade Organisation and Southern African Development Community	134
5.3 A Selected Case Study on Trade and Environmental Linkages in South Africa	136
5.3.1 Coal Mining and the Environment	137
5.3.1.1 Process or Production Impacts	138
5.3.1.2 Impacts from Coal Use	139
5.3.2 The Legislative Environment in Coal Mining	140
5.4 International Pressures on the Coal Industry	142
5.4.1 The Kyoto Protocol and the Demand for South African Coal	143
5.5 Background to USA's Trade and Environmental Issues	145
5.5.1 United States, the World Trade Organisation and North American Free Trade Agreement	148
5.6 A Selected Case Study on Trade and Environmental Linkages in the United States of America	154
5.6.1 Coal Mining and the Environment	154
5.6.1.1 Process or Production Impacts	155
5.6.1.2 Impacts from Coal Use	157

5.6.2 The Legislative Environment in Coal Mining	158
5.7 International Pressures	161
5.7.1 The Kyoto Protocol and the Demand for United States Coal	163
5.8 Findings and Evaluation	166
5.8.1 Environmental Recognition	166
5.8.2 Carrying Capacities of Developing and Developed States	169
5.8.3 Global Co-ordination on Trade and Environmental Issues between Developing and Developed Countries	175
5.9 Conclusion	178

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions	181
6.1.1 Trade/Environmental Debate and the Interpretation of Article XX	181
6.1.2 Multilateral Environmental Agreements and the World Trade Organisation	184
6.1.3 Disparities between Developed and Developing States	185
6.2 Recommendations	188
6.2.1 Trade/Environmental Debate and the Interpretation of Article XX	188
6.2.2 Multilateral Environmental Agreements and the World Trade Organisation	192
6.2.3 Disparities between Developed and Developing States	195

BIBLIOGRAPHY

BOOKS

L Bethlehem and M Goldblatt *The Bottom Line: Industry and the Environment in South Africa* (1997) UCT Press (Pty) Ltd: Cape Town

PW Birnie and AE Boyle *Basic Documents* (1995) Oxford University Press: USA

PW Birnie and AE Boyle *International Law and the Environment* (1992) Oxford University Press: USA

CJ Botha *Statutory Interpretation: An Introduction for Students* 4 ed (2005) Juta: Lansdowne

D Brack, M Grubb and C Windram *International Trade and Climate Change Policies* 2 ed (2000) Earthscan: London

I Brownlie (ed) *Principles of Public International Law* 4 ed (1998) Clarendon Press: Oxford

P Buchanan *The Great Betrayal: How American Sovereignty and Social Justice are Being Sacrificed to the Gods of the Global Economy* (1998) Little Brown and Company: USA

BR Copeland and MS Taylor *Trade and the Environment: Theory and Evidence* (2003) Princeton University Press: New Jersey

A Fijalkowski and J Cameron (eds) *Trade and the Environment: Bridging the Gap* (1998) Cameron May Publishers: London

F Francioni (ed) *Environment, Human Rights and International Trade* (2001) Hart Publishing: Oxford

B Fredrisson (ed) *Trade, Global Policy and the Environment* (1999) Princeton University Press: New Jersey

D Geradin *Trade and the Environment: A Comparative Study of EC and US Law* (1997) Cambridge University Press: Cambridge

DA Irwin *Free Trade under Fire* (2003) Princeton University Press: New Jersey

JH Jackson *The World Trading System* (1989) The Royal Institute of International Affairs: London

JH Jackson *The Jurisprudence of GATT and the WTO* (2000) Royal Institute of International Affairs: London

P Johnson and A Beaulieu *The Environment and NAFTA: Understanding and Implementing the New Continental Law* (1996) Island Press: San Francisco

M Kidd *Environmental Law: A South African Guide* (1997) Juta: Kenwyn

JJ Kirton and VW Maclaren *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges* (2002) Ashgate Publishing Company: USA

R Nader (ed) *The Case against Free Trade: GATT, NAFTA, and the Globalisation of Corporate Power* (1993) Earth Island Press: San Francisco

EU Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) Kluwer International: London

EU Petersmann *International and European Trade and Environmental Law after the Uruguay Round* (1995) Kluwer International: London

PWB Phillips and R Wolde (eds) *Governing Food Science Safety and Trade* (2001) McGill-Queens University Press: Montreal

M Pollack and G Shaffer *Transatlantic Governance in the World Economy* (2001) Bowman and Littlefield: New York

GP Sampson *Trade, Environment and the WTO: The Post-Seattle Agenda* (2000) Overseas Development Council: New York

P Sands *Principles of International Environmental Law* 2 ed (2003) Cambridge University Press: Cambridge

A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1976) Clarendon Press: Oxford

A Timoshenko (ed) *Dispute Avoidance and Dispute Settlement in International Environmental Law: Compilation of Documents* (2001) UNEP: Nairobi

The World Trade Organisation *GATT Analytical Index: Guide to GATT Law and Practice: Articles I-XXI* 6 ed (1995) WTO: Geneva

JOURNAL ARTICLES

MD Barber "Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement" (1992) 5 *Tulane Environmental Law Journal* 429

L Bartels "Article XX of GATT and the Problem of Extraterritorial Jurisdiction" (2002) 36 *Journal of World Trade* 353

S Charnovitz "Exploring the Environmental Exceptions in GATT Article XX" (1991) 25 *Journal of World Trade* 37

- R Howse "The Appellate Body Rulings in the Shrimp-Turtle Case: A New Legal Baseline for the Trade and Environment Debate" (2002) 27 *Columbia Journal of Environmental Law* 489
- W Jenks "The Conflict of Law-Making Treaties" (1953) 30 *British Yearbook of International Law* 401
- E Kim "Trade Liberalization and Productivity Growth in Korean Manufacturing Industries: Price Protection, Market Power and Scale Efficiency" (2000) 62 *Journal of Development Economics* 55
- A Mukerji "Developing Countries and the WTO: Issues of Implementation" (2000) 34 *Journal of World Trade* 33
- SD Murphy "The Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes" (1994) 88 *The American Journal of International Law* 24
- GJ Naldi "The Regulation of the Transnational Trade in Hazardous Wastes" (2000) 7 *SAJELP* 213
- G Nazeem "Recent Developments" (2000) 44 *Journal of African Law* 47
- PD Okonman "Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 *Journal of African Law* 43
- ND Palmeter "National Sovereignty and the World Trade Organization." (1999) 2 *Journal of World Intellectual Property* 77
- R Revesz "Rehabilitating Interstate Competition: Rethinking the Race to the Bottom: Rationale for Federal Environmental Regulation" (1992) 67 *New York University Law Review* 205
- A Rosas "Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective" (2004) 4 *Journal of Economic Law* 131
- TJ Schoenbaum "Free Trade and Protection of the Environment: Irreconcilable Conflict?" (1992) 86 *The American Journal of International Law* 700
- W Scholtz "The Relationship between the Environment and Trade in the WTO: Prolonging the Conflict between North and South?" (2005) 18 *Speculum Juris* 250
- S Shaw and R Schwartz "Trade and Environment in the WTO: State of Play" (2002) 36 *Journal of World Trade* 129
- S Shrybman "International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade" (1990) 20 *The Ecologist* 30
- AM Sinjela "Developing Countries' Perceptions of Environmental Protection and Economic Development" (1984) 24 *Indian Journal of International Law* 489

RH Steinberg "Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development" (1997) 91 *American Journal of International Law* 231

RB Stewart "The NAFTA: Trade, Competition, Environmental Protection" (1993) 27 *International Lawyer* 751

U Wasserman "United States: Environmental Deregulation" (1983) 17 *Journal of World Trade* 365

EB Weiss "Environment and Trade as Partners in Sustainable Development: A Commentary" (1992) 86 *The American Journal of International Law* 728

G Wisner "Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services" (2002) 2 *International Journal Global Environmental Issues* 293

TABLE OF CASES

Canada — Measures Affecting Exports of Unprocessed Herring and Salmon, 22 March 1988, adopted BISD 35S/98

Danish Bottles — Commission of the European Community vs Kingdom of Denmark (1992) ISBN: 1-56973-136-5

European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body report (2001), adopted WTO Doc WT/DS135/AB/R

Korea — Measures Affecting Import on Fresh, Chilled and Frozen Beef, Appellate Body Report, (2002), adopted WTO Doc WT/DS161/AB/R, WT/DS169/AB/R

Palia v Hawaii Department of Law and Natural Resources 1979 471 F Supp 985 D

SD Meyers vs Government of Canada (2001) 40 *International Legal Materials* 1408

Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes 7 November 1990, adopted BISD 37S/80

United States — EC Hormone Beef Controversy and the Standards Code, Appellate Body report (1985), adopted WT/DS26/AB/R

United States — Imports of Certain Automotive Spring Assemblies, 26 May 1983, adopted BISD 30S/107

United States — Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body report and Panel report, 6 November 1998, adopted WT/DS58

United States — Measures Affecting the Export of Softwood Lumber from Canada 1 November 2002, adopted BISD 40S/358

United States — Restrictions on Imports of Tuna, 3 September 1991, not adopted
BISD 39S/155

United States — Restrictions on Imports of Tuna, 16 June 1994, not adopted DS29/R

United States — Section 337 of the Tariff Act of 1930, 16 January 1989, L/6439

United States — Standards for Reformulated and Conventional Gasoline, Panel Report and Appellate Body Report, 20 May 1996, adopted WT/DS2/R and WT/DS2/AB/R

United States — Taxes on Automobiles 11 October 1994, not adopted DS31/R

United States — Taxes on Petroleum and Certain Imported Substances, Panel report 17 June 1987, adopted BISD 34S/136-166

TABLE OF STATUTES

WTO Documentation

Agreement on Agriculture, 1994

Agreements on the Application of Sanitary and Phytosanitary Measures, 1993

Agreement on Subsidies and Countervailing Duties, 1994

Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994

The General Agreement on Trade in Services, 1995

International Documentation

Agreement on Technical Barriers to Trade, 1979

The African Convention on Transboundary Movements of Hazardous Wastes, 1991

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989

The Cartagena Protocol, 2000

The Convention on International Trade in Endangered Species of Wild Flora and Fauna, 1973

The Convention on the Conservation of Antarctic Marine Living Resources, 2000

The Convention on the Conservation of Migratory Species of Wild Animals, 1979

The General Agreement on Tariffs and Trade, 1994

The International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 1927

The Kyoto Protocol, 1997

The Marrakesh Agreement, 1994

The Montreal Protocol on Biodiversity, 1987

The Rotterdam Convention, 1998

The United Nations Framework Convention on Climate Change, 1992

The Vienna Convention on the Law of Treaties, 1969

Canada

The Canadian Fisheries Act, 1970

South Africa

The Atmospheric Pollution Prevention Act 45 of 1965

The Constitution of the Republic of South Africa Act 108 of 1996

The Hazardous Substances Act 15 of 1973

The Marine Living Resources Act 18 of 1998

The Minerals Act 50 of 1991

The Mine Health and Safety Act 29 of 1996

The National Environmental Management Act 107 of 1998

Thailand

The Tobacco Act, 1996

United States of America

Marine Mammal Protection Act, 1972

North American Agreement on Environmental Cooperation, 1993

North American Free Trade Agreement, 1994

The Clean Air Act, 1970

The Clean Air Amendment Act, 1995

The Clean Water Act, 1977

The Constitution of the United States of America, 1787

The Endangered Species Act, 1973

The Federal Water Pollution Control Act, 1972

The Mining Law, 1872

The National Environmental Policy Act, 1970

The Pure Food Act, 1906

The Resource Conservation and Recovery Act, 1976

The Superfund Amendments and Reauthorization Act, 1986

The Surface Mining Control and Reclamation Act 30 of 1977

The Toxic Substance Control Act, 1976

United States Forest Resources Conservation and Shortage Act, 1990

INTERNET SOURCES

American Coal Foundation “Coal Mining in America: Federal and State Regulations”
<http://www.teachcoal.org/aboutcoal/articles/coalamer.html> (accessed 22 October 2005)

Anonymous “Amendment Protocol of 2000”
<http://www.tradescentre.org.zw/pdf/23%20Towards%20Implementation%20of%20the%20Trade%20Protocol.pdf> (accessed 05 June 2005)

Anonymous “Coal Mining”
http://www.info-en.com/index.php/coal_mining(accessed 28 February 2006)

Anonymous “Comparative Analysis”
http://www.uslegalforms.com/lawdigest/legaldefinitions.php/us/usCOMPARATIVE_LAW.htm (accessed 20 March 2005)

Anonymous “Conflict between Free Trade and Environmental Protection”
<http://www.law-bridge.net/english/e-environment.htm> (accessed 18 March 2005)

Anonymous "Declaration of Principles UNCED, Rio de Janeiro, 3-14 June 1992"
<http://www.oceanlaw.net/text/texts/uncedrio.htm> (accessed on 24 March 2005)

Anonymous "Kyoto Protocol"
http://www.simpsonrierson.com/Kyoto_Protocol.html (accessed 08 June 2005)

Anonymous "Opening Doors to the World Chapter Eight: Glossary of Terms"
http://www.dfait-maeci.gc.ca/tna-nac/2004/9_04-en.asp (accessed 08 June 2005)

Anonymous "The Evolution of Jurisprudence on GATT Article XX"
<http://www.law-bridge.net/english/e-environment.htm> (accessed 24 March 2005)

Anonymous "The Historical Approach to Research"
<http://www.ischool.utexas.edu/~palmquis/courses/historical.htm> (accessed 20 March 2005)

Anonymous "Trade-Import Restrictions"
<http://www.globalization101.org/issue/trade/12.asp> (accessed 05 May 2005)

Anonymous "(UNCTD) TAD/INF/PR/LDC02 18/06/02"
<http://www.unctad.org/Templates/webflyer.asp?docid=1634&lang=1> (accessed 20 February 2006)

Anonymous "Understanding the WTO"
http://www.wto.org/english/thewto_e/whatis_e/fact2_e.htm (accessed 01 June 2006)

Anonymous "United States Forest Resources Conservation and Shortage Act 1990: Quantitative Restrictions"
<http://www.meti.go.jp/english/report/downloadfiles/gCT0003e.pdf> (accessed 9 August 2005)

Anonymous "USGS Fact Sheet FS-157-96 Assessing the Coal Resources of the United States"
<http://energy.usgs.gov/factshetts/nca/nca.html> (accessed 13 October 2005)

D Brack and K Gray "Multilateral Environmental Agreements and the WTO", Report September 2003
<http://www.riia.org/pdf/research/sdp/MEAs%20and%20WTO.pdf> (accessed 10 April 2005)

J Campbell "Trade Topic: Sanitary and Phytosanitary (SPS) Measures"
<http://www.agr.gc.ca/itpd-dpci/english/topics/sps.htm> (accessed 03 May 2005)

P Costantini "What is wrong with the WTO?"
<http://www.speakeasy.org/~peterc/wtow/wto-dis.htm> (accessed 15 July 2005)

Consumer Unity and Trust Society Zambia “Summary of Presentations and Policy Recommendations of Regional Seminar WTO Doha Ministerial and the New Trade Round: An African Perspective”

http://www.sarpn.org.za/documents/d0000051/CUTS_Regional_Seminar.pdf
(accessed 10 August 2005)

Department of Environmental Affairs Botswana “Multilateral Environmental Agreements”

<http://www.envirobotswana.gov.bw/mul.html> (accessed 28 May 2005)

S Droge “National Climate Change” Discussion Paper October 2003

<http://www.diw.de.deutsch/produkte/publicationen/discussionspapiere/docs/papers/dp374.pdf> (accessed 25 May 2005)

P Ekins “Trade and Environment”

http://www.ecoeco.org/publica/encyc_entries/TradeEnv.doc (accessed 18 August 2005)

Energy Information Administration “Annual Coal Report 2003”

http://www.eia.doe.gov/cneaf/coal/page/acr/acr_sum.html (accessed 13 October 2005)

Energy Information Administration “Country Analysis Briefs: South Africa”

<http://www.eia.doe.gov/emeu/cabs/safrica.html> (accessed 02 October 2005)

Energy Information Administration “Country Briefs: United States of America”

<http://www.eia.doe.gov/emeu/cabs/usa.html> (accessed 05 October 2005)

Energy Information Administration “The Kyoto Protocol and its Status: EIA’s Analysis of the Kyoto Protocol”

<http://www.eia.doe.gov/oiaf/kyoto3/chapter1.html> (accessed 04 June 2005)

Energy Information Administration “What does the Kyoto Protocol Mean to US Energy Markets and the US Economy?”

<http://www.eia.doe.gov/oiaf/kyoto/kyotobrf.htm> (accessed 26 May 2005)

Environmental Literacy Council “Coal”

<http://www.enviroliteracy.org/article.php/18.html> (accessed 09 September 2005)

Environmental Literacy Council “United States Coal: An Overview”

http://www.eia.doe.gov/cneaf/coal/coal_ref_pdf/text.pdf (accessed 20 October 2005)

DC Esty “Greening World”

http://www.iie.com/publications/chapters_preview/66/4ii2350.pdf (accessed 05 April 2005)

DC Esty “Strengthening Global Environmental Governance: A Critical Counterpart to a Vibrant International Trading System”

<http://www.gets.org/pages/harmony/esty.doc> (accessed 05 August 2005)

S Fletcher and M Tiemann “Trade and Environment: GATT and NAFTA”
<http://www.ncseonline.org/nle/crsreports/economics/eco5.cfm?&CFID=698757&CFTOKEN=64529070> (accessed 05 September 2005)

A Freneau “WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective”
<http://www.lexana.org/memoires/pdf/200107AF.pdf> (accessed 01 July 2005)

GATT Secretariat “Industrial Pollution Control and International Trade”
<http://www.wto.org> (accessed 3 May 2005)

C Hamilton and J Duiggin “Economic Analysis of Greenhouse Policy”
http://www.tai.org.au/Publications_Files/DP15SUM.PDF (accessed 05 October 2005)

Institute of Research on Public Expenditure “Perverse Incentives: Subsidies and Sustainable Development”
<http://www.ecouncil.ac.cr/rio/focus/report/english/subsidies/chap2.htm> (accessed 16 May 2005)

The International Centre for Trade and Sustainable Development (ICTSD) “High-Level Roundtable on Trade and Environment”
<http://www.ictsd.org/biores/03-09-12/story1.htm> (accessed 06 February 2006)

International Centre for Trade and Sustainable Development “Trade and Environment Issues at Cancun”
<http://www.ucn.org/themes/pbia/themes/trade/training/Trade%20and%20Environment%20Issues%20at%20Cancun.pdf> (accessed 26 September 2005)

International Institute for Sustainable Development “WTO High Level Symposium on Trade and Environment”
http://www.wto.org/english/tratop_e/envir_e/sumhlevn.pdf (accessed 3 May 2005)

JP Kelly “The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Role of Developing Countries in WTO Governance”
<http://www.temple.edu/iilpp/images/PDFs/KellyPatrickShrimpSeaTurtle.pdf>
(accessed 24 February 2006)

ND Kitikiti “The Use of Trade Measures for Environmental Purposes: An African View”
<http://www.ictsd.org/dlogue/1999-02-10/KITIKITI.pdf> (accessed 01 October 2005)

L Lacovone “Analysis and Impact of Sanitary and Phytosanitary Measures”
<http://www.cid.harvard.edu/cidtrade/Papers/lacovone.pdf> (accessed 10 June 2005)

PJ Lloyd “Coal Mining and the Environment” Energy Research Institute, University of Cape Town
<http://www.eri.uct.ac.za/eri%20publications/IBA.environment.pdf> (accessed 01 October 2005)

M Matsushita “Dispute Settlement and Environmental Issues: Need for Amending Article XX of the GATT 1994”

<http://www.gets.org/pages/harmony/Matsushita.doc> (accessed 18 August 2005)

Mbendi Information for Africa “A Profile — South Africa Mining: Vanadium Mining”

<http://www.mbendi.co.za/indy/ming/vand/af/sa/p0005.htm> (accessed 02 November 2005)

McCloskey Group “Coal Case Study (2000)”

http://www.iied.org/mmsd_pdfs/066_mccloskey.pdf (accessed 13 October 2005)

CJ Napier “Constitutional Options: Economic Provisions”

<http://www.cic.nyu.edu/pdf/Economicissues.napier.pdf> (accessed 06 October 2005)

A Oxley “Environmental Protection and the WTO”

<http://www.ipn.lexi.net/images/uploaded/12-0> (accessed 05 May 2005)

A Oxley “The Environmental Threat to Development in the Doha Development Round”

<http://www.apec.org/au/docs/oxley2002.pdf> (accessed 25 March 2005)

M Roarty “The Kyoto Protocol — Issues and Developments through to Conference of the Parties (COP7)”

<http://www.apf.gov.au/library/intguide/sci/kyoto.htm> (accessed 08 June 2005)

S Shrybman “Special Committee on the Multilateral Agreement on Investment: Transcript of Proceedings October 1999”

http://www.legis.gov.bc.ca/cmt/36thparl/mai/hansard/t12_1001.htm (accessed 02 September 2005)

M Stilwell and R Tarasofsky “Towards Coherent Environmental and Economic Governance”

http://www.ciel.org/Publications/Coherent_EnvirEco_Governance.pdf (accessed 31 March 2006)

Subcommittee Country Profile: United States of America “Methane to Markets Partnership Coal Mine Methane”

http://www.methanetomarkets.org/docs/us_profile.pdf (accessed 10- October 2005)

Trade and Industry Policy Secretariat (TIPS) “Trade and Environment: A South African Country Study”

http://www.tradeknowledgenetwork.net/pdf/sacasefullrprt_e.pdf (accessed 01 October 2005)

Trade Lawyers Advisory Group “Update on the Hong Kong Ministerial Conference and Next Steps in the Doha Round January 2006”

<http://www.uscc.gov/researchpapers/2006/updatehomgkongministerialconference.htm> (accessed 11 February 2006)

D Vogel “The WTO, International Trade and Environmental Protection: European and American Perspectives”
<http://faculty.haas.berkeley.edu/vogel/greengiantfeb.pdf> (accessed 21 April 2005)

Wikipedia Encyclopedia “Aberfan Disaster”
<http://en.wikipedia.org/wiki/Aberfan> (accessed 13 October 2005)

Wikipedia Encyclopedia “Bhopal Disaster”
http://en.wikipedia.org/wiki/Bhopal_Disaster (accessed 18 August 2005)

Wikipedia Encyclopedia “Coal Mining”
http://en.wikipedia.org/wiki/Coal_mining (accessed 13 October 2005)

Wikipedia Encyclopedia “Position of the US: Framework Convention on the Emission Conference – UNFCCC”
http://en.wikipedia.org/wiki/Kyoto_Protocol#Position_of_the_European_Union
(accessed 06 October 2005)

VP Yu “World Trade Organisation and Multilateral Environmental Agreements”
<http://www.iucn.org/themes/pbia/themes/trade/training/Multilateral%20Env%20Agreements%20and%20WTOpdf> (accessed 25 May 2005)

ACRONYMS

ABARE	Australian Bureau of Agricultural and Resource Economics
ATBT	Agreement on Technical Barriers to Trade
CAAA	Clean Air Act Amendment
CBD	Convention on Biodiversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CDM	Clean Development Mechanism
CEC	Commission on Environmental Cooperation
CER	Certified Emission Reductions
CITES	Convention on International Trade and Endangered Species
CTE	Committee on Trade and Environment
DME	Department of Mineral and Energy
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
CSIRO	Commonwealth Scientific and Industrial Research Organisation
EC	European Community
EEC	European Economic Community
EFTA	European Free Trade Association
EMIT	Environmental Measures and International Trade
EMP	Environmental Management Programme
EPA	Environmental Protection Agency
ESA	Endangered Species Act
GATT	General Agreement on Tariffs and Trade

MFN	Most Favoured Nation
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NAMA	Non-Agriculture Market Access
NEPA	National Environmental Policy Act
NGO	Non-Governmental Organisation
NTB	Non-Tariff Barrier
OECD	Organisation for Co-operation and Development
SADC	South African Development Community
SMCRA	Surface Mining Control and Reclamation Act
SPSM	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TED	Turtle Excluder Device
TRIPS	Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNFCC	United Nations Framework Convention on Climate Change
USA	United States of America
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

1.1 THE PURPOSE OF STUDY

When GATT¹ rules were agreed upon, more than 50 years ago, interest in environmental protection hardly existed. Linking trade liberalisation and environmental protection in mutually supportive ways was therefore a challenge for the global community. The last three decades have however seen great initiatives to protect the environment, both at national and international level. The need to preserve the ecosystem and natural resources from degradation and depletion for the benefit of future generations has been the main cause for such positive action. This has, however, not been an easy road as achievement of this goal lies in pressurizing national governments and international organisations to adopt policies or measures to protect the environment. Trade-restrictive measures have to some extent had a negative impact on trade, both directly and indirectly, thereby coming into conflict with the views of free traders.

International trade is not a new concept in global history.² However, trade activities may in some instances create environmental degradation and such encroachment by trade on the environment has resulted in tension between the international trade community and environmental community. And for the last ten years environmentalists and the trade policy community have squared off over the environmental consequences of liberalized trade. On the one hand, free traders argue that the use of trade restrictions to enforce environmental standards constitute an obstacle to trade liberalization as these restrictions would lead to standards for protectionist and dominance goals. The environmentalists, on the other hand, maintain

¹ The General Agreement on Tariffs and Trade (1947 and 1994) hereinafter the GATT. GATT 1947 means the original GATT of 1947 along with all its amendments until 31 December 1994.

² Since time immemorial trade has been conducted throughout the world because of the obvious benefits, among others, competition, friendship, employment and economic benefits, widened consumer choices and improved quality of life. See generally, Samuel's theory of gains from trade and Adam Smith's theory of comparative advantage, discussed in detail in Irwin *Free Trade under Fire* (2002) 22.

that unrestricted trade leads to depletion of the environment and the ecosystem, thereby leading to self-destruction. They therefore insist on the use of trade measures to avoid that eventuality.³

Free trade ideology has in the past been, and still is, triumphant. It is only recently that environmentalists have stood their ground and challenged the dominance of free trade ideals in order to achieve international goals towards environmental protection. These challenges have since found favour within Multilateral Environmental Trade Agreements (MEAs).⁴ In the ensuing decade the GATT and its successor, the World Trade Organisation (WTO),⁵ have also taken up the task of identifying the ways environmental values could be protected within the ongoing process of trade liberalization.

The links between international trade and environmental issues are also associated with the differences between developed and developing worlds.⁶ Developing countries are concerned about loss of comparative advantage in certain industries due to more stringent domestic environmental regulations, while developed countries are worried that trade liberalization will promote liberalization in less environmentally-friendly industries, thus aggravating environmental damage.⁷ It will, however, be proposed in this thesis that the conflictual relationship runs much deeper than that because, as will be seen further in the thesis, the conflict between developed and developing states also emanates from disagreements over the implementation of environmental policies as well as from the existing economic disparities. The

³ Kidd *Environmental Law a South African Guide* (1997) 7.

⁴ Examples include: The principles adopted at the Earth Summit, Rio de Janeiro, in 1992, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1989 Basel Convention on the control of Transboundary Movements of Hazardous Waste and their Disposal, and the 1997 Kyoto Protocol.

⁵ As a result of the Uruguay Round the GATT Organisation became the WTO on 1 January 1995. The WTO provides a forum for implementing the multilateral trading system, negotiating new trade agreements and resolving trade disputes. The trade rules of the WTO are constantly re-negotiated and broadened to cover a number of issues that were not included or anticipated during the signing of the initial agreement.

⁶ The WTO Agreement does not contain definitions of developed and developing countries. A country must itself announce whether it is a developing country. Least-developed countries are designated by the United Nations (UN) according to specific criteria. At present there are 49 least-developed countries designated by the UN (Anonymous "(UNCTD) TAD/INF/PR/LDC02 18/06/02" <http://www.unctad.org/Templates/webflyer.asp?docid=2929&intItemID=1634&lang=1> (accessed 20 February 2006)).

⁷ Dean "Testing the Impact of Trade Liberalization on the Environment: Theory and Evidence" in Fredrisson (ed) *Trade, Global Policy and the Environment* (1999) 55.

disparities have resulted in dominance of some developed countries over others, especially developing ones, and this has built a mistrust that has consequently soured relations between developed and developing countries.

This research will confirm that the trade/environmental debate truly exists in the WTO. Accordingly, the main purpose of this thesis is to analyse the conflicting relationship that exists between trade and environmental standards, as depicted in the GATT/WTO jurisprudence, and its extent. Because Articles XX (b) and (g) create problems between states, an analysis of the Articles will be made against a backdrop of selected cases. It is also the objective of this study to determine how trade and environmental issues relate to the disparities between developed and developing countries and to establish the implications of such differences. Because both trade and environmental policies are useful tools for furthering human welfare,⁸ suggestions will be made on how to develop mechanisms aimed at reconciling these policies in the best way possible rather than establishing any absolute priority between them.

1.2 SCOPE OF STUDY

In order to reveal the problems faced in interpreting Articles XX (b) and (g) and in including trade-restrictive measures in environmental policies, reference will be made to a number of GATT/WTO cases. Three landmark cases will be analysed in detail. These cases were chosen because they cover the use of trade-restrictive measures in different aspects of the environment: the *Reformulated Gasoline* case⁹ deals with pollution of the air, the *Shrimp* case¹⁰ covers marine concerns and the *Asbestos* case¹¹ looks at human and plant health. Although the case-handling procedures of the GATT/WTO dispute settlement bodies are important, the study will not give a detailed description of the process. Instead it will focus on the causes of conflict between states due to the unilateral use by some countries of trade-restrictive

⁸ Geradin *Trade and the Environment: A Comparative Study of EC and US Law* (1997) 5.

⁹ *United States — Standards for Reformulated and Conventional Gasoline*, Panel Report and Appellate Body Report, 20 May 1996, adopted WT/DS2/R and WT/DS2/AB/R, hereinafter the *Reformulated Gasoline* case.

¹⁰ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body report and Panel report, 6 November 1998, adopted WT/DS58, hereinafter the *Shrimp* case.

¹¹ For example, in *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body report (2001), adopted WTO Doc WT/DS135/AB/R, hereinafter the *Asbestos* case.

measures. The thesis will deal with the outcome of each of the selected cases individually and point out the loopholes within the dispute settlement systems that have impacted on trade and environmental issues.

Sanitary and phytosanitary measures and market transformation measures¹² will be described in this study, mainly to show what trade measures are and also to clarify on how some of these trade measures restrict trade. Although several MEAs exist, three of these have been randomly selected to explain what MEAs include and also reveal how MEAs relate to trade and the environment, and to the WTO.

To ensure representivity, case studies of a developed country (United States of America) and a developing country (South Africa) in mining will be carried out. In keeping with the current classification of world economies, two regional groupings to which USA and South Africa belong, North American Free Trade Agreement (NAFTA) and Southern African Development Community (SADC) respectively, are also included in the case studies. The case studies will however not deal with all the provisions under the two regional agreements, but will refer to those provisions that are of relevance to the study: the environmental sections under NAFTA and SADC; the relationship of parties in an agreement concluded between a developed and developing country as in the case of NAFTA; and the perspectives and hindrances faced by developing countries who have created a free-trade area among themselves as represented by SADC.

Although it is not in the purpose of this study to provide solutions to the ongoing conflict between trade and environmental issues, the thesis will offer recommendations on possible solutions to such conflict.

1.3 SOURCES AND APPROACH

Material used in this thesis was obtained from relevant treaties, judicial decisions, textbooks, journals and internet articles. Treaties and conventions on trade and the environment, the GATT and WTO provisions, multilateral agreements and legislation

¹² The market transformation measures looked at are subsidies, quotas and tariffs.

of the two selected countries having a bearing on environmental matters were used. Relevant legislative materials that could not be accessed from libraries of South African universities were obtained from the internet. The use of the internet was also essential in keeping up to date with the recent literature on trade and environmental issues and for technical and statistical aspects of the research. Because most of the internet articles consulted were unnumbered, referenced internet articles in this thesis do not include page numbers.

It has been particularly difficult for countries of the world to agree on global environmental protection mechanisms and WTO/GATT cases will reveal the problems encountered in applying Article XX of the GATT. Although decisions upheld by GATT Panels do not create binding precedent, they are influential in resolving trade and environmental disputes. Accordingly, the importance of WTO/GATT landmark cases will not be ignored.

A critical analysis of the trade/environmental issues raised in the thesis will be undertaken, employing two research methods, namely, the historical¹³ and comparative¹⁴ methods. The importance of Article XX to this thesis cannot be overlooked. In order to get an in-depth understanding of the Article, the background of Articles XX (b) and (g) will be analysed and to reflect on the disparities between developed and developing countries that have led to disagreements over trade/environmental issues, case studies for comparison will be done.

¹³ Historical method is a procedure which is supplementary to observation in which the researcher seeks to test the authenticity of the reports or observations made by others. The method will be employed in those chapters where factual and historical foundations are discussed so as to give an expository historical and theoretical foundation to the topic. The historical method of research applies to all fields of study because it encompasses origins, growth, theories, personalities and crisis (Anonymous "The Historical Approach to Research"
<http://www.ischool.utexas.edu/~palmquis/courses/historical.htm> (accessed 20 March 2005)).

¹⁴ Comparative analysis is basically a comparison of legal systems so as to gain insights which would be denied to one who limits his study to the law of a single country. A comparison will be made on how the developed and developing worlds (looking at the USA and South Africa) view the issue on trade and the environment (Anonymous "Comparative Analysis"
http://www.uslegalforms.com/lawdigest/legal-definitions.php/us/usCOMPARATIVE_LAW.htm (accessed 20 March 2005)).

1.4 STRUCTURE OF THESIS

The thesis is divided into an introduction, four discursive chapters and a conclusion. From a perspective that focuses on trade rules, several questions are addressed:

- (a) Should the substance and/or interpretation of Articles XX (b) and (g) be modified in order to place environmentally-motivated national trade measures beyond legal challenge in the WTO?
- (b) Under what circumstances and with what constraints may trade restrictions be adopted to promote environmental objectives and whether the relationship between WTO and MEAs is irreconcilable?
- (c) What ideologies have resulted in the trade/environment conflict?
- (d) How do the disparities between developed and developing states affect fulfilment of the obligation on environmental conservation and at the same time maintain healthy trading relations?

Aspects of each of these questions are dealt with in the discursive chapters (Chapters 2-5). The discursive chapters will therefore address four broad issues which are central to the discussion on trade and the environment: Article XX, trade-restrictive measures under the WTO and MEAs, divergent views on trade and the environment, and the relationship between developed and developing countries over trade and environmental issues.

The first discursive chapter, Chapter 2, traces the history of the environmental debate in the GATT/WTO. Articles XX (b) and (g) are analysed in detail, covering the interpretation of the Articles and also addressing the question of extra-territoriality raised by the two Articles. Chapter 3 looks at the implementation of environmental policies at national and international levels and into the relationship between the WTO and MEAs. The two chapters that follow deal with the divergent views and attitudes on free trade and environmental policies. Each of these chapters focuses on a specific sector: Chapter 4 discusses arguments raised by free traders and environmentalists and accordingly provides an overview of the trade/environmental debate in the WTO; and Chapter 5 describes the relationship between developed and developing countries over trade and environmental issues, reflecting on the linkage

between the trade/environmental debate and the developed/developing countries conflict.

The final chapter of the thesis provides a summary of the conclusions reached in the preceding chapters. The chapter also contains recommendations on possible solutions that could be implemented and developed upon in order to resolve the trade/environment dispute within the international arena.

CHAPTER 2

ENVIRONMENTAL DEBATES, ARTICLE XX AND INTERNATIONAL TRADE

2.1 INTRODUCTION

Continuing global environmental damage poses a real threat to the survival of humankind. The economic advances made in most countries since World War II have produced an illusion of progress.¹ The consequence of neglecting the environment has been soil erosion, shrinking forests, deteriorating rangelands, expanding deserts, acid rain, stratospheric ozone depletion, the build up of green house gases, air pollution and the loss of biotic diversity, to mention a few. Such global environmental degradation has resulted in food scarcity especially in developing countries, which has forced the developing world to concentrate more on the alleviation of poverty rather than protecting the environment, which ironically, happens to be the main source of their economic wealth.

It is because of the negative effect on the environment that the call for proper earth stewardship, the avoidance of systemic damage and the protection of biological diversity should be taken into account in the articulation of global constitutional environmental rights. As the legal and institutional foundation of the multilateral trading system, the World Trade Organisation (WTO) determines how governments frame and implement domestic trade legislation and regulations. However, the rules of the General Agreement on Tariffs and Trade (GATT)² were agreed upon over fifty years ago, when interest in environmental protection was non-existent, and the question arises as to whether the GATT rules are clear and sufficient for environmental protection. GATT rules regarding the environment have proved problematic, as they do not make explicit reference to the “environment”. Despite the

¹ Illusory because national and international accounting systems did not take into account the depreciation of natural capital and environmental degradation caused by economic progress and mismanagement of resources.

² The GATT being the predecessor of WTO. As such WTO becomes the successor of GATT, and is thus founded on GATT principles and also embodies the results of the Uruguay Round (International Institute for Sustainable Development “WTO High-Level Symposium on Trade and Environment” http://www.wto.org/english/tratop_e/envir_e/sunhl1env.pdf (accessed 3 May 2005)).

shortcomings of the GATT, states have made efforts to address environmental issues and over the last three decades there has been a significant rise in campaigns³ as well as national and international initiatives⁴ for the protection of the environment.

For the last ten years, environmentalists and the trading community have debated the environmental consequences of liberalized trade. This debate was fuelled mainly by negotiations over the North American Free Trade Agreement (NAFTA) and the Uruguay Round of GATT negotiations, both of which occurred at a time when concerns over global warming, species extinction and industrial pollution were rising. The debate intensified with the creation of the WTO and proposals for future rounds of trade negotiations, as negotiators saw the WTO as a solution to their problems as well as a step forward towards the realisation of international trade goals, since the WTO closed loopholes created in previous trade agreements.

Environmentalists, on the other hand, were disturbed by the intrusion of trade agreements in purely domestic matters. This resulted in an attempt to initiate a new round of multilateral trade negotiations in Seattle, which in turn, became a flash point for growing unrest towards globalization and efforts at further trade liberalization. However, trade and the environment, as an issue, had already emerged decades before the riots in Seattle.⁵

This chapter will trace the history of the emerging environmental debate in GATT/WTO, as both the impact of environmental policies on trade and the impact of trade on the environment was recognised as early as 1970. Currently states rely on Article XX, particularly paragraphs (b) and (g), for implementing trade and environmental policies. The Article provides:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the

³ Examples would be the Battle of Seattle of 1999 and the WTO High Level Symposium on Trade and Environment held in Geneva in 1999.

⁴ The WTO/GATT principles, particular reference to Article XX, spearheading environmental activities.

⁵ The “Battle of Seattle” occurred in 1999, when environmental NGOs joined a number of other special interest groups, such as labour organizations, human rights activists, and anti-globalization groups, in massive protests in the streets of Seattle during the WTO ministerial meeting.

same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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

So far no WTO member has been successful in invoking and justifying Article XX for environmental reasons, raising the question whether the test imposed by the Article is too severe. In this chapter an analysis will be made on the application of Article XX, focusing on four main issues: the history or background of Article XX; the interpretation of Article XX; the standards established in Article XX to determine when a trade measure otherwise inconsistent with WTO rules maybe permissible; and the concept of extra-territoriality as dealt with in the GATT/WTO context.

2.2 HISTORICAL FOUNDATIONS OF THE ENVIRONMENTAL DEBATE IN GATT/WTO

2.2.1 Stockholm Conference

Growing international concern about the impact of economic growth on social development and the environment led to the call for an international conference on how to manage the human environment. The first and the best known, explicit articulation on such environmental right by the world community was made in 1972 at Stockholm.⁶ The conference was the culmination of a growing concern by nations about the impact of economic growth on social development and the environment. This was evidenced by the formal declaration⁷ made at the conference, which laid the foundation for international considerations on environmental protection within the trading system.

⁶ The United Nations Conference on the Human Environment in Stockholm is viewed as the starting point for the development of international environmental law as a separate field of international law. There were earlier articulations in 1948 and 1966, but these were confined to references to the right to an adequate standard of living. The link between trade and environment was first recognised in the early 1970s.

⁷ The declaration that “man has fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.

Preparations for the conference focused on the implications of environmental protection policies on international trade. The study taken by the Secretariat of the GATT⁸ reflected the concern of trade officials at the time: that environmental protection policies could become obstacles to trade as well as constitute a new form of protectionism, that is, *green protectionism*. This study evoked an urge to examine what the implications of environmental policies might be for international trade. As a result, in the discussions that occurred at the conference, a number of GATT members suggested that a mechanism be created in the GATT for enquiring the implications of environmental policies on international trade more thoroughly. The already existing Environment Committee⁹ on trade and environmental issues would cement such an idea.

During the same year, the GATT Council of Representatives agreed to set up a group on Environmental Measures and International Trade (EMIT).¹⁰ It was only in 1991 that European Free Trade Association (EFTA) member states¹¹ requested the GATT Director General to convene the EMIT group ahead of the upcoming 1992 United Nations Conference on Environment and Development (UNCED), since GATT had to make a contribution at that conference. The question, however remains, as to why, after twenty years of EMIT's inactivity, EFTA made such a request. Logically, the main reason why EMIT had to meet after such a long time was that international states were slow in adopting and accepting environmental issues — clearly reflecting on how slow environmental issues were being adopted and accepted within the international sphere. However, because of the new developments that occurred during 1971-1991,¹² environmental policies began to have an increasing impact on trade, and with increasing trade flows, the effects of trade on the environment also became more widespread as organisations and groups like EMIT could not continue to turn a blind

⁸ The Secretariat of the GATT prepared a study towards the preparation of the UN Stockholm Conference on the Human Environment: "Industrial Pollution Control and International Trade" <http://www.wto.org> (accessed 3 May 2005).

⁹ The Organisation for Co-operation and Development (OECD).

¹⁰ The EMIT group was established in November 1971. The group would convene only at the request of GATT members. EMIT met for the first time in 1991, because, until then, no one had asked for it to meet.

¹¹ At the time EFTA members were Austria, Finland, Iceland, Lichtenstein, Norway, Sweden and Switzerland.

¹² This period witnessed the adoption of Multilateral Environmental Agreements (MEAs), like the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) of 1973 and the Montreal Protocol of 1987.

eye on the environmental issues. EMIT's revival saw a number of discussions¹³ on trade/environment issues coming into play.

During the Tokyo Round of trade negotiations, participants took up the question of the degree to which environmental measures, in the form of technical regulations and standards, could form obstacles to trade. The 1979 Tokyo Round Agreement on Technical Barriers to Trade (ATBT) was negotiated. The Agreement called for transparency and non-discrimination in the preparation, adoption and application of technical regulations and standards. This would also apply to quotas, subsidies, taxes and, of course, policies implemented towards the application of Article XX of the GATT. The Uruguay Round also took up a role on trade-related environmental issues. Modifications were made to the ATBT Agreement and environmental issues were addressed in the 1995 General Agreement on Trade in Services, the Agreements on Agriculture,¹⁴ Sanitary and Phytosanitary Measures (SPS),¹⁵ Subsidies and Countervailing Measures,¹⁶ and Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁷

In 1982 the UN General Assembly adopted the World Charter on Nature. At the same time developing countries expressed concern that products prohibited in developed countries for environmental hazard, health or safety reasons, continued to be exported into their markets. Because of limited information on these products, informed decisions regarding their import could not be made. This served as an eye opener to countries of the world and, at the GATT ministerial meeting, members decided to examine measures needed to bring under control the export of products prohibited domestically.¹⁸ This resulted in the creation of a working group on the Export of Domestically Prohibited Goods and other Hazardous Substances in 1989.

¹³ Among these were the Tokyo Round of trade negotiations (1973-1979) and the Uruguay Round (1986-1994).

¹⁴ Act of 1994.

¹⁵ Act of 1993.

¹⁶ Act of 1994.

¹⁷ Act of 1994.

¹⁸ These were domestically prohibited on the grounds of harm to human, animal, plant life or health to the environment.

The Stockholm Conference in 1972 addressed the relationship between economic growth, social development and the environment, clearly reflecting on the importance of the environment on most spheres of life. In 1987 the World Commission on Environment and Development produced a report entitled *Our Common Future*,¹⁹ in which the term “sustainable development”²⁰ was coined. The report exposed and identified poverty as one of the most important causes of environmental degradation, hence exposing the reason why most developing countries have overlooked or totally ignored the need to concentrate more on the preservation of the environment. The report argued further that greater economic growth, fuelled in part by increased international trade, could generate the necessary resources to combat what had become known as the pollution of poverty. Such argument enhanced the need to interlink international trade which resulted in economic growth to the prevention of environmental degradation.

The dispute between Mexico and United States of America in 1991²¹ put the spotlight on the linkages between environmental protection policies and trade. The case concerned a USA embargo on tuna imported from Mexico, which was caught using *purse seine* nets that caused incidental killing of dolphins. The importation of yellowfin tuna harvested with *purse seine* nets in the Eastern Tropical Pacific Ocean (ETP) was prohibited under the Marine Mammal Protection Act (MMPA),²² unless the competent USA authorities established that:

- (a) The government of the harvesting country had a programme regulating takings of marine mammals that was comparable to that of the USA, and

¹⁹ The report is also known as the Brundtland Report.

²⁰ The term “sustainable development” means “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. The Commission on Environment and Development adopted this definition in 1987. Sands *Principles of International Environmental Law* 2 ed (2003) 198, quotes the same definition.

²¹ *United States — Restrictions on Imports of Tuna*, 3 September 1991, not adopted BISD 39S/155, hereinafter the *Tuna-Dolphin I* case.

²² The USA Marine Mammal Protection Act (MMPA) of 1972 required a general prohibition of “taking” (harassment, hunting, capture, killing or attempt thereof) and importation into the USA of marine mammals, except with explicit authorization. It governed, in particular, the taking of marine mammals, incidental to harvesting yellowfin tuna in the (ETP). Under the MMPA, the importation of commercial fish or products from fish caught with commercial fishing technology, which results in the incidental killing or incidental serious injury of ocean mammals in excess of USA standards, was prohibited.

- (b) The average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such takings by USA vessels.

Mexico appealed to GATT on the grounds that the embargo was inconsistent with the rules of international trade.²³ The Dispute Panel ruled in favour of Mexico on the grounds that the USA embargo was aimed at regulating the process of production (the mode of harvesting) and not the sale of the product (tuna fish). Under GATT rules the USA was obliged to treat Mexican tuna and tuna products, no less favourably than USA tuna, regardless of how the tuna was harvested.

The question of extra-territoriality²⁴ came under the spotlight in the *Tuna-Dolphin I* case and Article XX (b) was scrutinized for having failed to spell out clearly whether the resources being protected could fall outside the jurisdiction of the government adopting the environmental controls. The Dispute Panel found, on the basis of its drafting history, that Article XX (b) did not extend to measures protecting human, animal or plant life outside the jurisdiction of the country taking the measure. The Panel concluded that the drafters of Article XX intended it to apply only to the jurisdiction of the country taking action.

The Dispute Panel's report was not adopted by GATT members and this decision was heavily criticised by environment groups which felt that trade rules were an obstacle to environmental protection.²⁵ The case however served as a wake-up call for world states warning them that more work had to be done towards the implementation of environmental policies like the MMPA if confrontations of this nature were to be avoided.

²³ Mexico claimed that the import prohibition on yellowfin tuna and tuna products was inconsistent with Articles XI, XIII, and III of the GATT.

²⁴ The issue of extra-territoriality shall be discussed under 2.5.

²⁵ Anonymous "The Evolution of Jurisprudence on GATT Article XX" <http://www.law-bridge.net/english/e-environment.htm> (accessed 24 March 2005).

2.2.2 The United Nations Conference on Environment and Development – Rio “Earth Summit”

In June 1992, more than twenty years after the Stockholm Conference in 1972, the United Nations Conference on the Environment and Development (UNCED) was held in Rio de Janeiro, Brazil, attended by 178 countries and 1400 NGOs. The conference was otherwise known as the “Earth Summit”. The conference adopted a number of instruments, including a declaration of environmental principles known as the Rio Principles.²⁶ Treaties on global warming and biological diversity, a non-binding declaration on forest conservation principles and a document known as Agenda 21, which addressed many aspects of the environment and development, were also adopted.

The UNCED reaffirmed the declaration adopted at the UN conference on the Human Environment in Stockholm, and UNCED’s preamble further aspired to work,

“towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system, recognizing the integral and interdependent nature of the Earth, our home.”²⁷

The basic theme of the Rio Conference was sustainable development. Principle 8 provided that States had to work towards the reduction and elimination of unsustainable patterns of production and consumption.²⁸ At the same time states, in accordance with the UN charter and principles of international law, would maintain their sovereign right to exploit their own resources pursuant to their own developmental and environmental policies.²⁹ This right to development had to be fulfilled in a way that would equitably meet development and also the environmental

²⁶ Key principles that emerged from Rio were that sustainable development should form a conceptual and political link between environment and development, that the *precautionary principle* should be practised, and that common but differential responsibilities should underpin international efforts.

²⁷ Anonymous “Declaration of Principles UNCED, Rio de Janeiro, 3-14 June 1992” <http://www.oceanlaw.net/text/texts/uncedrio.htm> (accessed on 24 March 2005).

²⁸ For example logging in an area should be restricted to a cutting rate that would allow replacement trees to grow so that the number of trees in the area remained constant. Similarly, energy consumption should not exceed levels that would be sustainable on a permanent basis, considering all the effects of such consumption, such as global warming.

²⁹ Principle 2.

needs of present and future generations.³⁰ Therefore, in exploiting their resources, states would have to consider the present and the future and preserve the environment through implementation of environmental measures that guard against the complete and continuous depletion of the environment.

Of importance are two other principles: the *polluter pays principle*,³¹ which holds that those responsible for pollution should pay for its consequences and elimination, and the *precautionary principle*,³² which provides that where there are threats of serious irreversible damage the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. These two principles mark a high degree of progress by international states towards trade and environmental issues since they place responsibility on all states.

Lastly, Principle 26 provides for the dispute settlement mechanism and safeguards states against potential conflicts. In terms of the provision states should resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the UN.

In all, the UNCED managed to draw attention to the role of international trade in combating environmental degradation, and it yielded further concrete results when the Marrakesh Agreement was signed in 1994.

2.2.3 Trade and Environment in the WTO's Founding Charter — The Marrakesh Agreement, 1994

Towards the end of the Uruguay Round, attention was once again drawn to trade-related environmental issues, and the role of the soon-to-be-created WTO. As a result the WTO's founding charter³³ was founded on several obligations which include environmental protection, the conservation of scarce resources, and sustainable development.

³⁰ Principle 3.

³¹ Principle 16.

³² Principle 15.

³³ The Marrakesh Agreement establishing the WTO was signed in April 1994.

The WTO provisions include several references to the environment. Among these is the Preamble to the Marrakesh Agreement, which notes the importance of

“allowing for optional use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

Such recognition of sustainable development as an integral part of the multilateral trading system illustrates the importance WTO members placed on environmental protection. It seems that at this particular time member states had accepted environmental degradation as a problem towards any economic development. The WTO Appellate Body further stressed the importance of the Preamble in a later ruling and noted that the preambular language of the Marrakesh Agreement reflects the intentions of negotiators of the WTO Agreement and as such “we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement.”³⁴

The principal focus of the WTO’s work on trade and environment is also contained in the Uruguay Round Final Act,³⁵ which states:

“There should not be, no need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of sustainable development on the other.”

The decision on Trade and Environment³⁶ dismissed any prospects of recognizing discriminatory trading policies under the pretext of protecting the environment against any unfavourable activities. Having adopted the Decision on Trade and Environment, ministers called for the establishment of a Committee on Trade and Environment (CTE). The CTE work programme³⁷ would focus mainly on the identification of the

³⁴ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body report and Panel report, 6 November 1998, adopted WT/ DS58.

³⁵ Decision on Trade and Environment Signed in Marrakesh in April 1994.

³⁶ *Ibid.*

³⁷ The work programme of the CTE was established as follows: Item 1 MEAs and WTO rules; Item 2 Environmental Policies; Item 3 Taxes, technical regulations, labelling; Item 4 Transparency; Item 5 Dispute Settlement and MEAs; Item 6 Market Access; Item 7 Domestically Prohibited goods (DPGs); Item 8 Intellectual property (TRIPS); Item 9 Services; and Item 10 Arrangements with NGOs.

relationship between trade measures and environmental measures in order to promote sustainable development, and would make appropriate recommendations on whether any modifications to the provisions of the multilateral trading system were required and would be non-discriminatory in nature.³⁸

The progress made by international states towards environmental protection so far, raised various issues: how to implement environmental policies, how to deal with jurisdictional measures, and how to curb the use of discriminatory policies. These environmental issues could not be shelved for later, neither could they be ignored. And for the benefit of the present and future generations, the world had to put in place mechanisms aimed at protecting and preserving the ecosystem but at the same time enhancing trade activities.

2.3 GATT AND THE ENVIRONMENT

“Environmental protection was simply not a public issue in 1947” when Article XX was drafted “nor was this provision intended for that purpose.”³⁹ However with time, as traced earlier, environmental issues became prominent and they directly or indirectly affected trading systems among states. These developments saw the GATT 1994 and its successor, the WTO, take up the task of identifying ways in which environmental values could be protected within the ongoing process of trade liberalization.

WTO members believe that GATT/WTO rules already provide significant scope for members to adopt national environmental protection policies. GATT rules impose only one requirement in this respect: non-discrimination.⁴⁰ WTO members are free to adopt national environmental protection policies provided that they do not discriminate between imported and domestically-produced like products (the national

³⁸ CTE work programme which came into being with the WTO on 1 January 1995.

³⁹ Shrybman “International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade” (1990) 20 *The Ecologist* 30 at 33-34.

⁴⁰ Non-discrimination is one of the main principles on which the multilateral trading system is founded. It secures predictable access to markets, protects the economically weak from the more powerful, and guarantees consumer choice.

treatment clause),⁴¹ or between like products imported from different trading partners (the most favoured nation principle).⁴²

The GATT aims at liberalizing international trade, whereas environmental policies are enforced through instruments that are trade restrictive, such as product standards, licences, levies and subsidies. Seen in this light, environmental policies or standards are *prima facie* in conflict with the objectives of GATT. However, the GATT has always recognized that free international trade is not the only relevant policy goal for national governments. Accordingly, it included many exceptions that give equal or greater weight to other policy goals. For example, Article XIX permits trade restrictions for the purposes of safeguarding an injured domestic industry; and Article XX similarly exempts certain national measures from compliance with GATT provisions as long as they do not constitute arbitrary or unjustified discrimination between contracting parties.

Article XX seeks to balance trade liberalisation and environmental protection. Though Article XX exceptions are referred to as environmental provisions, controversy surrounds both their interpretation and implementation regarding environmental protection. The critical and debatable question revolves around the extent to which Article XX provisions allow for the introduction and maintenance of trade restrictions based on environmental policies. The debate arises from the lack of explicit reference to the environment in Article XX.⁴³ Some argue that both paragraphs (b) and (g) should be interpreted in a broad way to include measures aimed at protecting the environment.⁴⁴ The contrary view is that a generous interpretation of these paragraphs would open the gateway to protectionist policies and that environmental concerns would be used to restrict trade.⁴⁵

The jurisprudence of the GATT clearly indicates that Article XX is open to abuse. Technological advances coupled with complex scientific evidence tendered in cases

⁴¹ Article III of the GATT.

⁴² Article I of the GATT.

⁴³ Scholtz "The Relationship between the Environment and Trade in the WTO: Prolonging the Conflict between North and South?" (2005) 18 *Speculum Juris* 250 at 259.

⁴⁴ See in this regard GATT Secretariat: International Trade Geneva 1992, which reviews the interaction of trade and environment.

⁴⁵ *Osode Trade, GATT and the Environment* (unpublished notes, UFH, 2003) 78.

dealing with the environment sometimes make it difficult to determine the genuineness of impugned environmental measures. This problem received attention in the Uruguay Round and led to the promulgation of the ATBT. The ATBT expressly allows for the introduction and maintenance of technical regulations and standards which are aimed at protecting (a) human health and safety; (b) animal health or plant life; or (c) the environment. This specific inclusion of the environment in the ATBT is greatly supported by those who interpret Articles XX (b) and (g) broadly.

2.3.1 History of GATT Article XX

Plants and animals can recover quickly from over-exploitation and reproduce. Reproduction, however, may sometimes be slow, resulting in the plants and animals being more susceptible to extinction. Extinction may result from over-exploitation, habit destruction, and pollution. All these factors have an adverse effect on the environment and the survival of species. Wild life is also susceptible to mankind: they have been captured for food, their skins, feathers and trade, for scientific research even for medicinal, cultural, religious and artistic purposes. Such activities, if conducted in excess, tend to threaten the existence of individual species or habitats and even natural resources.

Because of adverse effects of over-exploitation of natural resources,⁴⁶ regulations to protect human, animal or plant life began as far back as the 15th century.⁴⁷ But it was not until over-exploitation of natural resources began to lead to extinction that serious interest was taken by states to develop legal obligations and principles for the protection and conservation of these resources on a sustainable basis.⁴⁸

Around the 1870s major commercial disputes⁴⁹ broke out over ecological protection.⁵⁰ From dealings of international environmental co-operation, governments have

⁴⁶ Natural resources include living and non-living resources. A difference however exists between migratory natural resources (living creatures) and static non-renewable resources (minerals).

⁴⁷ Birds, salmon and whales were amongst the first species to exercise such interest originally at national level. From 1597 onwards national control of the taking of these migratory species was recognised. See Birnie *International Regulation of Whaling* (1985) 102-104 for examples on whaling regulations.

⁴⁸ Birnie and Boyle *International Law and the Environment* (1992) 420.

⁴⁹ These disputes were over veterinary and quarantine disputes.

recognised how efficacious import and export measures could be in dealing with problems that flow beyond national borders. As a result of the ongoing conflicts, efforts towards environmental protection were made by international governments to resolve the disputes arising between member states. Included among the efforts made towards resolution of environmental protection disputes are: the implementation of environmental policies; the International Convention; and the International Trade Organisation.

2.3.1.1 Environmental Policies

In 1906 an international conference convened by Switzerland adopted a treaty to stop the production and importation of matches made with white phosphorus, a highly toxic chemical causing an occupational disease.⁵¹ This Convention proved effective in allowing manufacturers to switch to safer, but more expensive, methods of match production without fear of being undercut by less scrupulous competitors. The objection to phosphorus matches was not that the product itself was unsafe in its normal use, but that the production process constituted a health danger to domestic and foreign workers.

In 1921 Italy and the Kingdom of the Serbs, Croats and Slovenes (Yugoslavia) signed a Convention to prohibit trade in fish caught by methods having “an injurious effect upon the spawning and preservation” of fisheries. Among the proscribed methods were fishing with mechanically-propelled dragnets and the use of explosives “calculated to stun and stupefy fish”.⁵² This Convention was similar to that later adopted by United States in 1972⁵³ and its provisions were central issues in international conflicts which were to be presented before the GATT.⁵⁴

In order to preserve the natural fauna and flora of the world, states adopted a Convention relative to such preservation in 1933.⁵⁵ The Convention was particularly

⁵⁰ Charnovitz “Exploring the Environmental Exceptions in GATT Article XX” (1991) 25 *Journal of World Trade* 37 at 38.

⁵¹ Charnovitz 1991 *Journal of World Trade* 39.

⁵² Charnovitz 1991 *Journal of World Trade* 39-41.

⁵³ The Convention adopted by USA was the MMPA.

⁵⁴ *Tuna-Dolphin I* and *United States — Restrictions on Imports of Tuna*, 16 June 1994, not adopted DS29/R, hereinafter the *Tuna-Dolphin II* case.

⁵⁵ The Convention on the Preservation of Fauna and Flora in their Natural State.

aimed at the preservation of the African environment through the establishment of national parks and reserves, by regulating the hunting activities and the export of trophies. The Fauna and Flora Convention expanded upon the 1916 Treaty,⁵⁶ which was aimed at the protection of migratory birds. Article 9 of the Convention prohibited the import and export of trophies unless the exporter was given a certificate permitting the exportation of trophies. The Article further permitted parties to take measures to control and regulate the internal import and export of trophies acquired in a manner not in accord with national law.

Following the 1933 Convention countries of the Western Hemisphere in 1940 concluded the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. The Convention aimed at preserving all species and genera of native American fauna and flora from extinction, and to preserve areas of extraordinary beauty, striking geological formation or aesthetic, historic or scientific value.⁵⁷ This Agreement also acknowledged the protection of rare species through the regulation of trade,⁵⁸ thereby establishing a basis for Article XX which was later incorporated in the trade regulatory agreement, the GATT.

These and other relevant policies founded the formulation of Article XX, but as the need for greater international discipline on administrative protection became more apparent, the League of Nations decided to convene a multilateral conference to examine these and other import restrictions.

2.3.1.2 The International Convention

The International Convention for the Abolition of Import and Export Prohibitions and Restrictions⁵⁹ greatly influenced the drafting of Article XX and also highlighted on the difficulties of achieving a liberal trading system. The treaty called for the abolition

⁵⁶ The Treaty was concluded by Canada and the United States and it established specific seasons when useful or harmless migratory birds could be hunted and further prohibited the exports of birds during these seasons. The Treaty also banned "international traffic" in birds taken in violation of provincial or state law.

⁵⁷ Petersmann *International and European Trade and Environmental Law after the Uruguay Round* (1995) 155.

⁵⁸ Article 9 of the Nature Protection and Wildlife Preservation in the Western Hemisphere provides for the regulation of trade in protected species by the issuance of export permits.

⁵⁹ Act of 1927.

of all import and export restrictions, excluding tariffs,⁶⁰ within six months of its coming into force. Among the exceptions retained and adopted by the Convention was the exception that covered restrictions “for the protection of animals or plants against disease, insects and harmful parasites”. Debate revolved around this exception as well as sanitary measures. These discussions resulted in an addendum being added to the Treaty’s Protocol, which clarified that “the protection of animals and plants against disease also refers to measures taken to preserve them from degeneration and extinction”.⁶¹

Although the Convention permitted the traditional exceptions protecting animals and plants, it made them subject to the condition that they were not to be applied in a discriminatory manner between foreign countries where the same conditions prevail, or as a disguised restriction on international trade. These were the very words used in the Chapeau of Article XX, thus reflecting on the link that exists between the Article and the Convention.

To sum up, three principles from the 1927 Convention were important in the drafting of Article XX: first, the principle that action should be taken to protect public health, animals or plants; second, the principle setting up multilateral standards to access national law exemptions; and third, the principle dealing with the inclusion of sanitary, veterinary, phytopathological and nature preservation objectives under the same exemption.

In the years following the International Convention, trade measures were regularly employed in pursuit of environmental goals. A number of trade agreements, which included an exemption for animal or plant laws, came into being.⁶² Some of these trade agreements, negotiated between 1934 and 1946, used the “degeneration or

⁶⁰ Recourse to this exception was to occur only in extraordinary and abnormal circumstances. The Convention did not abolish eight types of restrictions. According to the Convention’s Economic Committee these eight exceptions were the “exceptions which have been admitted through long-established international practices that were believed to be indispensable and compatible with the principle of freedom of trade.” (Convention Document CE 1.22 (1927) 21).

⁶¹ Charnovitz 1991 *Journal of World Trade* 42.

⁶² An example is the 1933 London Convention for the Preservation of Fauna and Flora in their Natural State, which prohibited the importing, and exporting of specified animals, trophies or ivory horns from African territory without a certificate.

extinction” language,⁶³ and exempted restrictions “designed to protect human, animal or plant life or health” — thereby laying the foundation for the formulation of Article XX, as this was the very language adopted by the GATT.

2.3.1.3 *The International Trade Organisation*

Article 43 of the Draft Charter of the International Trade Organisation (ITO) also had a great influence on the drafting of Article XX. The Draft Charter was approved at the second session of the preparatory committee of the UN Conference on Trade and Employment.⁶⁴ Because the provisions of Article XX (b) and (g) are identical to the Geneva Draft (except for technical points),⁶⁵ one can gain insight into Article XX from the ITO deliberations regarding the same general exceptions.

The Preamble to Article XX discerned the first Draft Charter of the ITO which provided for the customary trade exceptions and permitted them unconditionally. The Geneva Draft modified the first Draft Charter of the ITO and included conditions to the exceptions which aimed to guard against indirect protection. Among the conditions adopted was an “arbitrary discrimination” proviso that no longer applied just to foreign countries, as it did in 1927. Impliedly, the proviso incorporated the principle of national treatment as well as non-discrimination — principles that are to be found in the Chapeau of Article XX.

Article XX (b), was founded on an ITO exception regarding measures “necessary to protect human, animal or plant life or health”.⁶⁶ By looking narrowly at the drafting process of Article XX (b) between 1946 and 1948, one could reach the conclusion that the intent was to cover only sanitary restrictions, as there was no explicit reference to an environmental purpose. But drawing such a conclusion from the ITO

⁶³ Canada — Mexico Trade Agreement of 1946 exempting restrictions imposed for protection against disease, degeneration and extinction.

⁶⁴ The first preparatory session produced the “London Draft” in November 1946. A special committee developed the “New York Draft” in February 1947. The second preparatory session approved the “Geneva Draft” in August 1947. The GATT was signed in October 1947. The UN Conference in Havana adopted the ITO Charter in March 1948.

⁶⁵ The technical differences are in the Preamble. Article 43 grants an exemption only to the Commercial Chapter of the ITO, whereas Article XX applies to the entire GATT. Article 43 refers to “member” countries, where Article XX refers to “contracting party”.

⁶⁶ USA Department of State Bulletin Volume XIII, No 337, Point III G 2 (1945) 924 in Charnovitz 1991 *Journal of World Trade* 44.

deliberations alone would neglect the historical background that clearly shaped Article XX (b).⁶⁷ This is so because comprehensive debates on the scope of this exception, had already taken place⁶⁸ and no state had indicated that the existing environmental treaties and laws should not be covered by the general exceptions. Moreover the USA, the author of the language used and ultimately adopted in the exception, clearly believed that Article XX (b) would countenance existing USA trade law, which included environmental as well as sanitary measures. Within these limits the language used in Article XX (b) can be justified to include environmental concerns. To conclude that Article XX (b) was aimed solely at sanitary restrictions, as pointed out by other critics,⁶⁹ would undermine the rationale behind the drafting process.

Provisions similar to Article XX (g) did not appear in any previous trade agreement and it similarly originated in the preparatory sessions.⁷⁰ The United States' Suggested Charter of 1946⁷¹ provided for an exception for measures which can closely be linked to Article XX (g). The provision read:

“...relating to the conservation of exhaustible natural resources if such measure are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption.”

This provision was adopted in the Geneva Draft, with the exclusion of the words “taken pursuant to international agreements”. Bearing in mind that this draft resulted in the GATT, it can be concluded that Article XX (g) is founded on the premises of the adopted provision included in the Suggested Charter. Throughout these discussions the natural resource intended to be conserved was typically described as a raw material or mineral. By definition, the term “exhaustible natural resources” meant resources like metals, not renewable or flow resources like animals, plants soil and water.⁷² To remedy this ambiguity, the Commodities Committee inserted a totally different exemption relating to the conservation of fisheries resources, migratory birds

⁶⁷ *Ibid.*

⁶⁸ Comprehensive debates had already taken place twenty years earlier leading to the ITO Charter which was equivalent to what the 1927 Convention and many bilateral treaties had.

⁶⁹ Shrybman 1990 *The Ecologist* 38.

⁷⁰ Charnovitz 1991 *Journal of World Trade* 45.

⁷¹ Suggested Charter for an International Trade Organisation, September 1946.

⁷² These renewable resources are exhaustible only when misused.

or wild animals into the draft.⁷³ The GATT authors went on to adopt the Geneva Draft, which establishes Article XX (g).

2.4 ARTICLE XX AND THE ENVIRONMENT

Article XX provides exceptions for certain kinds of trade restrictions. A country cannot invoke Article XX just because an imported product fails to meet an environmental standard, whether domestically or internationally. It can be invoked only if the manner of production or consumption of the traded good leads to a situation specifically covered by one of the listed exceptions. So, like any other “exception provision”, Article XX should be construed narrowly⁷⁴ and, secondly, the burden of proof, in case of invocation of the Article, lies with the party that invokes it.⁷⁵

Article XX, in principle, calls for minimum deviation from the general principles laid out in the GATT/WTO framework. Minimum deviation is firstly established by the Preamble of Article XX, which points out two characteristics that must be adhered to in invoking the Article, namely, that it should be applied in a manner which does not constitute “arbitrary or unjustifiable discrimination” or a “disguised restriction” of trade. The GATT, however, does not limit the choice of member states on measures to be used, and such measures can either be direct regulatory instruments, such as technical standards and norms economic instruments (subsidies, charges and tax measures) or trade instruments, such as import or export controls. Secondly, minimum deviation is established by the exceptions embodied in Article XX and WTO members cannot justify discriminatory measures on any grounds other than those laid down in the body of Article XX. Lastly, the necessity test established by Article XX also results in minimum deviation from the principles of the GATT.

⁷³ The United Nations Conference on Environment and Development: Document 2/C.5/9 in Kelly “The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the role of Developing Countries in WTO Governance” <http://www.temple.edu.iilpp/images/PDFs/KellyPatrickShrimpSeaTurtle.pdf> (accessed 24 February 2006).

⁷⁴ This is the generally accepted principle of interpretation, C J Botha, *Statutory Interpretation: An Introduction for Students* 4 ed (2005) 20.

⁷⁵ This principle was stated in *United States — Section 337 of the Tariff Act of 1930*, 16 January 1989, L/6439, hereinafter *Section 337*.

Though controversial issues surrounding the phrasing of Article XX have been raised, the language of Article XX, according to Petersmann,⁷⁶ if properly interpreted, would be adequate to meet the task of balancing free trade and environmental protection. Charnovitz⁷⁷ shares the same view and points out:

“There maybe a few issues that do not fit the Article framework — the preservation of scenic vistas, perhaps. But just about everything else relates squarely either to life or health of living organisms to the conservation of truly exhaustible resources like clean air, fossil fuels and stratospheric ozone.”

As such, the combination of GATT articles XX (b) and (g) provides an exception for a broad range of environmental measures. NAFTA Article 2101, which incorporates Article XX, states that the measures referred to in Article XX (b) include those necessary to protect human, animal or plant life or health; and that paragraph XX (g), relates to the conservation of living and non-living exhaustible natural resources. That provision serves to clarify the application of Article XX to environmental measures but at the same time, because of its language, it does not alter the Article’s meaning or scope.⁷⁸

2.4.1 Interpreting the Preamble of Article XX

The Preamble of Article XX has two components, namely, that which outlaws discrimination and that which prohibits disguised restriction. The former is essentially an obligation not to discriminate between identical situations. This interpretation has been confirmed by the recent GATT case law, which accepts that the conditions spelled out in the Preamble are fulfilled not only when identical, but also when similar, measures are used in isolation.⁷⁹ No measure so far has been found in breach of the condition.

⁷⁶ Petersmann *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 336.

⁷⁷ Charnovitz 1991 *Journal of World Trade* 55.

⁷⁸ Article XX (b) still applies to the protection of “human, animal or plant life or health” and Article XX (g) still applies to the conservation of “exhaustible natural resources”.

⁷⁹ In this regard see the *United States — Imports of Certain Automotive Spring Assemblies*, 26 May 1983, adopted BISD 30S/107, hereinafter *Automotive Spring Assemblies*.

However the situation is less clear when it comes to the prohibition of disguised restrictions on international trade since the decisions of the Panels which attempted to interpret the provision were never adopted.⁸⁰ Furthermore authors like Charnovitz⁸¹ are of the view that the “disguised restriction” condition was a check against attempts to mask protectionist pursuits in sanitary or environmental guise. In *Automotive Spring Assemblies*, the Panel found that there was no disguised restriction because the exclusion order had been published and was based on a valid patent whose infringement had been clearly established.⁸² The Panel concluded that publication and transparency of restrictive measures would suffice as exonerating factors against “disguised restriction”.

The interpretation given in the *Automotive Spring Assemblies* case implies that a protectionist measure might pass the “disguised restriction” test.⁸³ The fact that a measure will qualify as an undisguised restriction on the basis that it has been publicly announced becomes an area of concern, raising the question how the provision is to be interpreted in future, since determining when an environmental measure is really a protectionist measure has proved to be a difficult task. It is submitted that the interpretation of the provision should be left to the ruling Panel for each particular case, and that a more strictly-interpreted “disguised restriction” would be an important bulwark against the abuse of Article XX.

2.4.2 Interpreting Article XX (b)

The incorporation of Article XX (b) into the GATT proved to have been the solution to the preservation of the ecosystem with regard to international trade. Experience has however shown that the Article is controversial and problematic when it comes to its interpretation. The language used in Article XX (b) sets out requirements that should be established for member states to successfully invoke the Article, namely: necessity; availability of alternative measures; and least degree of inconsistency with other GATT provisions.

⁸⁰ *Ibid.*

⁸¹ Charnovitz 1991 *Journal of World Trade* 47.

⁸² Para 125.

⁸³ The Panel stated in paras 107-108 that the USA voiced disagreement with the interpretation that “a measure could not be considered to be a disguised restriction simply because it had been publicly announced”.

2.4.2.1 Necessary Restrictions on Trade

A *prima facie* case must be made, by any party relying on Article XX (b) that the policy or measure taken solely falls within the ambit of the Article.⁸⁴ Having established that a measure fits the exception, the party should then establish that the policy taken is “necessary” to achieve the policy goal.

The term “necessary” has been a guideline for the interpretation of Article XX (b). The Article came into the limelight in the 1990 *Thailand Cigarettes* case,⁸⁵ where the Panel established that the term “necessary” should be interpreted in a uniform manner despite it being referred to, in factually different situations. The Panel,

“could see no reason why under Article XX the meaning of the term “necessary” under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding policy goals to the extent that such inconsistencies were unavoidable”.⁸⁶

The USA, in the *Section 337* case, invoked Article XX (d) to defend its enforcement of patent laws. The Panel, in this case established that a measure is not justifiable as being necessary if an “alternative measure” which is not inconsistent with GATT provisions could have been reasonably used. The Panel therefore justifiably concluded in the *Thailand Cigarettes* case, regarding Article XX (b), that it had to be interpreted in the same manner as Article XX (d) had been done in the *Section 337* case.⁸⁷ The fact that paragraph XX (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph XX (b) applies to different inconsistencies, could not justify a differing interpretation of the term “necessary”.

⁸⁴ For example, in *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body report (2001), adopted WTO Doc WT/DS135/AB/R, the Panel found that the EC had made a *prima facie* case for the existence of a health risk in connection with the use of asbestos that was confirmed by the opinions of experts not rebutted by Canada. Thus the policy of prohibiting asbestos fell within the range of policies designed to protect human health.

⁸⁵ *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes* 7 November 1990, adopted BISD 37S/80, hereinafter *Thailand Cigarettes* case.

⁸⁶ The World Trade Organisation *GATT Analytical Index: Guide to GATT Law and Practice: Articles I-XXI* 6 ed (1995) 566.

⁸⁷ Para 74.

The test of necessity, in this regard, draws attention to whether an alternative measure that is consistent or less inconsistent with WTO obligations is reasonably available.

2.4.2.2 Availability of Alternative Measures

The necessity test requires a party to prove that no other alternative, non-trade-restrictive measures other than the one invoked were available to achieve the objective of the concerned party. However, in the absence of the measures, the least-trade-restrictive measure that is reasonably available should be chosen. Because of this requirement, Thailand could not succeed in enforcing Section 27 of its Tobacco Act of 1996, which prohibited the importation of cigarettes and other tobacco preparations, but at the same time authorized the sale of domestic cigarettes. The Panel ruled that since other measures “were reasonably available to Thailand to control the quality and quantity of cigarettes smoked”,⁸⁸ Thailand’s practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes, was not “necessary” within the context of Article XX (b).

The question that is most likely to be raised by any party in Thailand’s position is “what then are the alternative measures that could be used”? In this regard the Thailand cigarettes Panel went on to suggest alternative GATT-consistent measures which would have addressed Thailand’s concerns. With regard to the quality of cigarettes, the Panel held that a country could introduce “strict, non-discriminatory labelling and ingredient disclosure regulations” which it will, then control but at the same time it should inform the public consumer of the cigarettes’ content.⁸⁹ This will require a complete disclosure, which would be coupled with a ban on unhealthy substances. Such a measure implemented on a national treatment basis in accordance with Article III: 4 of GATT would qualify as being consistent with the General Agreement. Regarding the demand for cigarettes, a ban on advertising of both domestic and foreign cigarettes will obviously meet the requirements of Article III: 4.⁹⁰ The alternative measures suggested in the *Thailand Cigarettes* case are purely

⁸⁸ *Thailand Cigarettes* para 81.

⁸⁹ Para 75.

⁹⁰ Para 78.

guidelines established by GATT Panels which would help in the interpretation of the provision in question.

In *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef*,⁹¹ general guidelines were also set on how to determine whether a WTO-consistent alternative measure is reasonably available. Such determination was said to depend on the extent to which the alternative measure contributes to the realization of the end being pursued. Therefore the necessity of a measure will still remain important in characterising it as an alternative measure.

2.4.2.3 *Least Degree of Inconsistency with Other GATT Provisions*

Even if a measure is necessary, for a party to be able to invoke such a measure, it should be consistent with other GATT provisions. However, the problem arises in the event that those means available to GATT contracting parties and necessary to reach an objective stated in Article XX are all GATT-inconsistent. This issue was addressed by the *Section 337* Panel which held that in such a case a contracting party is bound to use those measures which are reasonably available to it, but at the same time which entail the least degree of inconsistency with other GATT provisions. Though a measure that entails a least degree of GATT inconsistency maybe a worthy objective, it is unclear from decided cases, on how such a condition could easily be read into the GATT.⁹² Worse still, the *Section 337* Panel laid down a rule, but failed to develop it further thereby creating a gap in the law.⁹³

This loophole poses the question, on how a contracting party can predictably determine the methods that entail a “least degree of inconsistency” with other GATT provisions. This standard has proved to be problematic and could lead to an internal deadlock in the adoption and enforcement of environmental measures.⁹⁴ Furthermore, in legal terms, an absolute distinction between consistency and inconsistency exists,

⁹¹ *Korea – Measures Affecting Import on Fresh, Chilled and Frozen Beef*, Appellate Body Report, (2002), adopted WTO Doc WT/DS161/AB/R, WT/DS169/AB/R, hereinafter *Frozen Beef* case.

⁹² See in this regard *Thailand Cigarettes* and also the two *Tuna-Dolphin* cases.

⁹³ The World Trade Organisation *GATT Analytical Index* 566.

⁹⁴ For example, Charnovitz 1991 *Journal of World Trade* 49 supports that, by using Article XX (b), bans on importing ivory could be challenged on the grounds that a more effective and more GATT consistent way to save the African elephants is to privatize them.

and this can be very difficult to qualify in principle. Further still, can a WTO member choose between a GATT-inconsistent and GATT-consistent measure? Obviously, GATT expectations would require that members be obliged to adopt the GATT-consistent measure. However this could still be problematic in circumstances where the GATT-consistent measure fails to achieve the desired level of the objective. For example, prohibiting the use of trade-restrictive measures (GATT-consistent) yet the use of the same trade-restrictions might be necessary in implementing an environmental policy. The *Section 337*⁹⁵ Panel addressed this very issue and pointed out that a party in such predicament could not be asked to change its policy or its desired level of enforcement of a law, if the law and level of enforcement are the same for imported and domestically-produced products. However, if a contracting party could “reasonably secure *that* level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so”.⁹⁶ This implies that GATT-consistent rather than GATT-inconsistent measures are used only to the extent that the desired level of attainment of the objective is possible through both measures. Therefore the test for GATT-consistency, in the context of Article XX will depend on the formulation of the objective, either as a general goal or as a precise level.⁹⁷

2.4.3 Interpreting Article XX (g)

Article XX (g) has played a central role in GATT/WTO cases involving environmental issues. Including Article XX (g) in the GATT ensured that the commitments under the GATT did not hinder the pursuit of policies aimed at the conservation of natural resources. Just like Article XX (b), this Article has been interpreted through the application of the least-trade-restrictive test. Interpreting Article XX (g) requires a close analysis of its elements. These are measures relating to conservation; exhaustible natural resources; and domestic production and consumption.

⁹⁵ Para 5.26.

⁹⁶ *Ibid.*

⁹⁷ Mattoo and Mavroids “Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT” in Petersmann (ed) *Trade Law and the GATT Dispute Settlement* 338.

2.4.3.1 Measures Relating to Conservation

Article XX (g) requires that a measure should “relate to conservation”. The guidelines for interpreting this provision were laid in the landmark case of *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*.⁹⁸ The GATT Panel examined regulations under the Canadian Fisheries Act of 1970 that prohibited the export of unprocessed herring and salmon from Canada. Having concluded that the export prohibitions did not fit under Article XI: 1 and were not justified by Article XI: 2, the Panel developed a “primarily aimed at” test in order to interpret the words “relating to” under GATT Article XX (g), since Canada insisted that its system of fishery management was justified under this Article.

The test required a measure to be “primarily aimed” at the conservation of exhaustible natural resources. This test characterised the purpose of a measure by comparing its effect on the environment to its effect on trade. If the measure is not an effective means of environmental protection, but a trade barrier, then the measure does not “relate to” environmental protection and consequently is treated as a simple trade barrier rather than an environmental measure. Such a test provides a constructive way of screening out those measures that have only a collateral relationship to conservation.

The “primarily aimed at” test was further developed to permit governments the freedom to employ a given conservation measure if that measure was adopted for conservation reasons only. This kind of analysis considers the conservation benefits of the measures as well as the alternative measures available that might achieve the same objective. The test implies that governments do not adopt conservation measures unless the benefits to conservation are worth the costs involved. This form of interpretation has however been met with criticism. Charnovitz criticised this as an “idealistic but dubious proposition” upon which to build a definition of “primarily aimed at”, thereby suggesting that the cost-benefit analysis should not be used to determine whether a given relation “relates to” environmental protection, because the

⁹⁸ *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, 22 March 1988, adopted BISD 35S/98, hereinafter *Herring and Salmon* case.

monetary value of environmental benefits cannot be accurately accessed.⁹⁹ The proposition for the cost-benefit analysis as a requirement for justifying a measure under Article XX (g) was subsequently rejected in the *Reformulated Gasoline* case.¹⁰⁰

The *Tuna-Dolphin I* and *Tuna-Dolphin II* rulings provided different forms of interpretation of Article XX (g). In the first *Tuna-Dolphin* case, Article XX (g) was interpreted as permitting only measures aimed at resource conservation within the jurisdiction of the enacting country.¹⁰¹ This means that a country could effectively control the production or consumption of a resource only to the extent that it falls under its jurisdiction. The second *Tuna-Dolphin* case, however, rejected such view arguing that a state can still regulate the conduct of “fishermen or vessels having its nationality with respect to fish located in the high seas”.¹⁰² Though these interpretations were never adopted, in the GATT, the two *Tuna-Dolphin* rulings remain relevant to future interpretations, in that they highlight the diverging opinions that exist under GATT when it comes to interpreting the provision.

GATT jurisprudence¹⁰³ has laid down that in interpreting Article XX (g) the relevant measures have to be related to conservation of exhaustible natural resources — meaning that the challenged measures must be “primarily aimed at” such conservation.¹⁰⁴ For a measure to qualify as primarily aimed, it is also necessary to consider whether or not there were other means less restrictive of trade that could equally serve the stated conservation purpose. Article XX (g), consequently requires parties to use the least-trade restrictive means of conserving natural resources in order to rely on the exception.¹⁰⁵

⁹⁹ Charnovitz 1991 *Journal of World Trade* 50-51.

¹⁰⁰ *United States — Standards for Reformulated and Conventional Gasoline*, Panel Report and Appellate Body Report, 20 May 1996, adopted WT/DS2/R and WT/DS2/AB/R.

¹⁰¹ Para 5.32.

¹⁰² Paras 5.20 and 5.33.

¹⁰³ See in this regard the landmark case for the provision “relating to the conservation” under Article XX: the *Herring and Salmon* case.

¹⁰⁴ *Osode Trade, GATT and the Environment* 78.

¹⁰⁵ *Herring and Salmon* para 4.6.

2.4.3.2 Exhaustible Natural Resources

The term natural resources cannot in principle be interpreted to mean or refer to a single item. In *Reformulated Gasoline* clean air was held to be an exhaustible natural resource.¹⁰⁶ The gasoline rule adopted by the USA permitted reformulated gasoline to be sold only to consumers in the most polluted areas of the country and conventional gasoline to be sold in the rest of the country. However, the complainants¹⁰⁷ claimed that the gasoline rule favoured domestic products and this disadvantaged their own exports. In interpreting “exhaustible natural resources”, the Panel considered that “a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX (g)”¹⁰⁸ and as such air indeed qualified within the parameters of the provision. The Appellate Body was of the same opinion and held that the baseline establishment rules contained in the gasoline rule fell within the terms of Article XX (g), but the measure was disqualified on the basis that it failed to meet the requirements of the Preamble of Article XX. This therefore means that Article XX (g) should be read in line with or in the context of the Preamble of the Article.

Sea turtles were also held in the *Shrimp* case to be an exhaustible natural resource¹⁰⁹ where the arguments that the term “natural resource” only referred to non-living natural resources were rejected. Section 609 of the USA Public Law prohibited the importation of shrimp harvested with technology that might adversely affect certain sea turtles. This was argued to be a discriminatory restriction on the importation of shrimp and shrimp products from countries that had not been certified,¹¹⁰ while like products from certified countries could be freely imported into the USA.¹¹¹ The Appellate Body found with regard to Article XX (g) that the sea turtles involved constituted “exhaustible natural resources” and that Section 609 was a measure “relating to” the conservation of an exhaustible natural resource, which however failed to meet the requirements of the Preamble of Article XX.¹¹²

¹⁰⁶ Para 6.21.

¹⁰⁷ The complainants were Venezuela and Brazil.

¹⁰⁸ *Reformulated Gasoline* para 6.37.

¹⁰⁹ *Shrimp*, Appellate Body report para 134.

¹¹⁰ The complainants were India, Malaysia, Pakistan and Thailand.

¹¹¹ *Shrimp*, Panel report para 2.7.

¹¹² *Shrimp*, Appellate Body report paras 134, 142 and 165.

The varying views regarding the term “natural resources” implies that in interpreting the provision, the generic term “natural resources” is not static in its content and therefore should be interpreted within the framework of the entire legal system prevailing at the time of interpretation.

2.4.3.3 *Domestic Production or Consumption*

Article XX (g) also requires that conservation measures be “made effective in conjunction with restrictions on production or consumption”. The Appellate Body in *Reformulated Gasoline* interpreted “made effective” as referring to a governmental measure being operative or in force or having come into effect.¹¹³ The phrase “in conjunction with” was taken to mean “together or jointly with”.¹¹⁴ The Appellate Body, in this regard pointed out that this very clause set a requirement of “even-handedness” in the imposition of conservational restrictions upon the production or consumption of exhaustible natural resources. The clause however does not set any textual basis requiring identical treatment of domestic and imported products. On this basis it becomes very difficult to identify any inconsistencies with Article III: 4 of the GATT in a case whereby identical treatment constitutes real not merely formal equality of treatment.¹¹⁵

Problems also arise from the interpretation given to Article XX (g) in the *Herring and Salmon* case. The Panel interpreted the Article as requiring trade measures to facilitate a domestic program. The first problem occurs when there is no domestic production or consumption within the state invoking Article XX (g), (for example, having a marine mammal protection law in a country that does no fishing). In such a case, it is obvious that the ban enforced will be very difficult to render the domestic program effective, since no fishing takes place at all. Other problems arise when the product being prohibited is not the same as the product being conserved, as was the case in the *Tuna-Dolphin* cases. In these cases tuna was the product being prohibited and dolphin the product being conserved. Ironically the dolphin, being protected, was not being consumed and the tuna, being prohibited, was not being conserved by the

¹¹³ Para 6.41.

¹¹⁴ *Ibid.*

¹¹⁵ *Reformulated Gasoline*, Appellate Body report, DSR (1996) 21.

environmental restriction in question. Though dolphins perfectly fit within the ambit of Article XX (g), interpreting the Article in this context remains problematic.

In the *Tuna-Dolphin I* case Article XX (g) was interpreted as allowing states to use trade-restricting measures only to protect the domestic environment, and that international environmental concern would remain an issue to be addressed by the states concerned.¹¹⁶ This means that states can impose standards on foreign products only when they enter their markets and provided that such standards apply equally to domestic products. Howse¹¹⁷ argues that any WTO member whose target regarding conservation concerns solely the policies of other countries without putting its own house in order, would have failed to meet the condition set by Article XX (g). Such interpretation has however been met with mixed feelings. Environmentalists, on the one hand, have rejected this interpretation on the basis that it is an undue restriction of the potential role of GATT in addressing global environmental concerns. On the other hand, the interpretation has been welcomed by the GATT Secretariat and international trade lawyers, who are of the opinion that restricting domestic environmental measures within states would guard against disguised interference in other states especially by developed nations.¹¹⁸

The interpretation accorded to Article XX (g) in the *Tuna-Dolphin I* case¹¹⁹ definitely raises jurisdictional issues in dealing with Article XX (g). GATT interpretations, with the exception of *Tuna-Dolphin I*, have not limited its scope to internal environmental issues, making it clear that Article XX (g) covers resources that occur outside a nation's territory. However, the degree of connection between the country enacting the measure and the resource in question remains unclear and must therefore be understood in light of the section's condition that unilateral trade measures be taken in conjunction with the restrictions on domestic resource production or consumption. By virtue of this condition, Article XX (g) already requires a link between environmental trade measures and domestic regulation dealing with the same conservation problem.

¹¹⁶ Para 5.26.

¹¹⁷ Howse "The Appellate Body Rulings in the Shrimp — Turtle Case: A New Legal Baseline for the Trade and Environment Debate" (2002) 27 *Columbia Journal of Environmental Law* 489 at 504.

¹¹⁸ Osode *Trade, GATT and the Environment* 83.

¹¹⁹ Para 5.26.

In this respect, measures aimed at the conservation of transnational or global resources would definitely fall into the range of subjects that fit the exception.

The GATT cases point to the difficulties encountered in interpreting this provision under Article XX (g) and warn that interpretation of this Article requires caution. However, the interpretation of the Article highlighted thus far will serve as an essential guide for future GATT Panels.

2.5 THE QUESTION OF EXTRA-TERRITORIALITY

The question of jurisdiction¹²⁰ is one which cannot be ignored when it comes to interpreting Articles XX (b) and XX (g). The jurisdictional ambit of measures taken by GATT contracting parties in order to protect the environment at some stage creates problems, which in turn complicates the interpretation of Article XX. Experience has shown that states tend to claim extra-territorial jurisdiction where they believe their legitimate interests are affected.¹²¹

The question of jurisdiction was discussed in the *Tuna-Dolphin* cases, and later re-surfaced in the *Shrimp* case. All three cases were concerned with measures expressly directed at extra-territorial activities, namely the killing of dolphins in the two *Tuna-Dolphin* cases, and the killing of turtles in the *Shrimp* case. The *Tuna-Dolphin* Panels rejected an extra-jurisdictional application of the trade measures used by the USA and the Appellate Body in the *Shrimp* case assumed that there should be a nexus between the migratory endangered species (turtles) and the state imposing the restrictive measure to determine whether a WTO member has jurisdiction to impose restrictions with respect to matters outside its territory.¹²² The arguments raised by the USA in each case differed on the degree of connection that existed between the USA and the animals being protected.

¹²⁰ The starting point in defining jurisdiction is domestic law. In principle, all domestic jurisdictions distinguish between territorial and *in personam* jurisdiction, and the sum of the two defines the precise ambit of domestic jurisdiction. The ambit of jurisdiction can however vary depending on the subject matter under regulation. International law can impose limitations to the ambit of domestic jurisdiction, either through treaty law, through recourse to general principles of law or through customary law. Petersmann *European Trade and Environmental Law* 421.

¹²¹ *Tuna-Dolphin I* para 2.6.

¹²² Appellate Body report para 119.

In the *Tuna-Dolphin* cases the USA did not argue that the dolphins being protected were within its territorial waters, but submitted that, “dolphins roamed the seas and were therefore common resources within the jurisdiction of no one contracting party”.¹²³ This submission by the USA resulted in the first *Tuna-Dolphin* Panel concluding that the USA had no jurisdiction to enact such measure. The Panel found on the basis of the drafting history that Articles XX (b) and XX (g) did not extend to measures protecting human, animal or plant life or health located outside the jurisdiction of the party imposing the measure. The Panel also considered that if the broad interpretation of Article XX (b) and XX (g) as suggested by the USA were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the GATT.¹²⁴

Although the Panel in the second *Tuna-Dolphin* case agreed that jurisdiction was the key issue, it expanded on the first Panel’s meaning of jurisdiction to permit extra-territorial measures, as long as these did not force other countries to change their policies within their own jurisdictions. Such coercion would mean that the measures could neither be “primarily aimed at” the conservation of an exhaustible natural resource under Article XX (g) nor “necessary” for the protection of animal life or health under Article XX (b).¹²⁵ On this basis, the *Tuna-Dolphin II* measures undertaken by the USA were seen to have coerced other countries into changing their policies as such the policies could not be covered by Articles XX (b) and (g).¹²⁶

The question of jurisdiction was once again addressed in the *Shrimp* case. In contrast to its argument in the *Tuna-Dolphin* cases, the USA now argued that the sea turtles were a “shared global resource” and also that “all species of sea turtles except the flatback (which was restricted to waters around Australia) regularly spent all or part of their lives in waters subject to USA jurisdiction in the Atlantic and Pacific Oceans and the Caribbean Sea”. The Appellate Body in the *Shrimp* case analysed the new

¹²³ Bartels “Article XX of GATT and the Problem of Extraterritorial Jurisdiction” (2002) 36 *Journal of World Trade* 2002 (36) 353 at 378.

¹²⁴ *Tuna-Dolphin I* para 5.27.

¹²⁵ *Tuna-Dolphin II* Para 5.20.

¹²⁶ Paras 5.27 and 5.39.

territorial element raised by the USA and stated that the sea turtles species was indeed at stake and was also common in waters over which the USA exercises jurisdiction.¹²⁷

The Appellate Body however decided to pass upon the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature and extend of that limitation.¹²⁸ But it took note that in the specific circumstances, for the purpose of Article XX (g), there is sufficient nexus between the migratory and endangered marine populations involved for the USA to have jurisdiction to protect the migratory turtles. The only concern raised by the Appellate Body was directed at the way in which the USA had exercised jurisdiction, which could not be justified under Article XX.¹²⁹

Although the Appellate Body had expressly refused to rule on the jurisdictional limits of Article XX, it permitted the regulation of an extra-territorial activity by non-nationals. In this regard it indicated that Article XX would allow a measure that can be justified under the rules of customary international law governing legislative jurisdiction.¹³⁰ This seems to be an acceptable interpretation on the question of extra-territoriality regarding Article XX, considering that the *Tuna-Dolphin* cases were never adopted in GATT jurisprudence.

It is clear from the cases that the GATT/WTO system has no jurisdictional provision. Mattoo and Mavroids point out those limitations to national jurisdictions are set in other bodies of international law and that the GATT/WTO framework assumes that its members will act in accordance with their international obligations regarding jurisdictional issues.¹³¹ Extra-territoriality, which was used in the second *Tuna-Dolphin* case, does not, in principle address the issue whether the exercise of national jurisdiction is legitimate or not.¹³² The case correctly stated that nothing prevents

¹²⁷ Para 133.

¹²⁸ The *Shrimp*, Appellate Body stated in para. 133 that: "we do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature or extent of the limitation".

¹²⁹ The USA measure required other countries to adopt essentially the same practices as the USA because the USA measures were applied in a rigid manner and any comparable policies would not suffice (paras 172-175).

¹³⁰ *Shrimp*, Appellate Body report para 166.

¹³¹ Mattoo and Mavroids "Trade, Environment and the WTO" 331.

¹³² *Ibid.*

states from exercising extra-territorial jurisdiction, an example being *in personam* jurisdiction. However, the crucial issue is whether the exercise of extra-territorial jurisdiction is legitimate. This can only be tested with reference to the applicable international law.¹³³

Therefore in addressing extra-territorial jurisdiction in the context of Article XX, international law becomes a necessary condition for the resolution of jurisdictional conflicts. In dealing with environmental issues, the relevant international law is embodied in MEAs. The status of these agreements thus becomes important under the GATT/WTO system.¹³⁴

2.6 CONCLUSION

As early as 1970 states became aware of the fact that trade activities impacted on the environment and came to realise the importance of putting into place measures that would protect the environment without affecting the prosperity in trade. At this point states engaged in international events and became party to agreements that would spearhead environmental activities.

The first of these marked events was the Stockholm Conference held in 1972. It was at this conference that states declared to maintain economic growth and at the same time protect the environment. During the same year EMIT was set up, but it was only after 20 years that EMIT's first meeting was convened. This reflected on how slowly environmental issues were taking shape within the international arena. However, with the revival of EMIT tremendous progress was witnessed. This progress subsequently saw the adoption of the World Charter on Nature that resulted in the creation of a working group that controlled the exportation of products prohibited domestically. UNCED maintained a similar focus to that reached at the Stockholm Conference by adopting the Rio Principles and the Agenda 21 document. In 1994 trade-related environmental issues were given further recognition in the Marrakesh Agreement

¹³³ *Ibid.*

¹³⁴ This importance and the relationship between trade provisions in MEAs and GATT/WTO rules is matter to be dealt with in Chapter 3.

which stressed the importance of protecting and preserving the environment in order to enhance economic development.

Central to the development of the environmental agenda was the only provision of the GATT that could be used for environmental purposes, Article XX. Although the GATT came into force at a time when environmental issues were not prominent among world states, Articles XX (b) and (g) later proved to be important exceptions, permitting states to use trade restrictions in protecting the environment, and seemed to be the answer to the ongoing conflict between environmentalists and free traders. However, by tracing the history of Article XX and the interpretations alluded to it, this chapter has revealed that such solution might remain ill-founded if the Article is interpreted and invoked for the wrong ends to disguise protectionist and selfish environmental policies.

The generally-accepted interpretation of Articles XX (b) and (g) is that, they must be construed narrowly and implemented in a non-discriminatory manner that is free from use of any disguised restrictions. Though interpretation is to depend on the merits of each case, the history behind Article XX establishes that in addition to the above requirements, restrictions under Article XX (b) must be necessary and at the same time ensure that no other measures were available to achieve the same objective intended by the invoking state. The restrictive measures must also maintain a least degree of inconsistency with other GATT provisions. Trade/environmental rules seek to balance trade and environmental policy goals by permitting environmental policy to be implemented in a manner that restricts trade. In order to achieve that balance, the rules must also restrict the use of trade-restrictive environmental policy instruments. GATT Article XX (b) therefore requires policy makers to choose the least trade-restrictive means available to achieve their environmental goals. These considerations do not require a nation to justify its substantive choice of environmental policy but rather the methods it chooses to implement that policy.

Article XX (g), on the other hand, would permit only those restrictions primarily aimed at the conservation of exhaustible natural resources. Conservation measures under Article XX (g) must also be used in conjunction with restrictions on production or consumption, meaning that conservation measures, as held in *Tuna-Dolphin 1*, must apply to domestic products regarding their method of production or

consumption. Foreign products would only be subjected to these measures the moment they enter the domestic market. This last requirement is controversial in that it raises jurisdictional issues over the implementation of trade-restrictive measures.

Because the rulings in the *Tuna-Dolphin* cases rejecting an extra-territorial application of restrictive measures were never adopted, jurisdictional matters under Articles XX (b) and (g) are influenced by the *Shrimp* judgment. The *Shrimp* ruling established that the regulation of an extra-territorial activity beyond national borders was permissible provided such activity was justified under the rules of customary international law governing legislative jurisdiction.

In theory, the elucidated interpretation of Article XX is ideal. Practically, however, as evidenced by the GATT cases discussed in this chapter,¹³⁵ interpreting the Article is much more difficult than the interpretation set down on paper. At the heart of the problem in determining whether measures are GATT-consistent is that the interpretation of Article XX that has been accepted thus far has not addressed the issues of feasibility and efficiency of measures. Worse still, a GATT/WTO Panel would not be able to judge the legitimacy of any constraints claimed by a state. If it were to do so, the decision may be regarded as an unjustified intrusion in the internal affairs of a sovereign country. If the legitimacy of these constraints is to be accepted, the GATT/WTO would not be in a position to give meaningful expression to the necessity test.

The other concern is the invasion of protectionist tendencies, that is, the unacceptable use of non-tariff barriers proclaimed under the banner of the environment. Articles XX (b) and (g) permit the use of trade-restrictive measures in exceptional circumstances, but judging the legitimacy of any such constraints on trade when claimed by a state is difficult and problematic. GATT Panels have in the past faced a difficult task in separating authentic trade-restrictions from disguised restrictions and also in identifying whether a measure being invoked by a state entailed the least degree of inconsistency required under Article XX (b). In the same context, Article XX (g) raised problems in the *Tuna-Dolphin* cases and *Shrimp* case in that the tuna

¹³⁵ See in this regard the *Tuna-Dolphin* cases, *Section 337* case and the *Herring and Salmon* case.

and shrimp being prohibited were not the same as the product being conserved. Although the measures employed by the USA were aimed at conserving natural resources, namely dolphins and turtles, and fitted within the ambit of Article XX (g), the dolphins and turtles were not being prohibited into the USA markets. Impliedly this means that the interpretation of the Article would encompass the method of production despite the fact that the product being preserved was not being consumed or prohibited. Furthermore, Article XX lacks explicit reference to the environment making it difficult to determine whether or not a restrictive measure qualifies as protecting the environment under the Article. These and other problems make it difficult to determine the legitimacy of trade-restrictive measures in environmental policies and this has continuously been a draw-back to international progress regarding the reconciliation of free trade ideals and environmental obligations.

The existing challenge created by the ongoing problems and conflicts that emanate from “dubious” environmental policies is to ensure the use of appropriate trade measures to enforce environmental standards and to curb the use of discriminatory environmental policies. Solutions must therefore be found to avoid environmental standards from being abused for protectionist ends. In implementing environmental policies states should among other things ensure that compliance with the restrictive is measure possible¹³⁶ and that the measure addresses the problem connected with the environment in the country enacting the measure.¹³⁷ A state should also consider whether market-based incentives, such as environmental labelling and non-discriminatory green taxes, would be as effective as trade restrictions to achieve the environmental goal.

¹³⁶ The measure must therefore be clear as to what constitutes compliance. This may be viewed as an aspect of transparency.

¹³⁷ This is so because a measure is unlikely to qualify as necessary if it addresses a problem that does not affect the importing country. Nor will it be necessary if it purports to address a domestic problem, but does nothing to restrict domestic activities that are a cause of the problem.

CHAPTER 3

THE USE OF TRADE MEASURES IN PROTECTING THE ENVIRONMENT

3.1 INTRODUCTION

From the onset, global trade liberalisation was the pre-eminent objective of the General Agreement on Tariffs and Trade (GATT). However, international trade also encompasses trade-restrictive measures — legal rules and principles designed to regulate trade across national borders. These rules include subjecting goods passing through a border to costs of entry, creating and regulating tariffs as well as the granting of subsidies by governments.

The first *Tuna-Dolphin* case¹ accepted the use of trade restrictions for the protection of the environment by establishing that trade restrictions should be used only for the purposes of enforcing domestic environmental standards. The ruling reflects that a distinction is to be drawn between environmental standards at national and international levels, meaning that environmental policies are implemented at both national and international level, but on different grounds.²

There has been growing support for the use of regulatory trade measures to protect the environment. The importance of the environment was emphasised in a declaration by Bill Clinton, on the need for trade sanctions to enforce environmental standards.³ The declaration was met with mixed feelings: on the one hand it was a comment designed to appeal to the domestic electorate and on the other it infuriated developing countries

¹ *United States — Restrictions on Imports of Tuna* 3 September 1991, not adopted BISD 39S/55.

² National standards are concerned with the standard of the product when entering domestic markets. International standards require the producer to comply with the environmental standards in their production process irrespective of their country of export meaning that international standards have global application across all producers.

³ The declaration was made during the Presidential campaign in 1999 (Johnson “From Trade Liberalisation to Sustainable Development: The Challenges of Integrated Global Governance” in Kirton and Maclaren (eds) *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges* (2002) 27).

because trade sanctions would impact negatively on their economies.⁴ Developing countries further felt that such declaration would serve as a bureaucratic process that would entrap them to serve interests of developing countries at the expense of their own affairs. Since then there has been considerable confusion and disagreement on the methodology of environmental protection at international level, the most contentious issue being the use of trade measures (restrictions or sanctions) to enforce international environmental standards.

More commonly, national environmental regulations may require imported goods and commodities to comply with local standards, for example, standards of labelling, packaging or manufacture. Trade restrictions of this kind raise problems, as they are potential sources of conflict with rules governing free trade established by the GATT and those within free trade areas such as the European Economic Community (EEC). But a policy of unrestricted free trade in all commodities will inevitably conflict in certain areas with environmental protection requirements, particularly where the policies do not enjoy the support of both the importing and exporting countries. The use of trade restrictions adopted on environmental grounds have therefore been accepted in the World Trade Organization (WTO) provided the national trade restrictions are carefully defined and designed not to encounter any difficulties with the GATT.

Trade measures are also used to implement and enforce International Multilateral Environmental Agreements (MEAs). However, if countries want to improve the environment through international action, they need to commit themselves into applying international environmental measures in national law.⁵ This is so because fusing multilateral trade laws to enforce non-trade purposes diminishes their capacity to serve trade ends and to benefit the common good of protecting the environment.⁶

⁴ *Ibid.*

⁵ The accelerating rate of environmental degradation has prompted countries to recognize the importance of the environment explicitly in more recent international trade agreements, for example, the 1993 European Economic Area (EEA) and North American Free Trade Agreement (NAFTA): Petersmann *International and European Trade and Environmental Law after the Uruguay Round* (1995) 7.

⁶ Oxley "Environmental Protection and the WTO" <http://www.ipn.lexi.net/images/uploaded/12-0> (accessed 05 May 2005).

Article XX of the GATT clearly accepts the use of trade measures, provided the restrictions remain in the ambit of the Article. GATT's principle of "sovereignty over national goals"⁷ implies the freedom of each member country to decide on its own environmental taxes, production, marketing, product, consumer, labelling and other internal regulations subject to the "national treatment" requirement.⁸ In this regard GATT law imposes few constraints on a country's freedom to protect its domestic environment through non-discriminatory trade measures.

This chapter will give insight into how environmental policies are implemented at national and international levels. In so doing, problems encountered in the use of trade restrictions as environmental protective measures at domestic and international level will be highlighted.

3.2 TRADE MEASURES COMMONLY USED TO ENFORCE ENVIRONMENTAL STANDARDS

Trade restrictions include taxes, tariffs, capital constraints, multiple currents rates dependent on the type of transaction, quotas and other impediments or requirements to execute an exchange of goods, services or financial transactions. Trade barriers are not only restricted to these measures but also include non-tariff measures that can restrict trade and these include import quotas, restrictive licensing systems, export and domestic production subsidies. Technical Barriers to Trade (TBTs) are divergent measures that countries use to regulate markets, protect their consumers and preserve natural resources, but they can also discriminate against imports in favour of domestic products. TBTs with the greatest impact on trade and the environment include sanitary and phytosanitary (SPS) measures and market transformation measures, namely, subsidies, tariffs, and quotas. Focus will therefore be placed on these four measures that are commonly used by states to enforce environmental standards.

⁷ The GATT principle of "national sovereignty" gives each contracting party freedom to have non-discriminatory internal taxes and regulations (Article III), production subsidies (Articles III: 8, XVI: 1), state trading enterprises (Article XVII), customs duties provided they do not exceed agreed tariff bindings (Article II), and even other trade restrictions if they are "necessary" to achieve certain specified public policy purposes (e.g. Articles XVIII-XXI). Petersmann *European Trade and Environmental Law* 17.

⁸ Article III of the GATT.

3.2.1 Sanitary and Phytosanitary Measures

Sanitary and phytosanitary measures have been defined by the SPS Agreement under Annex A: 1, as any measure, procedure, requirement or regulation taken by governments to protect human, animal or plant life or health from the risks arising from the spread of pests, diseases, disease-causing organisms or from additives, toxins or contaminants found in food, beverages or feedstuffs.⁹ According to Lacovone,¹⁰ sanitary measures are those related to human or animal health, and phytosanitary measures deal with plant health. The definition provided in the SPS Agreement structures the measures into four categories, those:

- (a) protecting human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food;
- (b) protecting human health and life from plant or animal-carried diseases;
- (c) protecting animal or plant life from the introduction of pests, diseases or disease-causing organisms; and
- (d) protecting a country from damage caused by entry, establishment or spread of pests.

The measures in place before the adoption of the SPS Agreement were vague and gave room for countries to protect their domestic producers from international competition. In most cases states would establish import restrictions which would be justified by the state's assertion that the measure existed for "health reasons" even if it did not and was more of a protectionist measure. To remedy these past weaknesses the SPS Agreement encompasses two major objectives: to protect and improve the current human health animal health and phytosanitary situation of all member countries; and to protect the

⁹ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures 1993 (SPS Agreement) was established during the Uruguay Round. The Uruguay Round (Article 5) established a framework of rules and disciplines for the establishment and application of measures to protect human, animal and plant life or health from risks associated with pests and diseases, and to protect human health from food additives, toxins, contaminants and disease-causing organisms in food.

¹⁰ Lacovone "Analysis and Impact of Sanitary and Phytosanitary Measures"
<http://www.cid.harvard.edu/cidtrade/Papers/lacovone.pdf> (accessed 10 June 2005).

member countries from arbitrary or unjustifiable discrimination due to different sanitary and phytosanitary standards.¹¹

To guard against disguised restrictions, the SPS Agreement requires WTO members to apply the measure transparently and only when necessary,¹² and also that the measure used should be based on scientific principles and a country cannot maintain an SPS measure without scientific evidence.¹³ Furthermore, the measures must be based on a risk assessment, meaning that the nature and magnitude of the perceived risk must be clearly established by a state so that the SPS measure is in line with the risk. The Agreement also contains procedures for managing risk to limit unnecessary restrictions on international trade.

To ensure the proper running of SPS measures the WTO established an SPS Committee. The main function of this committee is to oversee the implementation of the SPS Agreement. The Committee is also responsible for reviewing notifications, discussing specific trade problems and considering technical assistance and co-operation initiatives for developing countries.¹⁴ This Committee serves as a forum for consultation between countries on specific SPS measures. To strengthen the position of the Committee, Article 3 of the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures requires measures to follow international standards unless otherwise stipulated.¹⁵

¹¹ Article 2 and the Preamble of the SPS Agreement.

¹² Article 7 and Annex B.

¹³ Article 5.1 SPS Agreement.

¹⁴ Campbell "Trade Topics — Sanitary and Phytosanitary (SPS) Measures" <http://www.agr.gc.ca/itpd-dpci/english/topics/sps.htm> (accessed 03 May 2005).

¹⁵ Article 3 provides as follows: "In order to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement."

3.2.2 Market Transformation Measures

3.2.2.1 Subsidies¹⁶

Subsidies generally comprise of all measures that keep prices for consumers below the market level or keep prices for producers above the market level or that reduce costs for consumers and producers by giving direct or indirect support.¹⁷

Subsidies focus on government programmes or interventions in the production of goods designed to promote and preserve important socio-economic objectives.¹⁸ In this regard, subsidies are deemed to exist whenever there is a financial contribution by government or a scheme or practice implemented by the government of a country with the sole aim of advantaging the domestic producer. Subsidies generate a distortion of international trade because they create a difference between the actual costs incurred in producing a good and those which must be borne by the company undertaking production.¹⁹ By creating such a disparity subsidies tend to protect inefficient producers in both export and import markets. Apart from this distortion of trade, subsidies are difficult to regulate mainly because it is very difficult to distinguish between “legitimate” government programmes and trade-distorting subsidies. The difficulty in distinguishing legitimate government policies from trade-distorting subsidies is likely to open opportunities for protectionism, thereby painting subsidies as undesirable trade measures.²⁰

Subsidies are divided into two types namely, domestic²¹ and export²² subsidies. The rules governing subsidies are found in the GATT,²³ the Uruguay Round Agreement on

¹⁶ The 1994 Uruguay Round Agreement on Agriculture (Annex 2), as well as the Uruguay Round Agreement on Subsidies and Countervailing Measures (Article 8), makes it clear that GATT contracting parties may also use environmental subsidies.

¹⁷ Institute of Research on Public Expenditure “Perverse Incentives: Subsidies and Sustainable Development” <http://www.ecouncil.ac.cr/rio/focus/report/english/subsidies/chap2.htm> (accessed 16 May 2005).

¹⁸ Socio-economic objectives include full employment, poverty alleviation, increase in foreign exchange earnings and tax revenues, industrial and environmental development. Osode *Subsidies and Countervailing Duties* (unpublished notes, UFH, 2003) 62.

¹⁹ This is an economic theory upon which GATT regulatory framework is founded.

²⁰ Osode *Subsidies and Countervailing Duties* 63.

²¹ Domestic subsidy is granted to an industry or local producers for production of a product regardless of whether the product is being exported. A domestic subsidy has the effect of reducing the price of the domestic product.

Subsidies and the Uruguay Round on Agriculture. The Committee on Subsidies and Countervailing Measures established under Article 24 of the Subsidies Agreement regulates the imposition of subsidies and countervailing duties. Each subsidising country must notify the Committee of an implanted subsidy or one which the country intends taking. The Committee is responsible for giving advisory opinion to the member approaching it as to the nature of any subsidy the member is proposing or maintaining.

Due to the controversial nature of subsidies,²⁴ the European Community (EC) Treaty²⁵ further categorised subsidies as environmental subsidies by including a section that gives the EC express powers in the environmental field. Article 92 of the EC Treaty provides guidelines for member states as to what types and levels of aid maybe acceptable. Although the provision is only applicable to EC member states, the Article also provides guidelines to the international community in the use of subsidies as environmental policy measures. In terms of the treaty, subsidies may be used in the environmental field for investment,²⁶ information activities, training and advisory services; operating costs or to cover the extra production costs of renewable energies, and purchase or use of environmentally-friendly products.

Subsidies granted for information activities would be permissible under the Article for the provision of training and consultancy to help firms on environmental matters. Although the Article excludes aid for publicity campaigns aimed at environmental awareness and increasing knowledge on specific information on the conservation of the environment, these are avenues where subsidies will benefit states, if properly monitored. The same is true for subsidies implemented to encourage consumers to purchase environmentally friendly products. These subsidies, like any other subsidy, may be

²² Export subsidy is paid to an industry only on products that are being exported. Export subsidies tend to reduce the price of goods sold abroad compared to those sold in the domestic market.

²³ Article VI allows for the use of countervailing duties, Article XVI contains the general obligations on subsidies and Article XXIII prohibits the introduction of a new domestic subsidy on a product which is bound in country's GATT schedule.

²⁴ Environmental subsidies may distort competition, create trade barriers, and jeopardize the single market and gives advantage over competitors who are not receiving state aid even though they are subject to the same environmental constraints.

²⁵ Articles 130 (r), (s) and (t).

²⁶ Aid for investment should be necessary to meet environmental objectives intended to reduce or eliminate pollution and nuisances to the environment. Examples of this type of subsidy include aid to help firms adapt new mandatory standards or to help improve on the already existing environmental standards.

permitted only if they do not discriminate against the origin of the product, do not exceed 100% of the extra-environmental costs and do not conflict with other MEAs.

Countervailing Duties

Countervailing duties are additional charges, permissible under the Subsidies Agreement²⁷ and are imposed by the importing country when the subsidised imports have caused material injury to the domestic industry in the importing country.²⁸ Article VI of the GATT allows a country which is at the receiving end of imported goods that are subsidised to impose countervailing duties. This regulatory mechanism under the GATT ensures that subsidies are not abused by governments as protectionist strategies and as unfair discriminatory measures between foreign goods. To guard against abuse international trade rules set requirements that a country must follow in imposing countervailing duties. The following requirements must be adhered to:

- (a) Material injury — for a country to impose countervailing measures the subsidy in question must have caused material injury or is capable of causing material injury to an existing industry.
- (b) Non-discrimination in the application of countervailing duties — as per GATT expectations countervailing duties should not be applied in a discriminatory manner. They are to be applied to all products that have received the disputed subsidy irrespective of their origin.
- (c) Amount and duration of countervailing duties — the countervailing duty may not exceed the amount of the subsidy granted in respect of the imported goods. The duration of imposing countervailing duties is for a period not more than five years or not exceeding the time period required to undo the damage suffered by the domestic industry as a result of the imported subsidised goods. The five-year limitation can be extended if a

²⁷ Article 10 permits “members in accordance with the provisions of Article VI of the GATT and terms of this Agreement to impose countervailing duties”.

²⁸ Anonymous “Opening Doors to the World Chapter Eight — Glossary of Terms” http://www.dfait-maeci.gc.ca/tna-nac/2004/9_04-en.asp (accessed 08 June 2005).

country is able to establish that the withdrawal of the duty should lead to a recurrence of the subsidy-related injury.

- (d) Procedural aspects — a thorough and fair investigation must be conducted before the imposition of a countervailing duty. The investigation should reveal that the imports in question indeed enjoy a subsidy and such subsidy has caused the alleged injury to the domestic industry. In principle this investigation must be concluded within a year.
- (e) Provisional measures — during the investigation period and before the introduction of countervailing duties, provisional measures usually mandatory deposits or bank guarantees may be imposed by the country of import. A reasonable assumption that a subsidy has been granted and is causing injury to the local industry must however exist before provisional measures are resorted to. In the event that a countervailing duty is finally imposed but is higher than the deposited or guaranteed amount, the country of import cannot lay claim to the difference, if on the other hand the countervailing duty is lower the country of import must pay back the excess amount charged.

All disputes relating to subsidies and countervailing duties must be submitted to the Dispute Settlement Body (DSB). The provisions of Articles XXII and XXIII of the GATT, as elaborated and applied by the DSB, shall apply to consultations and the settlement of disputes, except when the Subsidies Agreement stipulates otherwise.²⁹

3.2.2.2 *Tariffs*³⁰

Tariffs are permissible trade restrictions that adhere to GATT principles of non-discrimination.³¹ A tariff is a tax³² that is imposed upon imported goods upon their entry

²⁹ Article 30 Subsidies Agreement.

³⁰ Environmental tariffs are permitted provided they are non-discriminatory (Article 1) and do not exceed voluntary tariff bindings (Article II).

³¹ Article III.

³² Internal taxation in terms of GATT Articles III and II: 2 (a) imply unlimited freedom over the use of internal, non-discriminatory instruments of environmental policy, e.g. environmental taxes, product standards or labelling requirements.

into a country or a tax that is imposed at the border (port of entry) on imported goods.³³ There are generally three types of tariffs, namely *ad valorem*, specific and mixed tariffs. *Ad valorem* tariffs are charges computed as a percentage of the value of the imports.³⁴ A specific tariff is a flat or fixed charge for each unit of imported goods, such as R4 per barrel of oil. A mixed tariff combines an *ad valorem* tariff and a specific tariff, such as R4 per barrel plus 20% of value.

While many GATT provisions are designed to prevent the use of non-tariff barriers for protectionist reasons, tariffs are still preferred.³⁵ This preference is given because tariffs are more visible than other trade restrictions and are easier to negotiate. Tariffs are also advantageous in that they do not require licensing to administer, nor do they require government funds (differentiating them from subsidies).

Tariffs are most often calculated as a percentage of the value of a given imported product. In order for these calculations to be fairly and consistently calculated a country is expected under the GATT to invent a detailed schedule of goods that indicates the tariff for each product. This national schedule will set the actual rate applied by that country for each product, thereby promoting transparency. The national schedule, however, works in conjunction with the GATT tariff schedule which specifies the maximum tariff that can be applied for each product listed. This therefore means a country will charge any tariff it pleases for those products not on the GATT schedule, but will only charge tariffs below the GATT maximum for those products listed on the GATT schedule. If a WTO member charges any tariff exceeding the GATT maximum, it will have violated its GATT obligations and may be brought before a dispute settlement Panel, unless a GATT exception applies.³⁶

³³ Anonymous "Trade – Import Restrictions" <http://www.globalization101.org/issue/trade/12.asp> (accessed 05 May 2005).

³⁴ For example, if imported clothing valued at R100 is subject to a 20% *ad valorem* tariff, R20 will be due on importation.

³⁵ The GATT does not prohibit the imposition of tariffs (customs duties) as it merely states "duties which are only applied to imported goods must be in the form of customs duties and not in the form of discriminatory internal taxes (Article III), or excessive/exorbitant import fees; (Article VIII).

³⁶ Exceptions are applicable under Article VI, in respect of anti-dumping and countervailing duties and Article XIX, the Escape Clause.

The effect of most tariffs is that they restrict or discourage imports by making imported goods relatively more expensive than domestic goods. The amount of a tariff is a cost of business to the importer that must be recovered when the good is sold in the importing country. Since locally-produced goods are not subjected to tariffs, a domestic producer may often charge a higher price for its goods than it could in the absence of the tariff.³⁷ In this regard tariffs become protectionist, as they tend to protect the domestic industry from foreign competition. And for this reason precautionary measures must be taken by states when implementing tariffs in MEAs.

3.2.2.3 Quotas³⁸

Quotas or quantitative restrictions specify the maximum quantity of a particular good that a country will allow to be imported in a specified time period. A quota can take two forms, it can either be global or a country quota. By being global, a quota imposes a limit on the amount of a particular good that can be imported from all sources that is all states from which that product is being imported — simply it applies across the board. A country quota, on the contrary, specifies limits on volumes or quantities that can be imported from specific countries.

Although the GATT does not prohibit the imposition of quantitative restrictions, quotas unlike tariffs, face the risk of government corruption in the licensing or allocation process. Furthermore, quotas have a tendency to conceal from the public the degree and cost of the protection being afforded to domestic producers. It is for this reason that Article XI (1) of the GATT eliminates quantitative restrictions. However, several exceptions to this sweeping prohibition save quotas from being totally eliminated.³⁹ Article XI (2), allows the use of import restrictions necessary to apply marketing standards as well as to implement government agricultural programmes,⁴⁰ which may include the conservation of natural resources. Other GATT exceptions such as the Escape Clause⁴¹ and the general exceptions under Articles XX and XXI apply to Article XI.

³⁷ *Osode Tariffs, Quotas and Non-Tariff Barriers* (unpublished notes, UFH, 2003) 32.

³⁸ Articles XII and XVIII (B) allow the use of import restrictions including quotas, in order to safeguard a country's external financial position.

³⁹ *Ibid.*

⁴⁰ Articles XI (2) (b) and (c).

⁴¹ Article XIX.

3.3 APPLICATION OF TRADE MEASURES UNDER THE GATT

When the WTO was established its main focus was on trade liberalization. Trade liberalization basically refers to trade which is free from any trade restrictions that is, eliminating all quotas, taxes, subsidies, SPS measures. Running concurrently with free trade is the need to expand on international trade and at the same time raise living standards within member states. The WTO also seeks to promote harmonization among its members and ensure fair trade. However, free trade can in a way have a negative impact on living standards as well as on the environment and is likely to result in conflicts between states. This is so because, in elevating free trade, the quality of products might be compromised. Furthermore, the rate at which natural resources are consumed will be higher as resources are freely accessible and this will likely result in extinction and over-exploitation of resources. With resources in short supply, trade deteriorates, leading to conflicts over the remaining trade resources.

In order to regulate trade, preserve resources and allow uniformity, the WTO has made permissible the use of trade restrictions, subject to various obligations.⁴² The general obligations set out under GATT that apply to trade products are the Most Favoured Nation (MFN) principle and the National Treatment obligation.

3.3.1 The Most Favoured Nation Principle

A fundamental obligation under GATT is the MFN principle.⁴³ In terms of the principle,

“Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁴⁴

The term “like product” included in the GATT and WTO rules was never clearly defined, but the Working Party on Border Tax Adjustments⁴⁵ set out a criterion that includes four

⁴² Articles III and I provide for non-discrimination policies under the GATT.

⁴³ Article I of the GATT.

⁴⁴ *Ibid.*

⁴⁵ BISD — Basic Instruments and Selected Documents (GATT/WTO).

factors for determining the likeness of products. The four factors are: the properties, nature and quality of the products; the end-uses of the products; consumers' tastes and habits; and the tariff classification of the products.⁴⁶ The *Asbestos* case advanced the Working Party's criterion by pronouncing that the evidence on each of the four criteria should be examined and then weighed together with any other evidence in order to determine whether a product could be regarded as "like".⁴⁷

The effect of the MFN principle is that it ensures that all contracting states will be accorded MFN treatment flowing from any existing or future bilateral or multilateral trade agreements,⁴⁸ even if other WTO states are not parties to the agreement prescribing such treatment. This means that all member countries are on an equal footing and share the benefits of any moves towards lower trade barriers. Because of this quality, the MFN principle ensures that developing countries and others with little economic leverage are able to benefit freely from the best trading conditions whenever and wherever they are negotiated.⁴⁹ In this regard, by committing themselves to the MFN principle, the richest and most powerful countries are mobilising their power behind the interest and aspiration of the poor and small countries, which are to be treated equally. This, according to Shaw and Schwartz,⁵⁰ represents the only way to realise the ideal of sovereign equality of nations and at the same time guarantees all states equal access to international markets.

The GATT, however, allows the MFN provision to be overridden in certain circumstances.⁵¹ The Enabling Clause of the GATT allows the maintenance of tariff preferences by developed countries.⁵² Article XXIV on the other hand allows for the creation of Regional Trade Groupings.⁵³ These Regional Trade Arrangements seek the

⁴⁶ *Ibid.*

⁴⁷ *European Communities — Measures Affecting Asbestos and Asbestos-Containing Product*, Appellate Body report (2001), adopted WTO Doc WT/DS135/AB/R.

⁴⁸ This also includes Multilateral Environmental Agreements (MEAs).

⁴⁹ Anonymous "Understanding the WTO" http://www.wto.org/english/thewto_e/whatis_e/fact2_e.htm (accessed 01 June 2006).

⁵⁰ Shaw and Schwartz "Trade and Environment in the WTO: State of Play" (2002) 36 *Journal of World Trade* 129 at 150.

⁵¹ Such circumstances include regional free-trade agreements or preferential treatment for developing countries (GATT Article XXIV).

⁵² Developed countries have conferred the maintenance of preference upon developing countries in order to facilitate access to developed national markets.

⁵³ These include EU (customs union), NAFTA (free trade area), SACU (customs union) and SADC (aiming at a free trade area).

elimination of barriers on the associated countries' trade as long as the arrangement does not harm the trade of non-members. Article VI allows imposition of countervailing and anti-dumping duties on subsidised exports or imports which injure the domestic market. Deviation from the MFN principle is also permissible for national security reasons.⁵⁴

3.3.2 The National Treatment Obligation

Article III of GATT provides for the National Treatment obligation which imposes conditions for non-discrimination between goods that are domestically produced and those that are imported. The National Treatment standard demands that goods, services or commercial interests of other contracting states be treated in the same way as those belonging to nationals. This accords with the prohibition of discrimination on grounds of nationality. Consequently, any measure that applies unequally to like imported and domestic products violates the National Treatment obligation.

National treatment in the environmental context was an issue in a case involving the USA Superfund Act.⁵⁵ The Superfund Act imposed a tax on imported oil which was 3.5 cents per barrel higher than the rate for domestically-produced petroleum products. Although the USA admitted that the tax applied on imported products was higher than that applied to domestic products, it argued that the resulting discrimination had insignificant commercial effects and that it was for a good cause: to finance pollution control measures and the cleanup of hazardous waste sites.

The Panel in the *USA Taxes on Petroleum and Certain Imported Substances* case found the tax to be inconsistent with the prohibition of tax discrimination under GATT Article III. In reaching this decision the Panel examined the tax on petroleum in the light of USA obligations under GATT. The petroleum tax, being an excise tax levied on imported and domestic goods, was therefore subject to the national treatment requirement of Article III (2), first sentence.⁵⁶ The imported and domestic products subject to the tax on

⁵⁴ Article XXI of the GATT.

⁵⁵ The Superfund Amendments and Reauthorization Act of 1986 was an issue in *United States — Taxes on Petroleum and Certain Imported Substances*, Panel report 17 June 1987, adopted BISD 34S/136-166 hereinafter the *USA Taxes on Petroleum and Certain Imported Substances* case.

⁵⁶ The first sentence of Article III (2) provides that "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to

petroleum were, in the Panel's view, "like products" within the meaning of Article III (2) and the first sentence of the Article applied whether or not the products concerned were subject to a tariff concession and whether or not adverse effects occurred. For these reasons the tax on petroleum was inconsistent with the Article. As for the tax on certain imported chemicals, the Panel concluded that the imported and like domestic substances bore the same burdens, and the tax was therefore within the ambit of Article III (2).

It is thus evident from the ruling that GATT's National Treatment policies are applicable to all taxes regardless of the policy purpose of the tax. Therefore, whether the imposition of an internal tax on imported products meets the National Treatment requirement of Article III depends on whether like products are taxed directly or indirectly on the same or higher rate. By permitting the use of trade measures, the GATT paved way for restricting trade, but at the same time it was cautious in subjecting the restrictive measures to conditions that will ensure fairness in trade. Environmental policies inclusive of trade measures are not exceptions to the conditions set out under GATT. Therefore the use of the above-mentioned trade measures to protect the environment must not violate the non-discriminatory provisions under GATT, otherwise the environmental policies risk becoming undesirable grounds of conflict between states.

3.4 PROTECTING THE ENVIRONMENT AT DOMESTIC LEVEL

"Charity begins at home" is a common English proverb that may be translated in environmental contexts to mean that the global fight to protect the environment from harmful trade activities can be won if environmental-protective measures are implemented at domestic level. For this reason the GATT scheme, although allowing limited freedom to determine domestic environmental policies, recognizes that contracting parties retain control over policies regarding health, safety and pollution, as well as natural resources within their jurisdiction.⁵⁷ The basis of this attribution is also founded on the *Tuna-Dolphin* case, where the court conceded that GATT permits extensive regulation of trade for environmental purposes:

internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like products."

⁵⁷ GATT Articles XX (b) and (g).

“The provisions of the General Agreement impose few constraints on a contracting party’s implementation of domestic environmental policies. A contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers.”⁵⁸

From this ruling it is evident that several different methods may be used to apply domestic environmental policies to imports and exports.

Firstly, the environment may be protected at national level through the use of import prohibitions or restrictions. GATT Article XX (b) permits the use of such restrictive measures to enforce domestic policies concerning “human health, safety and animal and plant conservation”. However, the use of import restrictions, as already seen, should not violate other GATT provisions. Such restrictions must be non-discriminatory,⁵⁹ “necessary” in the sense that other methods are not available or practicable,⁶⁰ and their use must be confined to the jurisdiction of the country enacting the measure.⁶¹ Accordingly, a state may make use of various environmental and health regulations on imports which may include, auto emission standards, food and drug regulations, toxic and hazardous substances regulations and pesticide residue limits. The use of such measures requires caution because most trade restrictions are bound to be controversial, as was evidenced in the *Hormone Beef* case,⁶² where the USA retaliated against EC’s restrictive measures on imported beef by unilaterally imposing tariff increases on agricultural imports from the community — a move that could have been avoided through a GATT dispute settlement Panel.

⁵⁸ *Tuna-Dolphin I* para 6.2.

⁵⁹ GATT Articles I and III.

⁶⁰ Article XX (b) GATT and the *Tuna-Dolphin I* case, where the Panel upheld that “the USA measures could not be considered necessary even if Article XX (b) were construed as having extra jurisdictional effect since other options were reasonably available such as the negotiation of inter-cooperative agreements.”

⁶¹ *Tuna-Dolphin I* para 5.2, where the Panel after examining the history, purposes and consequences of Article XX (b) found that it focuses on the life or health of human beings, plants and animals within the jurisdiction of the importing country. Article XX (b) did not cover measures intended to protect the animal or plant life or health of those species outside the country’s jurisdiction.

⁶² *United States — EC Hormone Beef Controversy and the Standards Code*, Appellate Body report (1985), adopted WT/DS26/AB/R, hereinafter *Hormone Beef* case, where the use of trade restrictions was controversial. In 1985 the EC prohibited the use in livestock farming of certain substances containing hormones, as well as the importation of meat from animals to which hormonal substances had been administered. The USA protested this action on the ground that the import restrictions and production process requirements could not be scientifically justified. The EC rejoined that the GATT consistency of such regulations did not depend on their scientific necessity.

Article XX (g) similarly permits the use of trade restrictions to conserve exhaustible natural resources. Permissible restrictions under the Article must be non-discriminatory,⁶³ “primarily aimed” at the conservation of the resource, enforced in conjunction with restrictions on domestic production and consumption, and aimed at conserving resources within the jurisdiction of the country enacting the measure.⁶⁴ Pursuant to this provision, a state is justified in, for example, banning or restricting the exportation of natural resources, and even endangered species, within its jurisdiction.

A state may also make use of conservational trade restrictions by prohibiting exports in instances where there are domestic shortages. This kind of restrictive measure may be “temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the contracting party”.⁶⁵ The ruling in the *Herring and Salmon* case held that the use of trade restrictions must be accompanied by corresponding domestic restrictions on production or consumption.⁶⁶ The ruling found support in the USA case concerning the Forest Resources Conservation and Shortage Relief Act, where the court cited that “it is doubtful that timber is really in short supply in the USA, especially since the export restrictions were not accompanied by any corresponding domestic restrictions on production or consumption”.⁶⁷

3.4.1 Problems and Possible Solutions when Protecting the Environment at Domestic Level

Despite the fact that the use of trade measures at domestic level is subject to non-discriminatory measures and that their application is considered to be within the power of sovereign states, these trade measures raise two kinds of concerns.⁶⁸ First, although most environmental health and safety standards are justifiable and necessary, some carry

⁶³ GATT Articles I and III.

⁶⁴ *Tuna-Dolphin I* Para 5.32.

⁶⁵ GATT Article XI (2) (a).

⁶⁶ *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon* 22 March 1988, adopted BISD 35S/98. The case construed Article XI (2) (a) to mandate domestic conservation requirements as a complement to controls on the exports of commodities in short supply.

⁶⁷ Anonymous “United States Forest Resources Conservation and Shortage Act 1990: Quantitative Restrictions” <http://www.meti.go.jp/english/report/downloadfiles/gCT0003e.pdf> (accessed 19 August 2005). See also in this regard *United States — Measures Affecting the Export of Softwood Lumber from Canada* 1 November 2002, adopted BISD 40S/358.

⁶⁸ Schoenbaum “Free Trade and Protection of the Environment: Ireconcilable Conflict?” (1992) 86 *The American Journal of International Law* 700 at 715.

ulterior motives like protecting the environment from foreign competition, thus raising the question whether the trade restrictive measure is a lawful restriction or disguised protectionism. Secondly, the fact that different countries have different policies, standards and regulations is a barrier to international trade.⁶⁹ This in itself is an issue of concern: whether the proliferation of national differences on environmental protection should be allowed, or whether the international community should adopt international standards to harmonize different national standards.

To address the first question, it is evident that Article XX restricts environmental exceptions to regulations fulfilling environmental purposes. For this reason it cannot be disputed that GATT guards against protectionism and excludes disguised restrictions by clearly distinguishing those restrictions protecting the environment from restrictions having other purposes.⁷⁰ In this regard one can safely conclude that disguised protectionism is unlawful and therefore not permissible under GATT. But how does one distinguish between genuine environmentally-protective trade restrictions and disguised trade barriers? The Court of Justice of the EC laid down three factors that could be used to identify disguised restrictive measures in the *Danish Bottles* case.⁷¹ The Court held that the criteria required states to determine whether the aim of the measure falls within the scope of the exemption, whether the measure has been applied on a non-discriminatory basis and whether the measure satisfied the principle of proportionality, which requires that the protective measure be necessary to accomplish its purpose.

The Court of Justice emphasised that the principle of proportionality is a useful method for determining whether a restriction invoking Article XX is legitimate. The *Danish Bottles* case⁷² therefore set out a criterion that indicates how GATT Article XX may be interpreted to exclude disguised restrictions on trade from the exception.

Regarding the second concern on differing national policies having a negative impact on the environment, the GATT Standards Code embodied in the Agreement on Technical

⁶⁹ Schoenbaum 1992 *American Journal of International Law* 716.

⁷⁰ GATT Articles XX (b) and (g).

⁷¹ *Danish Bottles — Commission of the European Community vs Kingdom of Denmark* (1992) ISBN: 1-56973-136-5 in Schoenbaum 1992 *American Journal of International Law* 716.

⁷² *Ibid.*

Barriers to Trade⁷³ provides a possible solution to reduce the conflict emanating from differing environmental regulations. The Standards Code recognises that differing technical standards imposed by different states may constitute non-tariff barriers to trade and therefore obliges GATT member states to apply national standards where necessary to protect the environment, human health and safety. However, the standards code stipulates that states must avoid “unnecessary obstacles to international trade” by mandating the use of open procedures in adoption of product standards and testing methods, requiring the application of standards to non-discriminatory, approving technical assistance for developing countries and proving procedures for settling disputes.⁷⁴

The Standards Code however falls short in that it applies only to activities of central governments, giving room for states and local governments to adopt environmental standards that may distort international trade. Furthermore, the Standards Code lacks an explicit mandate to deal with environmental standards; a weakness that can be eliminated by amending the Standards Code to require (a) that environmental protection be considered in the formulation of standards and, (b) that standards be harmonized at the highest practicable levels of protection for the environment so that no state can make its capacity to absorb pollution a feature of its comparative advantage.⁷⁵ In addition, Article XX should be renegotiated to include a criterion for applying the exceptions in subsections (b) and (g). This criterion could include new principles of environmental protection, for example, principles regarding global environmental issues. On the whole, the GATT should not be conservative, but should develop new principles, like those set in the *Danish Bottles* case, for example, principles that harmonize international trade and environmental concerns. Harmonization of differing standards, as set out in the *Danish Bottles* case can best be achieved by implementing environmental policies at international level.

⁷³ Act of 1979.

⁷⁴ *Ibid* Article 2.

⁷⁵ Jackson *The World Trading System* (1989) 209.

3.5 PROTECTING THE ENVIRONMENT AT INTERNATIONAL LEVEL

International agreement is preferable to unilateral action when it comes to tackling transboundary or global environmental problems.⁷⁶ And as the realisation grows that protection of the environment must be addressed on a global basis, a number of multilateral and bilateral agreements are being enforced. MEAs are agreements among governments that co-operatively address shared environmental problems.⁷⁷ The importance of MEAs in environmental policies has increased over the years as the international community struggles to address increasing global environmental problems, such as the spread of toxic pollutants, biodiversity and global warming.⁷⁸

3.5.1 Multilateral Environmental Agreements

Multilateral Environmental Agreements identify co-operative solutions, limit the use of unilateral measures, discourage environmentally harmful process and production methods, discouraging the migration of industries to countries with lower environmental standards and reducing the incentives for countries to remain outside the agreement and become “free riders” and benefiting from the absence of MEA standards. Generally, MEAs reflect a balance between the three pillars of development – the environment, economic trade and social welfare – by applying integrated approaches to achieve the objectives of all three pillars. Several MEAs⁷⁹ have therefore been put in place and membership varies from small groups to over 180 countries. Most of these agreements use restrictions on trade as a policy instrument; they are now used in over 20 MEAs.⁸⁰ Trade measures in MEAs serve a number of purposes, including the regulation of trade in environmentally-risky products (such as hazardous wastes and genetically modified organisms), discouraging unsustainable exploitation of natural resources (such as endangered species) and enhancing compliance with MEA rules. But at the same time

⁷⁶ Principle 12 of the Rio Declaration.

⁷⁷ Stilwell and Tarasofsky “Towards Coherent Environmental and Economic Governance” http://www.ciel.org/Publications/Coherent_EnvirEco_Governance.pdf (accessed 31 March 2006).

⁷⁸ *Ibid.*

⁷⁹ Approximately 200 MEAs exist (Brack and Gray “Multilateral Environmental Agreements and the WTO”, Report September 2003

<http://www.riia.org/pdf/research/sdp/MEAs%20and%20WTO.pdf> (accessed 10 April 2005)).

⁸⁰ Stilwell and Tarasofsky “Environmental and Economic Governance”.

trade measures may also include or require the use of other measures that may affect trade, like national policies, subsidies, labelling schemes, taxes and tariffs.

As examples, the scope of this study will be limited to three MEAs selected from the various categories of MEAs. These are: the Convention on International Trade on Endangered Species (CITES) 1973,⁸¹ the Basel Convention on the control of Transboundary Movements of Hazardous Wastes and their Disposal 1989⁸² and the Kyoto Protocol 1997 (which came into force in 2005).⁸³ These MEAs oblige parties to use trade sanctions to enforce specified environmental objectives and require them to ban trade in certain goods with countries that are not party to the MEAs.⁸⁴

3.5.1.1 The Convention on International Trade on Endangered Species, 1973

In an effort to conserve the environment through the regulation of trade, 113 states adopted the Convention on International Trade on Endangered Species (CITES) in 1973 and the Convention came into force on 1 July 1975. CITES was formed for the following reasons:

- (a) international states noticed that wild species were being exploited worldwide at a high rate, which was incompatible with their regenerative capacity;
- (b) huge volumes of wild species were being traded; and
- (c) there was need for international cooperation and regulation of trade in wildlife and wildlife by-products to protect species against over-exploitation and illegal harvesting.⁸⁵

⁸¹ Selected from the category covering biodiversity and wildlife.

⁸² Selected from the category dealing with waste.

⁸³ Selected from the category of designed to protect the atmosphere.

⁸⁴ Oxley "The Environmental Threat to Development in the Doha Development Round" <http://www.apec.org.au/docs/oxley2002.pdf> (accessed 25 March 2005).

⁸⁵ Department of Environmental Affairs, Botswana "Multilateral Environmental Agreements" <http://www.environbotswana.gov.bw/mul.html> (accessed 28 May 2005).

These and many other reasons were not only linked to the decline in the number of species due to the loss of habitat, but also due to increased over-exploitation especially through trade.⁸⁶

CITES, unlike other similar Conventions,⁸⁷ is not designed to protect and conserve migratory or endangered species in their habitats as well as from threats to their existence such as pollution, over-exploitation or uncontrolled catches and trade. The Convention instead aims at controlling international commercial trade in endangered species or their products. Under CITES trade in endangered species, as well as in the products derived from them, is banned. The Convention plays a similar role with regard to plants and preserves component parts of the habitat of some species.

CITES does not only function at regional levels, but has been established on a global scale because the regulation of trade under CITES is based on a system of international permits that permit the transportation of species listed under the three Appendices of the Convention. Appendix I, though with some exceptions, forbids trade in those species threatened with extinction.⁸⁸ However, the Convention permits trade (subject to control) with regard to those species not yet threatened with extinction but which may become so if trade is not controlled and monitored. These species are listed under Appendix II of CITES.⁸⁹ Parties having stricter legislation that restricts the export of species not listed under Appendices I and II are permitted under the Convention to list these species as Appendix III species. Other parties are therefore obliged to regulate trade in the listed species. The Convention permits international trade in these listed species on the basis that proper documentation is issued by the exporting state.

⁸⁶ Over the years trade improved due to the growth of modern transport facilities either by sea, road or air. Such development has facilitated the shipping of live animals, plants and their products in a bid to meet the great demand in the lucrative trade business: Birnie and Boyle *International Law and the Environment* (1992) 475.

⁸⁷ The Convention on the Conservation of Migratory Species of Wild Animals 1979, which conserves habitat and aims to protect species during their migrations.

⁸⁸ Included in this list are all apes, lemurs, the giant panda, many South American monkeys, great whales, cheetahs, leopards, tigers, Asian and African elephants, rhinoceroses, many birds of prey, cranes, all sea turtles, some crocodiles and lizards, orchids and cacti among others.

⁸⁹ Included in this list are primates, cats, otters, whales, dolphins and porpoises, birds of prey, tortoises, crocodiles and orchids, fur seals, the black stork, birds of paradise, the coelacanth, some snails, bird wing butterflies and black corals.

CITES has so far been effective because it has an elaborate and workable system under which a national export or import permit system works hand in hand with the national institutional system. Regulation of trade under the Appendices as laid down in the Convention requires each party to establish a Management Authority and Scientific Authority.⁹⁰ These two Authorities are responsible for checking that the required conditions for the issue of permits are complied with and in that eventuality grant the permits.

All conditions for export, re-export and import with regard to the various species under protection are elaborated in the Convention:

Appendix I Species

Article III of CITES prohibits the export of species listed under Appendix I without the prior grant and submission of an export permit. This permit is only issued if the Management Authority is satisfied that the species have been legally obtained, are to be exported alive and that their transportation conforms to the standards laid down in the Convention.⁹¹ The Scientific Authority must advise and confirm that the exports in question will not be detrimental to the survival of that particular species before the permits are issued.⁹² Lastly, an export permit will not be issued unless an import permit has already been issued.

Importation of Appendix I specimens requires the prior grant and presentation of an import permit and either an export permit or re-export certificate. An import permit will be issued only if the requirements stated in the preceding paragraph are met. In addition to these requirements the Management Authority must also be satisfied that the specimen is not to be used primarily for commercial purposes.⁹³ This requirement limits trade to specimens only used for scientific and educational purposes.⁹⁴

⁹⁰ Articles III, IV and V for each Appendix.

⁹¹ Article III (2) (c). The form of shipment should minimize the risk of injury, damage to health or cruel treatment.

⁹² CITES Article III (2) (a).

⁹³ Article III (3) (c).

⁹⁴ Birnie and Boyle *Law and the Environment* 476.

A re-export permit for any species under Appendix I requires the prior grant and presentation of a re-export certificate. Granting of a re-export certificate follows similar prerequisites to the granting of an export permit.

Appendix II Species

The export and import of species included in Appendix II follow similar requirements to those set out for Appendix I species,⁹⁵ except for the prerequisite that an import permit should be issued first. Re-exporting is only permissible when a re-export certificate has been presented. This certificate is granted only when the Management Authority of the state of re-export is satisfied that the specimen was imported into that state in accordance with the provision of the Convention and also that any living specimens will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.⁹⁶

Appendix III Species

The export of specimens included under Article III also require prior granting and presentation of an export permit which will be issued only after the Management Authority is satisfied that the specimen was not obtained in contravention of the laws of that state for the protection of fauna and flora and that a living specimen will not be exposed to injury, damage or cruel treatment.⁹⁷ Except in circumstances where conditions for re-export apply, the importing of species included in the Appendix will require the prior presentation of a certificate of origin and, where the import is from a state which has included that species in Appendix III, an export permit.⁹⁸ Re-exporting, on the other hand, will require a certificate granted by the Management Authority of the state of re-export that the specimen was processed in that state or is being re-exported. This shall be accepted by the state of import as evidence that the provisions of the Convention have been complied with in respect of the specimen concerned.⁹⁹

⁹⁵ CITES Article IV (2).

⁹⁶ Article IV (5).

⁹⁷ Article V (2).

⁹⁸ Article V (3).

⁹⁹ Article V (4).

Despite the organised framework of prerequisites set out in CITES, the Convention has not been free from problems. It has been a difficult task to identify the plants and animals in the customs posts of the state parties. This problem mainly emanates from the fact that Article II (2) (b) allows “look-alike” species to be added to Appendix II even if they are not under threat. Furthermore, Article I (b) (ii) refers to “any recognizable part”, a phrase not defined under the Convention, thereby leaving the task to each state to compile its own list that enables the state to identify items being referred to by the phrase. This has led to open debates whether a minimum list to cater for the animals being referred to by the phrase should be drawn up by party states.¹⁰⁰

3.5.1.2 *The Basel Convention, 1989*

The United Nations Environment Programme (UNEP) acknowledges the need to respect international law applicable to the protection of the environment.¹⁰¹ Principle 21 of the Stockholm Declaration forms the basis of the first attempt at international regulation, through the Basel Convention on the control of Transboundary Movements of Hazardous Wastes and their Disposal.¹⁰²

The Basel Convention of 1989 aims at regulating transboundary movement of hazardous wastes¹⁰³ in order to prevent or at least limit environmentally unsound management of wastes. The Convention’s main focus, later to be cemented by the 1991 African Convention on Transboundary Movements of Hazardous Wastes,¹⁰⁴ was to prevent illegal dumping of toxic wastes in developing countries. In this regard the Basel Convention requires industrialized nations to permit exports of specified material only if

¹⁰⁰ Birnie and Boyle *Basic Documents* (1995) 415.

¹⁰¹ Cairo Guidelines and Principles of Environmentally Sound Management of Hazardous Wastes, 1985.

¹⁰² This is a global Convention developed by UNEP and intended to minimize and control international trade in hazardous wastes. The Convention places on exporting and importing states a shared responsibility for environmentally sound management and disposal of such wastes, while affirming the sovereign right of any state to prohibit imports.

¹⁰³ Article 2 of the Convention defines objects as wastes when they are disposed of or intended to be disposed or is required to be disposed of by national law and not by the objects worthlessness or cessation of function. Article 1 defines hazardous wastes as (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of the export, import or transit.

¹⁰⁴ The African Convention on Transboundary Movements of Hazardous Wastes prohibits imports into Africa from non-parties and regulates trade in waste among African states.

they consider approving the waste management policies of importing countries; and it bans completely trade in other proscribed materials like radioactive wastes, as these are covered by other arrangements.¹⁰⁵ The scope of the Convention sets an obligatory minimum standard for states¹⁰⁶ by specifically providing that wastes are hazardous only when listed in the Convention's Annex I or if defined as such by national law and notified to the Convention's Secretariat. The Convention further defines "disposal" to include landfill released into watercourses, the sea, or seabed, incineration and permanent storage or recycling.¹⁰⁷ Such scope or coverage confines the Basel Convention to apply to waste exported for dumping in coastal maritime zones.

The Basel Convention is also based on a system of environmental responsibility shared among all states involved in each transaction.¹⁰⁸ This is so because exportation of hazardous wastes is permissible only under two circumstances. Firstly, hazardous wastes may be exported where the state of export does not have the technical capacity and necessary facilities to dispose of such waste in an environmentally sound and efficient manner¹⁰⁹ and where the wastes in question are destined for recycling and recovery.¹¹⁰ Secondly, a notice-and-consent procedure for the transboundary movement of hazardous wastes must be followed.

Environmentally Sound Management

The primary obligation imposed by the Basel Convention is to manage the transboundary movement of waste in an environmentally sound manner. Environmentally sound management of wastes in terms of the Convention means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.¹¹¹ The Cairo Guidelines of 1985 elaborate on the definition by giving detailed guidelines pointing out that environmentally sound management includes "the

¹⁰⁵ Code of Practice for the Management of Radioactive Waste from Nuclear Power Plants 1985, IAEA, regulates for the safe transport of radioactive material, 1988 IMO's International Marine Dangerous Goods Code covers transport of radioactive materials in ships. (None of these instruments is formally binding.)

¹⁰⁶ Article 1 (1).

¹⁰⁷ Article 2 (4) and Annex IV.

¹⁰⁸ Birnie and Boyle *Law and the Environment* 335.

¹⁰⁹ Basel Convention Article 4 (9) (a).

¹¹⁰ Article 4 (9) (b).

¹¹¹ Article 2 (8).

use of best practicable means, approval of sites, and facilities, disposal plans, monitoring, public access to information and contingency planning”.¹¹² This obligation applies to exporting,¹¹³ transit¹¹⁴ and importing¹¹⁵ states alike,¹¹⁶ and also to trade with non-parties, which may only be conducted under an agreement providing for management no less environmentally sound than is required by the Convention.¹¹⁷ The obligation binds all states, including developing countries,¹¹⁸ not to permit the export or import of waste if they believe the waste will not be handled in an environmentally sound manner. The exporting state remains responsible for ensuring proper management of waste until its final disposal and may even permit re-import whenever this is necessary. In this regard responsibility may not be transferred by an exporting state to the state of transit or import.¹¹⁹

The Basel Convention observes international standards¹²⁰ when it comes to the transportation of hazardous wastes. Article 4 (7) (b) of the Convention requires that packaging, labelling and transporting of the wastes should conform to the generally accepted and recognized international rules and standards in the field of packaging, labelling and transport. Therefore any transport failing to meet these standards is regarded as having failed to meet the environmentally sound management obligation.

¹¹² Although these guidelines are not obligatory, their adoption by UNEP gives them persuasive force as a basic standard for states to meet in fulfilling their obligations and the Basel Convention, Birnie and Boyle *Law and the Environment* 339.

¹¹³ State of export means a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated.

¹¹⁴ State of transit means any state, other than the state of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place.

¹¹⁵ State of import means a Party to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any state.

¹¹⁶ Basel Convention Article 4.

¹¹⁷ Articles 4 (5) and 7.

¹¹⁸ Under Articles 4 (2) (g) and 10 of the Basel Convention, developing states do not escape the obligation for sound management of imported waste, because if they cannot meet the requirement they must either seek assistance for international cooperation or prohibit the import.

¹¹⁹ Basel Convention Articles 4 (10) and 8.

¹²⁰ References to other instruments imply that the Convention’s provisions on environmentally sound management are a framework only, and not a complete code in themselves (Birnie and Boyle *Law and the Environment* 339).

The Principle of Prior Informed Consent

Exportation of hazardous wastes under the Convention follows what has been termed as a “notice-and-consent” procedure¹²¹ for the transboundary movement of hazardous wastes. Under the procedure a state of export must notify or require the exporter to notify the state of import and any state of transit of the proposed export before it can allow the export of hazardous waste. It is only after the state of import and, where applicable, the state of transit have consented in writing¹²² that the state of export will allow the export to precede. In the case of transit states that are parties to the Convention, the requirement for informed consent maybe waived in favour of tacit acquiescence.¹²³

The requirement of prior consent can also be referred to as an expression of sovereignty for a state over the use of its territory and resources. This does not mean that the information given by the state of export with regards to its intended export should be a mere request. As was held in the *Lac Lanoux* case,¹²⁴ the Convention requires the information supplied by the state of export to be sufficient to enable the nature and effects of the proposed movement on health and the environment of the proposed movement to be assessed.

Prior consent is enforced in two ways, namely, by making the state of export return illegal waste, or where the importer is at fault, imposing on the state of import a duty to ensure safe disposal of the waste. The second method aims to ensure that states punish illegal traffic as a criminal offence.¹²⁵

The Basel Convention, over and above the requirement of prior consent, also prohibits transboundary movement where a state party makes a declaration that it prohibits the import of hazardous wastes or any other wastes. In such a case no state may then be allowed to export any such wastes to that state.¹²⁶ Prohibition is also permissible where

¹²¹ Murphy “The Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes” (1994) 88 *The American Journal of International Law* 24 at 25.

¹²² Basel Convention Articles 4 (1) (c), 4 (2) (f), 6 (1) (2) and (10), and 7.

¹²³ Article 6 (4).

¹²⁴ *Lac Lanoux* arbitration, 24 *ILR* (1957).

¹²⁵ Basel Convention Articles 4 (3), (4) and 9 (5).

¹²⁶ Article 4 (2) (e) and 2 (g).

there is reasonable belief that the export waste will not be managed in an environmentally sound manner.

Implementing the Basel Convention

To ensure effective compliance with the two requirements set under the Convention, states have implemented institutional supervision. Under the institutional framework, a Conference of the parties has been established which has power to adopt amendments and Protocols and also to undertake additional action required in furthering the objectives of the Convention. International supervision plays a similar role in ensuring compliance with the Convention. The Convention's reliance on dispute settlement machinery is weak, as it requires agreement by concerned parties and also gives an optional acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) or arbitration. A further weakness of the Convention is the absence of any agreement on principles of liability and compensation for damage resulting from transboundary movements of wastes. The Convention has so far adopted a Protocol to the Basel Convention in an effort to counteract such problems.¹²⁷ The Protocol aims at deterring mismanagement of wastes before, during and after transboundary movement and provides compensation where such mismanagement causes harm to human health and the environment.

The ending of all trade in hazardous wastes has not been achieved at global level, but the Basel Convention has strived to regulate the trade in hazardous wastes. According to Birnie and Boyle,¹²⁸ what has been achieved is a compromise that places three important and far-reaching restrictions on this trade. Firstly, the Basel Convention is said to recognize the sovereign right to ban imports at national or regional level. The Convention strengthens this right, and prohibits trade in waste by providing for import bans to be notified to other parties through the Secretariat and as such no state may permit transboundary movement of wastes to a party prohibiting their import, except by special agreement permit transport for disposal by non-parties. Secondly, the Convention does not permit transboundary movement of hazardous wastes except where the state of export does not have the capacity to dispose of the wastes in an environmentally sound manner

¹²⁷ The Protocol was adopted in Basel during the fifth meeting of the Conference of Parties in 1999.

¹²⁸ Birnie and Boyle *Law and the Environment* 333.

or unless it is intended for recycling. In this regard the Convention is based on a philosophy of minimizing the generation of hazardous wastes and promoting disposal at the source. This requirement does not only protect the importing state, but benefits the international community as a whole. Lastly, trade requires prior consent, a requirement that protects the importing state.

The Basel Convention has also been met with criticism, the most serious of these being that it legitimizes trade that cannot adequately be monitored or controlled and so leaves developing states vulnerable to unsafe disposal practices.¹²⁹ To counter these criticisms, the 1997 amendment to the Basel Convention prohibited the export of hazardous waste, even for recycling purposes, specifically from Organization for Co-operation and Development (OECD) member countries to non-member countries. The ban on the export of hazardous products to African and other developing countries would in theory eliminate or at least decrease the traffic and dumping of toxic wastes in those countries. The Basel Convention has also not defined “environmentally sound management”. What might be environmentally sound to one state might not be so to another, and more clarity as to what “environmentally sound management” consists of is required.

3.5.1.3 The Kyoto Protocol, 1997

Global warming is causing worldwide climate change, including rising sea levels and a greater incidence of storms, droughts and floods, and scientists predict that the world will continue to warm over the next 100 years because of human activity.¹³⁰ In this regard steps need to be taken if global warming is to be slowed or even stopped. The first of the steps was taken at the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, which aimed to stabilise greenhouse concentrations to a level that would not interfere with the climate system. The UNFCCC had a loophole despite having been ratified by all developed countries; its targets towards the reduction of greenhouse gas emissions were non-binding. Because of this loophole in the UNFCCC, the international community drafted a further international agreement that had a similar objective, the Kyoto Protocol.

¹²⁹ Naldi “The Regulation of the Transnational Trade in Hazardous Wastes” (2000) 7 *SAJELP* 213 at 222.

¹³⁰ Anonymous “Kyoto Protocol” http://www.simpsoagrierson.com/Kyoto_Protocol.html (accessed 08 June 2005).

The Kyoto Protocol and its Status

The Kyoto Protocol was agreed to in 1997 and only came into force on 16 February 2005.¹³¹ The Protocol is the first legally-binding international agreement aimed at slowing and eventually stopping global warming.¹³² The Kyoto Protocol targets were for the reduction of greenhouse gas emissions of Annex I countries¹³³ relative to their emissions levels in 1990. On this basis Non-Annex I countries¹³⁴ have no targets under the Protocol, although the Protocol reaffirms the commitments of the Framework Convention by all parties to formulate and implement climate change mitigation and adaptation programs.

The Protocol could only come into force in 2005 when the necessary requirements were finally fulfilled. These requirements were that at least 55 countries, including industrialized countries representing at least 55% of 1990 carbon dioxide emissions, had to accept and ratify the Protocol before its coming into force. The Protocol would then enter into force 90 days after the requirements had been met. With Russia ratifying the Protocol on 18 November 2004, these requirements were met.

The Protocol does not prescribe specific steps to be taken but it enumerates potential actions to be undertaken towards the limitation of greenhouse gas emissions. These include energy efficiency improvements,¹³⁵ enhancement of carbon absorbing sinks,¹³⁶ research and development of sequestration technologies,¹³⁷ phasing out of fiscal incentives and subsidies that may inhibit the goal of emissions reductions, and the

¹³¹ From 1-11 December, representatives from more than 160 countries met in Kyoto, Japan, at the third session of the Conference of the Parties to the 1992 Framework Convention on Climate Change.

¹³² Anonymous "Kyoto Protocol".

¹³³ Annex I countries are industrialised countries and include New Zealand, United Kingdom, Japan, Turkey, and USA among others. Among these countries some also fall under Annex II, these are developed countries which pay for costs of developing countries and include Sweden, United Kingdom, USA and New Zealand to mention a few.

¹³⁴ Non-Annex I countries are developing states and they do not have immediate restrictions under the Protocol. They may however volunteer to become Annex I countries when they are sufficiently developed. Included in this list are Iran, Israel, South Africa and most African states.

¹³⁵ Kyoto Protocol Article 2 (a) (1).

¹³⁶ Articles 4 (1) (d) and 4 (2) (a).

¹³⁷ Articles 4 (1) (g) and (h).

reduction of methane emissions in waste management and in energy production, distribution and transportation.¹³⁸

Flexibility Measures for Compliance

The flexibility measures for compliance under the Protocol are often referred to as *what*, *where* and *when*.¹³⁹ *What* flexibility refers to the source of the emissions.¹⁴⁰ Carbon dioxide is the major greenhouse gas in terms of the level of emissions.¹⁴¹ The Protocol, however, also includes methane, nitrous oxide, hydro fluorocarbons, per fluorocarbons and sulfur hexafluoride. Because the aggregate target is based on the carbon equivalent in each of the gasses *what* flexibility includes carbon-absorbing sinks, forests, other vegetation and soils. Since 1990 net changes in emissions by direct anthropogenic land use changes and forestry activities have been used in meeting the commitment, limited to afforestation, reforestation and deforestation.¹⁴² The specific guidelines and rules for the accounting of land use and forestry activities are resolved by the Conference of the Parties.

Parties are therefore obliged to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.¹⁴³ This obligation is coupled with the urge to take precautionary measures towards the anticipation, prevention and minimization of the causes of climate change and mitigating its adverse effects and lack of resources or scientific certainty should be no excuse.¹⁴⁴ Accordingly, the developed country parties should also take the lead in combating climate change and the adverse effects thereof.

¹³⁸ Article 4 (1) (c).

¹³⁹ Energy Information Administration "The Kyoto Protocol and its Status: EIA's Analysis of the Kyoto Protocol" <http://www.eia.doe.gov/oiaf/kyoto3/chapter1.html> (accessed 04 June 2005).

¹⁴⁰ Sources of emissions include energy combustion, fugitive emissions from fuels, industrial processes, solvents, agriculture, and waste management and disposal.

¹⁴¹ The aggregate target of these gases is established using the carbon dioxide equivalent of each of the GHG based on global warming potential of each gas.

¹⁴² Kyoto Protocol Article 3 (3).

¹⁴³ Kyoto Protocol Article 3 (1).

¹⁴⁴ *Ibid.*

Where flexibility includes international activities that would allow a country to meet its emissions target by taking action with or within other countries. In this regard trading among Annex I countries is permitted.¹⁴⁵ Groups of Annex I countries are also permitted to meet the total commitments of all the member nations jointly, either by allocating a share of the total reduction to each member or by trading emissions rights. Joint implementation projects are also allowed among Annex I countries.¹⁴⁶ Joint implementation allows a nation to take emissions credits for projects that reduce emissions or enhance emissions-absorbing sinks in other Annex I countries.

The Protocol also establishes a Clean Development Mechanism (CDM) under the *where* flexibility compliance system. Under the CDM program Annex I countries can earn credits for projects that reduce emissions in non-Annex I countries. An executive body is established to supervise the CDM. An unspecified share of the proceeds from certified project activities is used to cover administrative expenses of the executive body as well as to assist developing country parties that are vulnerable to adverse effects of climate change to meet the costs of adaptation.

When flexibility sets out the time frame when targets under the Protocol should be met. The targets set can be achieved on average over the first commitment period that runs from 2008 to 2012 (not in each individual year).¹⁴⁷ No targets have been established for periods after 2012 but the conference parties should initiate consideration of future commitments within seven years before the end of the first commitment period. Banking or carrying over emissions reductions that go beyond the target from one commitment period to a subsequent commitment period is allowed.

The Commonwealth Scientific and Industrial Research Organisation (CSIRO) Department of Atmospheric Research has outlined possible paths states may follow in order for them to meet their targets towards the stabilization of atmospheric carbon

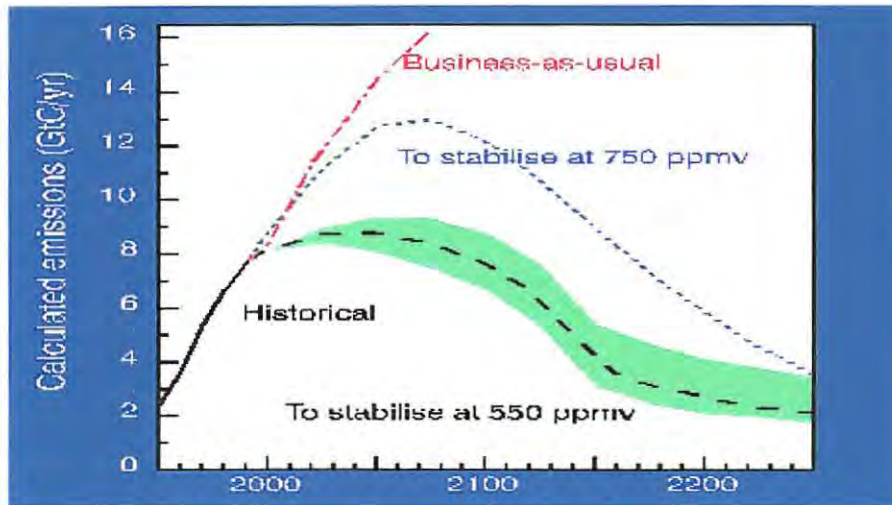
¹⁴⁵ An emission trading is a market system that allows those who own more emission units than they need to trade them to those who need more.

¹⁴⁶ Kyoto Protocol Article 3 (1).

¹⁴⁷ Energy Information Administration "What does the Kyoto Protocol mean to USA Energy Markets and the USA Economy?" <http://www.eia.doe.gov/oiaf/kyoto/kyotobrf.htm> (accessed 26 May 2005).

dioxide emissions. The graph below illustrates the effect of each of these possible methods.

Figure 1: World emissions paths required to stabilize levels of atmospheric CO₂ concentrations. Source: CSIRO Department of Atmospheric Research



According to the Department, greenhouse gas emissions have grown substantially from around 2 Gigatonnes a year (Gt/y) in 1950 to a little over 8 Gt/y in 2000. A “business as usual scenario” without the implementation of the Kyoto Protocol would see emissions grow around 17 Gt/y by the year 2100. If such levels were reached then the effects on climate maybe profound considering that the present increase in atmospheric concentration of around 30% on pre-industrial levels is already having considerable impact.¹⁴⁸

Even with the ratification of the Kyoto Protocol, scientists in the CSIRO Department of Atmospheric Research have projected that greenhouse gas emissions will gradually increase.¹⁴⁹ The main reason being that the stabilization of emissions from Annex 1 countries would be more than offset by increases in emissions from non-Annex 1 countries. Most Annex 1 countries emission levels are now well above what they were in 1990 and emissions from non-Annex 1 countries are expected to overtake Annex 1 countries by around 2005.¹⁵⁰ The increase will also be attributed to the fact that

¹⁴⁸ Roarty “The Kyoto Protocol — Issues and Developments Through to Conference of the Parties (COP7) <http://www.aph.gov.au/library/intguide/sci/kyoto.htm> (accessed 08 June 2005).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

greenhouse gas emissions are relatively long lived and remain in the atmosphere for long periods, and this will definitely add to the emissions currently produced, thereby causing global warming.

States may decide to maintain the historical outputs of pre-industrial times by stabilizing greenhouse gas emissions at 550 parts per million (ppm). This according to the graph above seems acceptable, but if one is to consider the current world population estimated at over six billion people and that about two billion people do not have access to reliable power supply and they aspire having such access, the idea becomes highly improbable. Furthermore, it remains an indisputable fact that the world's population will continue to grow. Such growth will see the electricity infrastructure depending on fossil fuels (coal, gas or oil), which in turn will increase the emission of carbon dioxide.

Seeing that the “business as usual scenario” and stabilization at 550 ppm are improbable paths, stabilizing at 750 ppm seems to be the answer. However, for this to work all states should partake in the fight against global warming. This therefore emphasises the idea raised in the Protocol that even non-Annex 1 countries, specifically developing nations, should play a part in reducing greenhouse gas emissions.

3.5.2 The Relation between Multilateral Environmental Agreements and Trade Restrictions

Great strides have been made by international states to safeguard the environment from ongoing trade practices. Globally, MEAs have been widely accepted as the best way of handling environmental problems.¹⁵¹ MEAs have managed to protect the environment through the use of trade restrictions. However, the use of trade restrictions in MEAs is a ground for a possible clash of WTO obligations and those of MEAs, indicating that there is need to intertwine the two if MEAs are to serve their purpose effectively. In a world where the use of force is increasingly considered inappropriate and where other enforcement mechanisms are limited, trade measures sometimes will be the best available

¹⁵¹ Rio Declaration Principle 12. This has also been evidenced by the large number of MEAs in existence.

point of leverage.¹⁵² For this and other reasons trade measures have been and are still being used to implement and enforce international environmental agreements.¹⁵³ MEAs incorporate trade measures that regulate or restrict trade in particular substances in an effort to safeguard the environment from destructive trade practices.

Various policies and measures have been included in MEAs and these may in one way or the other have an impact on international trade. The trade measures are usually set out in texts of the MEA or they maybe derived from decisions of the parties after the MEA has entered into force. Among those trade measures included in MEAs the most commonly used are:

- (a) Reporting requirements: requiring that the extent of trade in a particular product must be monitored and reported;
- (b) Labelling or other identification requirements: stipulating that products in trade must be identified in some way, depending on their product and or process characteristics;
- (c) Requirements for movement documents or notification and consent: requiring the import and export of particular products to be accompanied by permits, licences or other documents indicating consent by involved states;
- (d) Export and import bans (targeted): stipulating that trade in specified products with particular states, non-complying parties or non-parties is not permitted;
- (e) Export and import bans (general): stipulating that trade in specified products with any state is not permitted. Usually the export and import ban accompanies production and consumption bans within the state applying the trade measure; and
- (f) Market transformation measures: taxes, charges, subsidies or other forms of fiscal measures and non-fiscal measures maybe applied to products whether domestic or imported, as a means of growing market share for

¹⁵² Esty "Greening World" http://www.iie.com/publications/chapters_preview/66/4ii2350.pdf (accessed 05 April 2005).

¹⁵³ The WTO Secretariat lists 31 MEAs containing potential trade measures, though some of these are regional rather than global agreements, and protocols are included along with their parent conventions under single headings — though for most purposes it makes more sense to treat them as different agreements.

desired products, and reducing it for non-desired products, with the aim of complying with the requirements of the MEA.¹⁵⁴

These trade measures may also be divided into specific¹⁵⁵ and non-specific¹⁵⁶ trade measures.

Trade restrictions have been incorporated in MEAs for several reasons, the major reasons according to Charnovitz, being to monitor and control trade, to promote compliance with MEA requirements, and to enforce MEAs.¹⁵⁷

3.5.2.1 Monitoring and Controlling Trade

Reporting and labelling requirements, movement documents or notification and consent requirements, and trade bans are the most common trade measures used by states to monitor and control trade. These forms of trade restrictions are common features in various MEAs and among them is CITES and the Basel Convention.¹⁵⁸

CITES requires parties to present export permits for all trade in endangered species listed under the Convention's appendices. Import licences are also a pre-requisite for Appendix I species.

The Basel Convention¹⁵⁹ similarly requires compliance with the notice and consent procedure from either the state of import, export or transit before any trade in hazardous waste is undertaken. The shipment of any waste under the Convention must in addition be accompanied by a movement document. The 1995 amendment to the Basel

¹⁵⁴ Brack and Gray 'MEAs and WTO'.

¹⁵⁵ Specific trade measures are those measures explicitly described in the MEA or in decisions of its parties, for example requirement for a ban on trade — Montreal Protocol contains such ban on trade with non-members as well as export and import licences.

¹⁵⁶ Non-specific measures are those measures which are not explicitly described in an MEA, for example labeling requirements, excise taxes and imports bans usually applied by parties to meet obligations for phasing out consumption of ozone-depleting substances.

¹⁵⁷ Chamovitz "The Role of Trade Measures in Treaties" in Fijalkowski and Cameron (eds), *Trade and the Environment: Bridging the Gap* (1998) 70.

¹⁵⁸ Other MEAs incorporating monitoring and controlling trade measures include the Montreal Protocol of 1987, the Rotterdam Convention of 1998, the Cartagena Protocol of 2000 and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) of 2000.

¹⁵⁹ Article 4 (2) (f).

Convention also acts as a trade restrictive measure as it places an outright ban on exports of waste from developed to developing countries. This ban was initially on transboundary movement of waste for disposal purposes but eventually it also applied to waste trade for recycling and re-use. The Basel Convention¹⁶⁰ imposes packaging and labelling requirements upon states. These must fully indicate the contents of the waste being transported for the benefit of the importing as well as the transit state.

Although the form of trade measures in question may be drawn too widely in their use thereby requiring the use of other procedures,¹⁶¹ most MEAs have demonstrated great flexibility in the application of trade measures, therefore justifying their use.¹⁶² Furthermore, the monitoring and control of trade measures are adopted between consenting parties as a necessity in the regulation of trade, a fact which rules out unjustifiable theories linked to trade measures of this kind.

The use of monitoring and controlling trade measures is necessary in the regulation of international trade, especially in a world which encompasses de-regulation in its trading agenda. These trade restrictions become very useful in tracking and keeping record of traded products in situations where the existing systems fail to provide sufficient information on the products. The notification procedure required by most MEAs using this kind of trade measure provide an avenue for co-ordination between the WTO and MEAs.¹⁶³ Such monitoring, according to Brack and Gray, “represents very little, or no, disruption to trade and has low administrative requirements; there appears to be no non-trade restricting effective alternative.”¹⁶⁴

The trade measures in question are, however, not free from problems as these very same trade restrictions can be misused by countries to ban or restrict trade in products which have not been granted consent for import or export. This type of measure is usually abused by developing countries because in most cases they use the regulatory and

¹⁶⁰ Article 6.

¹⁶¹ The blanket ban imposed by the Basel Convention on north-south movements of hazardous wastes for recycling may require the implementation of an advanced informed agreement procedure rather than a total ban.

¹⁶² For example, CITES allows the sale of elephant ivory.

¹⁶³ The link is reflected by the fact that usually notifications are submitted to various WTO committees, or example the TBT Committee.

¹⁶⁴ Brack and Gray “MEAs and WTO”.

institutional capacity to control domestic products not permitted for either import or export. And such behaviour amounts to a disguised restriction on trade that violates WTO rules. In cases like this preference is usually transferred to less trade-restrictive options.

3.5.2.2 Promoting Compliance with MEA Requirements

Trade restrictions used under this category include labelling, market transformation measures, export and import bans. The Kyoto Protocol contains similar trade measures which are capable of affecting trade. The Protocol under Article 2 requires each Annex 1 party to implement or further elaborate on policies and measures in accordance with the party's national circumstances. The removal of market distortions is also advocated for under the Protocol. The use of the trade measures in question is justifiable under the Protocol and as such parties may possibly use them as disguise methods that will protect their industries. Border tax adjustments are likely to be used as restrictive measures, for example, where energy or carbon taxes are introduced by a state to reduce emissions.¹⁶⁵

Trade measures under this category are usually non-specific and as such have little effect on WTO expectations on liberalizing trade which deals with specific trade restrictions. According to WTO rules, specific trade restrictions must not be applied in a discriminatory manner. In principle, therefore, there is no need for environmental justification in cases of discrimination, though these environmental policy instruments must reflect upon non-discriminatory provisions.¹⁶⁶ This is so because the domestic industry is being controlled at the same time as its imports and exports, meaning that the aim of the MEA in question has been accepted as valid. Therefore the control of products, domestic production and consumption should similarly be accepted as complying with MEA requirements.

The above argument applies equally to the Kyoto Protocol. Measures implemented to restrict greenhouse gas emissions such as energy or carbon taxes and fuel excise duties, subsidies for renewable energy and energy efficiency investments may affect international effectiveness.¹⁶⁷ But because these measures have been accepted as valid

¹⁶⁵ Brack, Grubb and Windram *International Trade and Climate Change Policies* 2 ed (2000) 165.

¹⁶⁶ *Ibid.*

¹⁶⁷ Brack and Gray "MEAs and WTO".

aims of MEAs, they will obviously offset domestic control measures¹⁶⁸ which also have a direct impact on trade.

3.5.2.3 Enforcing MEAs

Trade restrictions found in MEAs play a great role in enforcing an MEA. Trade bans are usually common restrictions under this category. These trade restrictions are aimed at preventing any state that has avoided implanting an MEA because of the cost effect, from enjoying a competitive advantage in trade with other states controlled by the MEA.

CITES sets a good example, as it does not permit trade with non-parties except where documentation equivalent to CITES permits is provided.¹⁶⁹ The same procedure has been used in cases where countries have persistently been non-compliant with the Convention. The Standing Committee of the CITES Conference has in this regard recommended that all parties take stricter domestic measures than those provided by the treaty, including complete prohibitions of trade against the offending countries.¹⁷⁰ Similarly, the Kyoto Protocol targets Annex 1 states.

The Basel Convention¹⁷¹ permits the exportation of waste only to party states unless the country in question is a signatory to another agreement bilateral, regional or multilateral. If the agreement was reached before the Basel Convention entered into force, it must be “compatible” with the aims of the Convention; if reached later it must not be “less environmentally sound” than the Basel Convention.¹⁷²

Trade restrictions under this category become very controversial in that trade restrictions are indirectly imposed on countries that have not agreed to become party to the MEA and usually amount to an infringement upon a state’s sovereignty. The above analysis on

¹⁶⁸ These measures include border tax adjustments, exemptions and revenue recycling.

¹⁶⁹ The procedure has also been used against states not party to the Convention, after persistent refusal to provide “comparable documents” to CITES licenses. Cases include Singapore, Grenada, El Salvador and Equatorial Guinea. A total of thirty seven countries have been subject to the process, which starts with warnings; seventeen have been subject to general CITES or species-specific trade bans, and in almost every case the country has come back into compliance or acceded to the Convention (Brack and Gray “MEAs and WTO”).

¹⁷⁰ CITES Article XIV (1).

¹⁷¹ Article 7.

¹⁷² Brack and Gray “MEAs and WTO”.

trade restrictions clearly reflects that trade restrictions, though not immune to abuse, are important features in the efficient running of MEAs and for this reason their inclusion in MEAs is justified. But it is important to determine whether or not this inclusion of trade restrictions acts contrary to the WTO obligation on free trade.

3.5.3 Clash of Cultures — Multilateral Environmental Agreements versus World Trade Organisation

The conflict between the obligations of countries as members of the WTO and their obligations as members of MEAs has generated much debate and require more analysis.¹⁷³ The alleged conflict raises two questions: whether trade sanctions would be permitted to enforce environmental policies and whether imports would be restricted if they are not processed in a way that meets the domestic environmental standards of the importing country. What seems to be at stake here are a country's WTO obligations, as they generally do not allow such trade controls. This section of the thesis will explore the existing conflict between WTO and MEAs and then seek to find solutions to the conflict by addressing the questions posed above.

A general conflict in the present circumstances will exist in instances when one treaty (MEA) requires a particular course of action that is either prohibited in the other instrument (WTO) or the latter instrument requires the opposite action. The incompatibility emerges where a party to both treaties cannot comply with the obligations under both treaties simultaneously.¹⁷⁴ By virtue of including trade restrictions in them, MEAs are likely to clash with the founding obligation of the WTO — to eliminate trade restrictions and a party to both treaties will usually find himself in a dilemma as to which route to take — whether or not to impose restrictive trade measures under an MEA or risk violating WTO obligations.

The conflict in question is inevitable when it comes to the interpretation of measures in MEAs and WTO rules. It arises from the fact that WTO rules bar members from

¹⁷³ Oxley "Environmental Protection and WTO".

¹⁷⁴ Jenks "The Conflict of Law-Making Treaties" (1953) 30 *British Yearbook of International Law* 401 at 426.

imposing their own policies extra-territorially, under the threat of trade bans, and it bars members from discriminating against each other in their trade policies. In contrast, the MEAs require that trade be conducted only if the WTO member country applies the policies and standards of the MEA. Basic WTO rules call for non-discrimination among members, like products and between domestic and international production. MEA-based measures are most likely to violate these expectations in cases where imports are treated less favourably than domestic goods in the markets. Though the WTO provides exceptions in Article XX of the GATT, no reference is made to MEAs under the exception.¹⁷⁵ A violation of WTO rules by MEAs serves as the first possible ground of conflict.

The WTO seeks to promote efficient trade, but MEAs at times impose a total ban on trade, as evidenced by provisions included in CITES and the Basel Convention that place a ban on trade and “proscribed materials” respectively. Such bans amount to a violation of WTO rules. CITES contains enforcement-related trade measures directed mainly against non-complying parties and non-parties.¹⁷⁶ Enforcing such measures might not be justifiable before the WTO as this might turn out to be a source of unfair discrimination which restricts trade. CITES might, however, escape the accusation of discrimination on the basis that the Convention contains language that might ensure mutual supportiveness with WTO requirements. The Convention provides:

“The provisions of the present Convention shall in no way affect the provisions of any domestic measures or obligations of parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking possession or transport of specimens which is in force or subsequently may enter into force for any party including any measure pertaining to the customs, public health, veterinary or plant quarantine fields.”¹⁷⁷

In this regard the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) may be used to access WTO-compatibility with CITES trade measures and the requirements for import and export licences.¹⁷⁸ The Basel Convention on the other

¹⁷⁵ This exclusion may be explained on the basis that very few MEAs existed when the GATT was first written.

¹⁷⁶ CITES Articles VIII (1) and (2).

¹⁷⁷ Article XIV (2).

¹⁷⁸ Brack and Gray “MEAs and WTO”.

hand restricts trade in hazardous waste to exports of specified material only and places a total ban on other proscribed materials. By restricting and banning trade the Basel Convention at the onset does not fulfill WTO obligations which aim at free trade. Unlike CITES the Basel Convention cannot escape apportionment of the blame on the basis of language compatibility. By failing to accord any recognition to international trade obligations, the Convention creates another conflicting aspect that it does not take cognizance to priorities of other international organisations like the WTO.¹⁷⁹ It can therefore be inferred that there is no specific requirement that WTO obligations are to be taken into consideration when implementing any trade measures relating to hazardous waste, suggesting that the parties intended to keep hazardous waste a distinct and separate class of products.¹⁸⁰ Such inference finds support in *S D Meyers Incl. vs Canada* where the court held that where a NAFTA party had a choice among equally effective and reasonably available alternatives for complying with the Basel Convention they should choose the alternative least-inconsistent with NAFTA.¹⁸¹

With regard to the Kyoto Protocol, the discriminatory element can immediately be identified from the requirement of the Protocol that “only parties to the Kyoto Protocol can participate in the Kyoto mechanisms”.¹⁸² The result of such an exclusion is that markets in emission permits or the Clean Development Mechanisms (Certified Emission Reductions) (CERs) would be barred to non-parties. On this ground, it has been held that licences or permits provided by the parties to the Kyoto Protocol are a form of government regulatory activity, and would not be equivalent to either a good or a service under WTO disciplines.¹⁸³

Furthermore various articles of the Protocol may constitute possible sources of conflict between the two agreements. Article 15 of the Convention on Biodiversity (CBD) for instance, permits states to limit or place conditions on access to genetic resources. This

¹⁷⁹ Yu “Discussion Paper on the World Trade Organisation and Multilateral Environmental Agreements” <http://www.iucn.org/themes/pbia/themes/trade/training/Multilateral%20Env%20Agreements%20and%20WTO.pdf> (accessed 25 May 2005).

¹⁸⁰ *Ibid.*

¹⁸¹ *S D Meyers vs Government of Canada* (2001) 40 International Legal Materials 1408.

¹⁸² Articles 2 and 3 Kyoto Protocol.

¹⁸³ Wisner “Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services” (2002) 2 *International Journal Global Environmental Issues* 293 at 294 argues that CERs would neither be a good nor a service, but a licence instilling a future right to pollute and therefore not subject to WTO scrutiny.

provision could in theory be WTO-inconsistent, though its implementation would depend on the design of genetic resources and whether the states treat foreign companies differently from domestic enterprises.¹⁸⁴ The CBD might similarly be under scrutiny if analyzed under the TRIPS Agreement.¹⁸⁵ The conflict arises from whether WTO members would be obliged to provide intellectual property protection to plant parts such as cells or genes conferred in other jurisdictions by countries that have allowed for such patentability, which would then have implications for access and benefit-sharing regimes.¹⁸⁶

3.5.4 Possible Solutions to the Ongoing Conflict between Multilateral Environmental Agreements and the World Trade Organisation

Since there has not yet been a dispute involving an MEA trade measure that contradicts WTO rules,¹⁸⁷ any discussion on how such a conflict might be resolved by either the WTO dispute settlement body or by MEA's procedures is speculative. Because of the possibility that disputes may arise in future, it is worthwhile analysing possible solutions that may be used by the relevant dispute settlement Panels to resolve disputes.

The first possible solution will be to resort to interpretation of international law. Because international law governs the WTO agreements and their interaction with MEAs this form of dispute resolution is justified. The WTO agreements are treaties to be interpreted in accordance with "customary rules of interpretation of public international law".¹⁸⁸ MEAs are international treaties, and therefore form part of international law. Accordingly, the Appellate Body in the *Reformulated Gasoline* case linked the WTO and the MEAs by upholding that WTO agreements are not to be viewed in clinical isolation from other rules of international law, including treaties.¹⁸⁹ From this perspective it therefore becomes possible for a WTO Panel or Appellate Body to consider MEAs in the

¹⁸⁴ Article 26 of the CBD.

¹⁸⁵ Article 27.2 of TRIPS allows members to exclude from patentability inventions for the purpose of protecting *ordre public* or morality, including protecting human, animal and plant life or health or to avoid serious prejudice to the environment. Article 27.3 (b) at the same time allows members to exclude plants and animals from being patented but prohibits members from excluding micro-organisms, non-biological and micro-biological processes from patenting.

¹⁸⁶ Brack and Gray "MEAs and WTO".

¹⁸⁷ *Ibid.*

¹⁸⁸ Article 3.2 of the WTO Dispute Settlement Understanding.

¹⁸⁹ *United States — Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, 20 May 1996, adopted WT/DS2/AB/R, DSR.

interpretation of the WTO agreements that include GATT Article XX exceptions. In interpreting Article XX the necessity test is of importance as well as the need to opt for the least restrictive measure which does not represent “arbitrary and unjustifiable discrimination”. MEAs may in various circumstances be found to be such measures and therefore in line with the WTO.¹⁹⁰

However, in the event that conflict between the WTO and the MEA is unavoidable then the measure taken pursuant to an MEA could be justified as necessary for the purposes listed in GATT Article XX (b) or (g) under the general preference for multilateral instead of unilateral action underlying the WTO.¹⁹¹ MEAs may therefore in this regard be the preferred context for trade measures.

Another possible solution is to integrate the dispute settlement mechanisms. Both MEAs and the WTO possess dispute settlement mechanisms — various methods to resolve disputes and the DSU respectively. WTO offers a relatively strong mechanism as decisions are binding on all WTO members where there is a trade consequence of a particular measure.¹⁹² On the contrary, the context of the MEA mechanism imposes requirements on parties and concerns itself with matters of compliance or non-compliance. A number of MEAs¹⁹³ have developed effective non-compliance mechanisms that cover incentives in the form of financial and technical assistance, backed up by disincentives such as the withdrawal of financial assistance and trade measures.¹⁹⁴ Though the range of options and flexibility of addressing non-compliance have been received favourably by parties, the WTO is often perceived to be more effective than equivalent MEA measures since WTO dispute settlement is compulsory. Preference has therefore been given by international states to the WTO dispute settlement in trade disputes involving an MEA.

¹⁹⁰ The existence of the MEA, or the negotiations leading to an agreement, could help to prove the “necessity” of the exception claimed under Article XX (b), whether the measure is “related to” the objective sought in the trade measure under Article XX (g), and also as multilateral measure not “arbitrary” under the Preamble of Article XX.

¹⁹¹ *United States — Import Prohibition of Certain Shrimp and Shrimp Products* Appellate Body Report, 6 November 1998, adopted WT/DS58 AB-2001-4. The acceptance of a unilateral trade-related environmental measure in this case suggests that a measure taken under a wider, multilateral agreement could well survive a WTO challenge.

¹⁹² Marrakesh Agreement Annex 2.

¹⁹³ For example, the Kyoto and Montreal Protocols.

¹⁹⁴ Anonymous “Kyoto Protocol”.

It may however be argued that MEAs might, by recognizing their specific nature, form a *lex specialis*, meaning that “a later law, general in character, does not repeal an earlier law which is special in character”.¹⁹⁵ This principle becomes relevant for MEAs agreed to prior the establishment of the WTO. Under the principle, no conflict is likely to arise since MEA provisions would override general international trade obligations under the WTO agreements. However, it remains uncertain that WTO Dispute Settlement Body would respect the *lex specialis* of MEAs.¹⁹⁶

The *lex specialis* principle finds support under the rules of treaty interpretation. The Vienna Convention on the Law of Treaties provides that when treaties dealing with the same subject matter are in conflict then the treaty that came into force last will prevail.¹⁹⁷ In cases where there is a conflict between two treaties and one party is not a party to both instruments, then the agreement that both parties ratified will prevail. Where a treaty specifies that it is not to be considered as incompatible with an earlier or later treaty then the provisions of the other treaty are to prevail.¹⁹⁸ The earlier treaty would apply only to the extent that provisions of the earlier treaty are incompatible with the later treaty.¹⁹⁹

Dispute settlement mechanisms could also be integrated by increasing contact between the Secretariat staff responsible for dispute settlement, increasing information flow between MEA Secretariats and the WTO Secretariat.²⁰⁰ Promoting expert participation in the WTO process for alternative dispute settlement through, for example, good offices, conciliation and mediation, will also reap positive results towards the integration of mechanisms. All these measures could help to broaden the information available to the WTO dispute settlement mechanism and break down its institutional isolation from non-trade concerns.²⁰¹

¹⁹⁵ The principle of *lex specialis* does not appear in the 1969 Vienna Convention on the Law of Treaties although it has been recognised as a principle of treaty interpretation by the Permanent International Court of Justice (Brack and Gray “MEAs and WTO”).

¹⁹⁶ Brack and Gray “MEAs and WTO”.

¹⁹⁷ Article 30 (4) Vienna Convention on the Law of Treaties.

¹⁹⁸ Article 30 (2) Vienna Convention on the Law of Treaties.

¹⁹⁹ *Ibid.*

²⁰⁰ Stilwell and Tarasofsky “Environmental and Economic Governance”.

²⁰¹ *Ibid.*

An MEA “saving clause”²⁰² is also a possible solution that might help resolve the conflict between MEAs and WTO requirements. The “saving clause” may provide greater clarity on how MEAs that follow trade-restrictive measures should be treated at the WTO. The clauses are to be interpreted under the customary international legal rules of interpretation, which provide that where a treaty expresses that it is subject to, or not to be considered incompatible with an earlier or later treaty, the provisions of the other treaties prevail.²⁰³ For MEAs negotiated after 1995, this would include WTO agreements. Therefore, in terms of the Vienna Convention on the Law of Treaties,²⁰⁴ WTO rules would be applicable to parties of the MEA in the event of any conflict between a measure taken pursuant to an MEA and WTO obligations.

“Saving clauses” may in a way give recognition to mutual supportiveness of MEAs and the WTO. Mutual supportiveness reflects on parties’ intentions not to terminate previous obligations when signing new agreements and this implies compatibility. Inference of mutual supportiveness in this regard creates no problems, but problems tend to arise when the nature of mutual supportiveness is used to mask underlying tensions between two regimes.

The eco-labelling²⁰⁵ scheme is another possible resolution to the conflict between MEAs and the WTO. An eco-label is a seal or logo suggesting that a product is environmentally friendly. Eco-labeling programs aim at harnessing market forces and channeling them towards promoting more environmentally-friendly patterns of production. This is so because eco-labels provide consumers with easily recognizable symbols, indicating that the product environment-friendliness has been assessed and approved. In so doing, consumers can make informed purchasing decisions creating a higher environmental consciousness. Eventually, the manufacturers will be forced to change their process into a more environmental-friendly process otherwise they would risk losing markets.²⁰⁶

²⁰² “Saving clause” has been added to MEAs in order to ensure that the agreement’s provisions do not override existing obligations of the parties under other international agreements, such as WTO agreements.

²⁰³ Article 30 (2) of the Vienna convention on the Law of Treaties.

²⁰⁴ *Ibid.*

²⁰⁵ Eco-label is also referred to as “green-label”. It’s coming into being is accompanied with the political awakening and rising level of public concern with the environment protection. The Germany government was the first to launch the eco-label program in 1978, Anonymous “Free Trade and Environmental Protection”.

²⁰⁶ Anonymous “Free Trade and Environmental Protection”.

Although most industrialized countries have adopted the eco-label program at local, national, regional or international level,²⁰⁷ it is still argued, especially by developing countries, that eco-labelling acts as a *de facto* trade barrier. Developing countries feel that the labelling scheme may often result in discrimination against foreign producers and is also a non-tariff barrier to free trade. They argue that the nature of the labelling scheme is discriminatory because its goal is to select only those products that have less significant environmental impact compared with other products in the same category. On the face of it, eco-labelling is considered as a tariff barrier because it places small and foreign producers at a disadvantage mainly because of the costs involved.²⁰⁸ Practically, however, eco-labelling has been successfully implemented in those countries that have adopted the scheme.²⁰⁹ And on these grounds eco-labelling accordingly qualifies as an appropriate solution to the possible conflict between MEAs and the WTO.

In order to assure environmentalists' fears that the rules of international trade will be used to override environmental programs, the WTO should deem GATT-consistent those measures used to enforce significant existing MEAs such as CITES and at the same time adopt rules to guide the future use of these trade measures.

To help reconcile the tensions between environmental policies and liberalized trade the WTO should make clear that the Article XX environmental exceptions apply to the TBT and SPS Agreements.²¹⁰ It would also be useful for WTO Panels reviewing challenges to environmental standards to adopt a principle similar to the "arbitrary and capricious" standard applied by the United States Administrative Law, aimed at "intentionally or egregiously discriminatory" regulations.²¹¹ This standard of review would help in that it would unveil misuses of environmental policy for protectionist purposes but at the same time allow legitimate environmental programs to stand.

²⁰⁷ Included among these are Canada, Japan, Norway, Austria, France and Singapore.

²⁰⁸ Anonymous "Free Trade and Environmental Protection".

²⁰⁹ The CTE recognises the effectiveness of the eco-labelling programme by stating that "well-designed eco-labelling schemes/programs can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer."

²¹⁰ Charnovitz "Trade Measures in Treaties" 74.

²¹¹ Croley and Jackson 1996 in Charnovitz "Trade Measures in Treaties" 76.

The recommended solutions above seem to allow the imposition of trade sanctions for enforcing environmental policies provided that these are justified under principles of fair trade. The restriction of imports that do not comply with domestic environmental standards of importing countries is also permissible, provided that such restriction is genuine, justified and non-discriminatory.

3.6 CONCLUSION

Over the past century the multilateral system of the world trade rules has provided a stable environment under which international trade has flourished.²¹² However, the fast growing consumption and over-exploitation of natural resources and the environment at large has seen the WTO come under fire. NGOs and environmental groups, among others, have objected to WTO rulings on trade and environmental issues. For this reason the MEA-WTO relationship has become an issue that can no longer be ignored and if the whole trade/environmental debate is not given adequate attention, then an inaccurate image of the WTO as an institution that has no interest in environmental issues is reinforced.

Though the use of trade restrictions in MEAs has been criticized as opening the trade market to protectionism, the use of MEAs is widely accepted internationally as a possible solution to trade/environmental disputes. As a rule, however, all standards regulated by MEAs must be applied in accordance to GATT National Treatment and MFN principles. The rule regulating MEAs in theory solves the problem of protectionism but ironically, trade restrictions contained in MEAs remain controversial and tend to contradict the two principles set under the GATT.

The problems raised by the trade/environment relationship are not unique phenomena and should be treated just like any other problem encountered in the implementation of new ideologies in any other system. The international community has responded to the problems posed by environmental degradation by adopting national, regional, and global level measures which have made it possible to develop a set of standards, principles and

²¹² Irwin *Free Trade under Fire* (2003) 179.

rights aimed at protecting the environment. Included among these measures are CITES, the Basel Convention and the Kyoto Protocol. Although these three agreements are not in themselves enough to guarantee a healthy environment because of the problems encountered in implementing them, the agreements do reflect a recognition of the right to a satisfactory environment and, if implemented in conjunction with other instruments not dealt with in this thesis, constitute progress to that end.

It is true that the WTO Appellate Bodies have given less restrictive interpretations in subjecting MEAs to WTO agreements. The reason behind all this is to amicably resolve conflicts between states but this does not necessarily mean that future disputes are avoided. More disputes touching on the MEA-WTO relationship are likely to arise and there is therefore need to put into place measures that will guard against such eventuality. The starting point would be to contextualise the MEA-WTO relationship by implementing a principled and prescriptive approach that governs mutual supportiveness. Integrating various dispute settlement measures to give a more powerful approach to trade/environmental disputes can also conquer the conflicting relationship. Such a move will definitely set the foundation for sound rulings at the dispute settlement boards.

Getting the WTO to accept the use of trade restrictions as a tool for enforcing MEAs is an important aim for environmental advocates, but free traders view this initiative as being detrimental to their efforts of reducing trade barriers and discouraging the use of trade measures to advance non-trade policies. While advocates for liberalized trade seek disciplines on national environmental policies so that they cannot be used to obstruct trade, environmentalists see the same agenda as an infringement on sovereignty in the regulatory domain. As a result, even if environmentalists and traders can agree on the need for action, they will often disagree about the direction reform should go. This debate will continuously cause conflicting views and decisions in trying to merge trade restrictions with environmental policies. For these reasons it is necessary to analyse the tension that exists between free trade and the environment so as to formulate a possible and effective solution for the ongoing disputes in the trade and environment arena.

CHAPTER 4

CONFLICT BETWEEN FREE TRADE AND ENVIRONMENTAL PROTECTION

4.1 INTRODUCTION

The establishment of the General Agreement on Tariffs and Trade (GATT)¹ and the World Trade Organisation (WTO)² is founded on the belief that trade liberalisation is important in enhancing the world economic welfare.³ But, on the other hand, it has become evident that environmental protection is also an important objective among international states, as evidenced by the United Nations Conference on Environment and Development (UNCED) in 1992 where nations adopted the Rio Declaration. With such value placed on the environment, the cause of environmental degradation has become a global concern, raising various views on the issue. Some believe that free trade leads to depletion of natural resources and pollution of the environment, while others identify poverty as the primary cause of environmental degradation. Some states use trade measures to protect the environment but other states are opposed to such measures. The diverging views clearly depict that the opinions of environmentalists and free traders differ and that there are also differences in attitude on the issue between developed and developing states.

Free traders have argued that environmental degradation may even emanate from the very use of good environmental policies that include trade-restrictive measures and therefore restricting trade is actually an inefficient and unreliable way to protect the environment.⁴ More importantly, the developing world has contended that if the unilateral establishment and enforcement of environmental standards were permitted they could be used to block or restrict access of developing countries' products into the markets of developed countries. On the other hand, the environmentalists argue

¹ GATT was established in 1947 and was amended on a number of occasions until 1994.

² The Marrakesh Agreement establishing the WTO was concluded on 15 April 1994 and entered into force on 1 January 1995.

³ The GATT preamble indicates that the aim of member states is to "reduce tariffs and other barriers to trade"; an aim further enhanced in the preamble of the Marrakesh Agreement.

⁴ Copeland and Taylor *Trade and the Environment: Theory and Evidence* Princeton (2003) 107.

that unrestricted free trade will lead to the degradation and ultimate destruction of the environment.

The use of MEAs has raised concerns, especially when trade restrictions embodied in them are used as protectionist measures. For instance, the 1987 Panel report on *US Taxes on Petroleum and Certain Imported Substances*⁵ found that the taxes on petroleum discriminated against imported products in violation of Article III (2) of the GATT. The USA did not even argue that this tax discrimination had been necessary for achieving the set environmental objectives. This is a clear indication that trade-restrictive measures adopted by the USA had been used for protective means, and the USA could not find any basis for disputing that fact.

Another form of abuse clearly lies in the adoption of unilateral environmental policies that are implemented by states, mainly for the protection of their domestic industries. In this regard, disadvantages of unilateral environmental policies outweigh the advantages as states have a tendency to adopt unilateral environmental policies under the pretext of protecting the environment; but in reality these policies are disguised restrictions.

For these and other reasons dispute settlement has been and still remains a focus of inter-state relations as well as an important tool for dealing with international trade/environmental problems. Recently the international community has paid increasing attention to the need for development and use of dispute avoidance mechanisms, improving implementation and compliance with international obligations to curb trade/environmental disputes.⁶ The United Nations Environmental Programme (UNEP), which among its objectives aims to develop mechanisms that facilitate the avoidance and settlement of environmental disputes, evidences this.⁷ For this objective to be fulfilled, UNEP has developed methods, procedures and mechanisms that promote informed decisions, mutual understanding and confidence-building, with a view to avoiding environmental disputes and, where such avoidance is impossible, to promote peaceful settlement.

⁵ *United States — Taxes on Petroleum and Certain Imported Substances*, Panel report 17 June 1987, adopted BISD 34 S / 136 – 166.

⁶ Timoshenko (ed) *Dispute Avoidance and Dispute Settlement in International Environmental law: Compilation of Documents* (2001) 5.

⁷ UNEP Programme for the Development and Periodic Review of Environmental Law for the 1990s (Montevideo Programme II).

This chapter will outline the different views and attitudes that exist regarding the issue of free trade and the environment. Furthermore, the concerns raised in the previous chapter will be addressed: whether free trade is the absolute answer to environmental disputes or whether states should maintain MEAs to protect the environment. Relevant cases to the trade/environmental debate will be discussed, focusing on the settlement of disputes under the overarching GATT/WTO Dispute Resolution Mechanism.

4.2 CONFLICTING OPINIONS AND ATTITUDES TO FREE TRADE AND ENVIRONMENTAL PROTECTION

4.2.1 What is Trade Liberalisation?

In simple terms, trade liberalisation is “free trade”. Free trade refers to trade arrangements where tariffs or other barriers to the free flow of goods and services are eliminated. Proponents of free trade contend that for trade to be advantageous to all parties involved, “all duties, customs and excise (on imports) should be abolished and free commerce and liberty of exchange should be allowed with all nations”.⁸

Free trade is based particularly on the gains from specialisation and exchange.⁹ In terms of specialisation, a state maximises production in those goods and services in respect of which it has a comparative advantage and imports the goods and services produced by another state for which the former state has a comparative disadvantage.¹⁰ Such specialisation, according to Irwin,¹¹ enhances productivity, thereby having a positive impact on a state’s economy. Production is enhanced because a state specialising in a particular item will develop strategies that enable its industries to produce more goods of the same kind using the same resources. And

⁸ Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1976) 511 and 514.

⁹ Irwin *Free Trade under Fire* (2002) 22.

¹⁰ The theory of comparative advantage can be explained by the following example: assuming the people of Zimbabwe and South Africa (SA) survive on tobacco and radio sets and both states have the capacity to produce the two goods. However, in producing 50kgs of tobacco Zimbabwe uses R200 and the same production costs SA R250. The production of one radio costs SA R200 and Zimbabwe R250. This means that Zimbabwe has a comparative advantage in the production of tobacco while SA has a comparative advantage in the production of radios. The same principle can be re-stated by saying that Zimbabwe has a comparative disadvantage in the production of radios while SA has a comparative disadvantage in the production of tobacco. Therefore, in terms of the theory Zimbabwe would export the good that it produces most efficiently (tobacco) and import the goods that SA produces most efficiently (radios).

¹¹ Irwin *Free Trade* 22.

obviously, by virtue of being a specialist in a particular field, quality production is guaranteed. Because of the benefits encompassed by the theory of comparative advantage, free traders allow for the free exchange of goods and see no reason why trade between states should be limited in the absence of a compelling reason to do so.

Why is free trade a desirable policy? Free trade has been preferred by international states because of the advantages it offers.¹² It increases competition in the home market as domestic industries will strive to meet the standards of imported goods. Such competition is healthy for any market as it encourages production of quality goods and curtails the power of domestic industries to exploit consumers through high prices and poor services. Furthermore, a country would gain from free trade by exchanging exports of goods that are costly on the world market for imports of goods that are cheap on the world market. And in the long run this form of exchange enhances interstate relationships, thereby promoting stability which in turn permits a healthy economy.

Moreover, free trade enables all countries, particularly developing states, to extend the effective size of their market. This is so because under such circumstances trade allows developing countries to reap a higher income than if international exchange were artificially limited by government policies. For developing countries the theory of comparative advantage is beneficial. Even if the state lacks an absolute productive advantage in any field it will always have a comparative advantage in the production of some goods¹³ and in turn could use the export revenues to improve their standard of living; for example, using the export revenue to purchase scarce commodities like fuel and medicine. With free trade being promoted by the theory of comparative advantage no country is prevented from engaging in mutually-beneficial trade with other countries because of economic circumstances. It must however be noted that the comparative advantage principle does work in theory, but when implemented practically, it has some flaws. This is so because developed states have a tendency to

¹² This view is clearly indicated by the WTO's primary aim that focuses on the promotion of free trade. Furthermore states like Chile, New Zealand, Spain, Japan, Canada, and Turkey, among others, have embarked upon the course of trade liberalisation and have experienced rapid growth in productivity.

¹³ For example, countries like Korea and Bangladesh are unable to match the productive efficiency of any USA industry, but are still able to export some goods to the USA.

counter comparative advantages of developing states by granting subsidies, particularly in the textile and agricultural industries.¹⁴

There is also a rebuttable presumption that free trade permits states to benefit fully from all the advantages that trade offers. Economically, the advantages of trade fall under two categories: direct economical advantage and productivity gains.

Direct economic advantage basically refers to the positive impact that trade has upon the economy of any state. Trade includes the exporting and importing of goods, and by exporting some of its domestically-produced goods in exchange for imports, a state engages in mutually-advantageous trade that enables such state to use its limited productive resources (like land, labour and capital) more effectively. Trade viewed in this manner results in higher national income returns than there could be in the absence of trade.¹⁵

According to Mills,¹⁶ trade is also advantageous in that it increases productivity gains, which ensure that resources are not only brought to their most efficient use, but are made more productive within states' industrial activities. This means that by producing goods targeted for a larger market than its own, a country is likely to make improvements and inventions in the process of production. International trade contributes to productivity in that it encourages the transfer of foreign technologies between states and this enhances productivity through increase of competition, which stimulates industries to become more efficient and improve their productivity.¹⁷ Without trade, all these favourable economic factors may not be possible and industries risk going out of business.¹⁸

¹⁴ The Cancun Ministerial Conference 2003 was dominated by the issue of reduction of subsidies granted by developed states in the agricultural and textile sectors of their industries.

¹⁵ Mills *Principles of Political Economy* (1848) in Irwin *Free Trade* 35.

¹⁶ *Ibid.*

¹⁷ For example, the South Carolina textile industries owned by Milliken bought textile machinery from Switzerland and Germany because domestically-produced equipment is more costly and less sophisticated than that which the industry imported. This imported machinery has enabled Milliken's firms to increase productivity significantly (Eaton and Kortum "Trade in Capital Goods" in Irwin *Free Trade* 49).

¹⁸ Kim "Trade Liberalization and Productivity Growth in Korean Manufacturing Industries: Price Protection, Market Power and Scale Efficiency" (2000) 62 *Journal of Development Economics* 55 at 57 points out: "Detailed studies of India's trade liberalization in 1991 and Korea's in the 1980s reached essentially the same conclusion: trade not only disciplines domestic firms or force them to behave more like a competitive industry, but helps increase their productivity."

The advantages of free trade contribute to the adoption of better technology and at the same time expose domestic industries to new competition that forces them to improve their productivity. Consequently, engagement in trade helps raise the per capita income and that generally improves the state's economy.

Although free trade on the face of it appears to be an attractive principle for benefiting a state's economy, it is not free from problems. Among these problems exists the major dispute presented by environmentalists. Environmentalists argue that free trade is not good for the environment as it leads to over-exploitation of resources which ultimately amounts to the degradation of the environment. According to environmentalists, the increase in productivity promoted by free trade maybe detrimental since, in a bid to meet productivity standards, producers tend to overlook the importance of protecting the environment from, for example, waste disposals and pollution. In this regard, Nader charges that the "GATT and NAFTA agenda would make the air you breathe dirtier and the water you drink more polluted."¹⁹ Buchanan also claims: "Broken homes, uprooted families, vanished dreams, delinquency, vandalism, crime — these are hidden costs of free trade."²⁰

On the whole, free trade, together with the organisations promoting it,²¹ is viewed by environmentalists as "systems that serve the interests of corporations rather than people, harms workers, decimates manufacturing industries, sweeps aside environmental regulations and undermines state sovereignty."²² One wonders, however, whether such criticisms against free trade, particularly its adverse impact on the environment are entirely fair.

4.2.2 Environmental Protection

As seen in Chapter 3, environmental protection at both national and international levels includes the use of trade-restrictive measures. These trade restrictions may, according to Schoenbaum, be grouped into four categories: (a) regulations on imports and exports, (b) trade restrictions to enforce environmental standards in international

¹⁹ Nader (ed) *The Case against Free Trade: GATT, NAFTA, and the Globalisation of Corporate Power* (1993) 1.

²⁰ Buchanan *The Great Betrayal: How American Sovereignty and Social Justice are being Sacrificed to the Gods of the Global Economy* (1998) 286.

²¹ Organisations promoting free trade are, for example, the WTO, SADC and NAFTA.

²² Buchanan *Great Betrayal* 286.

agreements, (c) trade restrictions in response to perceived inadequate environmental protection, and (d) controls on the export of hazardous products, technologies and waste.²³

4.2.2.1 Regulations on Imports and Exports

Regulations on imports and exports are methods of restricting trade adopted by all nations to safeguard domestic resources and the environment so as to protect public health and safety. This form of restriction promotes state sovereignty and at the same time contributes to economic efficiency, because by implementing environmental standards, states eradicate abuses that would have distorted the international trading system. If states did not have environmental regulations of this nature, producers would be at liberty to impose external costs on society which is bound to result in a misallocation and misuse of resources. Nevertheless, the imposition of environmental and safety standards may result in international controversy because differing environmental standards adopted by states constitute non-tariff barriers to free international trade and may amount to disguised protectionism.²⁴

4.2.2.2 Trade Restrictions to Enforce Environmental Standards in International Agreements

The trade restrictions are included in various international agreements, for example, to protect the ozone layer and stem global warming,²⁵ or to protect endangered species of plants and animals,²⁶ or to restrict international movement of hazardous wastes.²⁷ The use of trade restrictions to protect the environment is not free from problems in the sense that it is difficult to identify the kinds of threats to global resources that can be justified by trade restrictions. What might appear as a threat to one state may not be so to another. Furthermore, measuring the proportionality of the measures

²³ Schoenbaum "Free International Trade and Protection of the Environment: Irreconcilable Conflict?" (1992) 86 *American Journal of International Law* 700 at 703.

²⁴ This was the case in the *Hormone Beef* case where the EC enacted a ban on the importation of hormone-treated beef, which was disputed by the USA as being a disguised restriction resulting in the USA taking retaliatory measures against EC exports. *United States — EC Hormone Beef Controversy and the Standards Code*, Appellate Body report (1985), adopted WT/DS26/AB/R hereinafter *Hormone Beef* case.

²⁵ For example, the Kyoto Protocol 1997 discussed in Chapter 3.

²⁶ For example, the Convention on International Trade on Endangered Species 1973 discussed in Chapter 3.

²⁷ For example, the Basel Convention 1989 discussed in Chapter 3.

employed in relation to the environmental harm is subjective. Trade restrictions in this category can either be unilaterally or multilaterally applied. If unilaterally applied, they are open to abuse and if multilaterally applied, developed states may have an upper hand over developing ones.

4.2.2.3 Trade Restrictions in Response to Perceived Inadequate Environmental Protection Controls in Other Countries

Trade restrictions of this nature are used to compensate for the inadequacy of environmental controls in other states. Compensatory restrictions are usually evident in instances where states with stringent environmental controls question the adequacy of environmental policies in other states, as was the case in *Tuna-Dolphin I.*²⁸ States resort to the restriction for environmental considerations, but in most cases it is because of the realization that the restriction creates unfair competition from foreign companies not subjected to strict environmental controls. Consequently, a nation may employ unilateral trade restrictions to enforce national environmental objectives and to induce other nations to adopt the former's environmental standards.²⁹ Not only does this behaviour result in loss of sovereignty in implementing environmental policies, but also in the restrictive measure taking the form of a surcharge or ban on imported goods.³⁰

4.2.2.4 Controls on the Export of Hazardous Products, Technologies and Waste

The control restriction in question emanates from global concerns over hazardous products, waste and technologies. Countries exporting hazardous products, technologies and waste have undertaken to restrict the export of hazardous products. This may be achieved by either banning the export of those products barred from use in territories of the countries in question, or permitting their exportation through regulations that require prior informed consent.³¹ Both exporting and importing nations may also negotiate multilateral agreements that would cater for the risks involved in exportation. Although these steps taken by exporting countries are useful,

²⁸ *United States — Restrictions on Imports of Tuna*, 3 September 1991, not adopted BISD 39S/155 where the USA felt that tuna fishing methods of the complainant states were inadequate to protect dolphins.

²⁹ *Ibid.*

³⁰ Schoenbaum 1992 *American Journal of International Law* 704.

³¹ Prior informed consent as discussed under the Basel Convention in Chapter 3.

they still create problems. Because the term “hazardous” has never been defined in international trade, it becomes difficult to implement export restrictions on the export of technologies and products. Furthermore, how do states determine the risk assessment methods? Even if risk is assessed determining the method of regulation, there is still a problem: whether to use a tax, ban or prior informed consent, because states tend to select a method that suits them best, not one that best addresses the risk.

4.2.3 Conflict between Free Trade and Environmental Protection

Free trade principles point to the fact that trade liberalisation promotes the economy yet environmentalists view this differently. According to environmentalists the protection of land, water and air is the ultimate good. Free traders see protectionist and discriminatory barriers to trade as evils towards the prosperity of trade. This divergence in approach is emblematic of a range of differences in both substances and style. These differences have also contributed to the rocky start of the WTO’s trade and environment program.³² Controversy has arisen over the use of trade measures in environmental policies because environmentalists would like to see a broad endorsement by the WTO of the trade measures invoked in all existing MEAs and yet free traders advocate for limitations in the use of environmental trade measures constraining trade-based enforcement actions under future MEAs.³³

The tension between trade and the environment exists because advocates of free trade aim to further trade with minimum obstacles. Their main fear lies in that environmental standards may act as trade barriers in certain instances.³⁴ Free traders feel that WTO acceptance of the use of trade restrictions as a tool for enforcing MEAs is detrimental to their efforts to reduce trade barriers and to discourage the use of trade measures to advance non-trade policies. On the contrary, environmentalists attempt to restrict trade, especially in goods that may be harmful to the environment, and therefore advocate for the use of trade-restrictive measures to protect the environment. So they strongly support the need to promote the acceptance by the WTO of trade restrictions at a higher level.

³² Esty “Greening World” http://www.iie.com/publications/chapters_preview/66/4ii2350.pdf (accessed 05 April 2005).

³³ Department of Environmental Affairs, Botswana “Multilateral Environmental Agreements” <http://www.environbotswana.gov.bw/mul.html> (accessed 28 May 2005).

³⁴ Esty and Geradin “Market Access, Competitiveness and Harmonization: Environmental Protection in Regional Trade Agreements.” (1997) 21 *Harvard Environmental Law Review* 265 at 266.

Those in favour of free trade argue that by eliminating trade restrictions, trade is enhanced and economic growth is promoted.³⁵ This is so because by liberalising trade the theory of comparative advantage is promoted and states will engage in specialised production, thereby increasing production. Furthermore, free trade allows for the free movement of goods which is theoretically advantageous to state economies. Environmentalists view the argument raised by free traders differently. They argue that trade liberalisation can harm the environment due to the fact that economic growth is promoted and this stimulates the production of environmentally-damaging products.³⁶ What worries environmentalists most is that with trade liberalisation the focus of international states shifts to market access and this supersedes national environmental standards, which they believe to be the utmost important factor protecting the environment from trade activities.

Another issue raised by free traders is that there should be no inherent conflict between trade and the environment because the two sides share a common objective, which is to better life. Free trade to them is a means of attaining sustainable development, a view that finds support in the Rio Declaration.³⁷ Therefore, free traders feel that trade measures should be used to protect the environment further, not to restrict trade.³⁸ To the free traders environmental policies should strictly be aimed at protecting the environment *per se* and trade activities should not in any way be affected by these environmental measures. Environmentalists find fault in such argument on the ground that free trade destroys the environment³⁹ and therefore believe that environmental measures should restrict trading activities that are destructive to the environment; for instance, the banning of exportation and importation of hazardous products. If only these environmental measures could be

³⁵ Ekins "Trade and Environment" http://www.ecoeco.org/publica/encyc_entries/TradeEnv.doc (accessed 18 August 2005).

³⁶ Wilson "GATT Trade Liberalization and the Environment: An Economic Analysis" in W Scholtz "The Relationship between the Environment and Trade in the WTO: Prolonging the Conflict between North and South?" (2004) 18 *Speculum Juris* 250 at 250.

³⁷ Principle 12 of the Rio Declaration provides "states should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation."

³⁸ Anonymous "Conflict between Free Trade and Environmental Protection" <http://www.law-bridge.net/english/e-environment.htm> (accessed 18 March 2005).

³⁹ Shrybman "Special Committee on the Multilateral Agreement on Investment: Transcript of Proceedings October 1999" http://www.legis.gov.bc.ca/cmt/36thparl/mai/hansard/t12_1001.htm (accessed 02 September 2005); pointed out that the USA-Canada Free Trade Agreement is a "disaster because the environment was utterly and completely ignored".

used without disguised protectionist intentions, then perhaps free traders would accept this proposition, thereby reducing the existing tension.

Free traders strongly feel that there are indeed other factors that have contributed to environmental damage and that trade restrictions are not the only necessary policy instruments to use in the protection of the environment.⁴⁰ They point out that the greatest environmental disasters that took place in Eastern Europe and the former Soviet Union, and that the air pollution caused by state-run, coal burning, capital intensive industries, and the pollution of lakes and streams with toxic chemicals, owe nothing to free trade. These disasters resulted from “a system of centralized decision-making that valued resources less wisely than a system of decentralized markets with well-established property rights and prudent government regulation”.⁴¹ Furthermore, free traders point to the fact that the burning of the Amazon rain forests is largely caused by local inhabitants clearing land for their own use, not by international trade.

Evidently free traders do not attribute environmental degradation to poor trade policies but to poor environmental policies, particularly government policies, lack of public responsibility and even natural disasters.⁴² Poor environmental policies result in inappropriate use of natural resources in the land, sea and air. These government policies are commonly related to the lack of well-defined property rights.⁴³ By failing to establish property rights, it means no one has ownership rights and control over a resource. And once there is lack of control over a resource such resource is open to access which leads to its exploitation that is beyond the socially optimal level.⁴⁴ This could have been avoided if well-established property rights existed because the owners would regulate and charge for the resources; for example, the use of timber in an owned plantation. Based on these arguments, it is clear from a free trader’s point of view that trade policies have at most an indirect effect on environmental problems and therefore trade policies are not the first-best means by which to achieve environmental objectives.

⁴⁰ Anonymous “Free Trade and Environmental Protection”.

⁴¹ Irwin *Free Trade* 48.

⁴² Irwin *Free Trade* 48 and 49.

⁴³ *Ibid.*

⁴⁴ For example, if ownership of a forest is not well defined anyone is at liberty to chop down trees or cut grass for his own use without paying the costs associated with utilizing the resource.

On the other hand, environmentalists view these arguments differently and remain critical of trade liberalisation. In their view, free trade is “responsible for many aspects of environmental degradation and the failure of policy makers to protect the environment adequately”.⁴⁵ On this basis environmentalists argue that free trade amounts to unfair competition, considering, for example, that stringent measures have been implemented by some states over pollution and yet other states having high pollution emissions still promote free trade. It means that producers in states imposing stringent pollution measures face unfair competition from producers that are not subject to strict pollution controls.⁴⁶ This is also evidenced by the fact that negotiations regarding a free trade agreement with Mexico⁴⁷ prompted objection from American companies that they would face unfair competition from plants in Mexico that are subject to less-stringent environmental regulations.⁴⁸

Environmentalists argue that producers who find themselves in such a predicament will migrate to countries having lax environmental regulations and then export their goods to nations with stricter controls. The Kyoto Protocol is a good example where such can happen because only Annex 1 states have undertaken obligations to reduce emission of greenhouse gases.⁴⁹ Environmentalists are of the opinion that the production of pollution-intensive goods shifts to the low income, high polluting developing states and in that way global pollution is still increasing. This is so because the decrease in northern emissions aimed at by the Kyoto Protocol is insufficient to compensate for the increase in emissions by non-Annex 1 states.⁵⁰ Environmentalists feel that because pollution is not local, but trans-boundary, pollution in one country may affect another country’s environment and for this reason free trade should be done away with. Global efforts to protect the environment have already been established in most parts of the world and permitting free trade in some parts and not others would promote divisions among international states.⁵¹

⁴⁵ Anonymous “Free Trade and Environmental Protection”.

⁴⁶ Schoenbaum 1992 *American Journal of International Law* 704.

⁴⁷ The Agreement is NAFTA.

⁴⁸ Barber “Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement” (1992) 5 *Tulane Environmental Law Journal* 429 at 429.

⁴⁹ The Kyoto Protocol Article 2.

⁵⁰ Roarty “The Kyoto Protocol — Issues and Developments Through to Conference of the Parties (COP7) <http://www.aph.gov.au/library/intguide/sci/kyoto.htm> (accessed 08 June 2005).

⁵¹ Anonymous “Free Trade and Environmental Protection”.

Another source of conflict, according to free traders, emanates from the attitude that exists between developed and developing states over the use of restrictive trade measures to protect the environment. Developing countries would rather have free trade for the betterment of their economies as they feel that trade-restrictive measures are used as disguised protectionist measures that bar their goods from developed markets. Furthermore, in most cases trade-restrictive measures have turned out to be unilateral trade sanctions imposed by developed states over developing ones. Such unilateral trade sanctions present problems, especially when used to display controlling characteristics by developed countries over developing ones. Irwin points out that these unilateral trade sanctions are a poor instrument for achieving environmental objectives.⁵² For example, measures taken by the USA to exclude from its market tuna caught with *purse* nets, do not do anything to help the dolphins since affected states can still divert the tuna and shrimp caught using harmful methods away from the USA market to other markets that would accept them, leaving the whole problem unsolved.⁵³ On this basis, free trade becomes preferable and fruitful because the lack of cooperation by a few powerful states in implementing trade-restrictive measures to protect the environment can undermine the trade/environmental goal and interlink.

Developing states further argue that developed countries portray a false image in that they appear to be seen as being concerned with the environment when in actual fact they are not.⁵⁴ Developed states are, for example, the highest consumers of energy and hence cause the highest pollution, yet they are unwilling to reduce their energy consumption. Furthermore, developing states claim that their counterparts export goods that are domestically prohibited in their own territory as well as hazardous waste products to developing countries which led the Basel Convention to ban such activities by developed states.⁵⁵

The economic disparities between states have also resulted in developing states preferring free trade over restricted trade because developed states are economically powerful and tend to use the carrot and stick to raise environmental standards, which

⁵² Irwin *Free Trade* 201.

⁵³ Oxley "Environmental Protection and the WTO" <http://www.ipn.lexi.net/images/uploaded/12-0> (accessed 05 May 2005).

⁵⁴ Anonymous "Free Trade and Environmental Protection".

⁵⁵ The 1995 amendment to the Basel Convention placed an outright ban of exports of waste from developed to developing countries.

developing industries fail to meet. Worse still, though in theory developed countries purport to provide assistance to developing nations to counter financial deficiencies, the latter nations feel that developed states are miserly in providing financial and technological assistance.⁵⁶ Consequently, developing states would rather have non-restricted trade where they could increase production and channel profits to economic and social development projects than use the little resources they have to meet the high environmental standards called for by their developed counterparts.

Environmentalists, however, dispute such propositions and argue that trade liberalisation could cause developing and developed states to lower the environmental standard altogether.⁵⁷ WTO policies promote free trade flow to develop domestic economies. To benefit from the advantages of free trade, developing states that already enjoy the privilege of relaxing their environmental standards will further lower their environmental requirements for some industries. And once one state does this, other states are likely to follow suit so as to keep up with the competitive international markets and lure investing companies into their states. Environmentalists, therefore, claim that in a bid to sustain economies, both developed and developing countries will lower the environmental standards by eliminating trade-restrictive measures and by promoting competition in a situation where international states race each other to the bottom so as to allow free trade. Such moves would undermine established environmental policies and worsen the damage on the already tainted environment.⁵⁸ To conclude this argument, environmentalists charge that even though countries acknowledge the need for environmental protection, their inability to agree or trust each other means that each country will opt for lower levels of protection in order to maximize their market share in the world economy.⁵⁹

The tension that exists between trade and the environment, according to environmentalists, is enhanced further because they feel that the WTO plays a negative role regarding environmental protection.⁶⁰ This proposition is controversial

⁵⁶ Ekins "Trade and Environment".

⁵⁷ Anonymous "Free Trade and Environmental Protection".

⁵⁸ Esty and Geradin 1997 *Harvard Environmental Law Review* 273.

⁵⁹ Anonymous "Free Trade and Environmental Protection".

⁶⁰ The *Tuna-Dolphin I* ruling was one case that was heavily criticised by environmentalists. By finding the USA Marine Mammal Protection Act not necessary to protect animal life within the ambit of Article XX (b), environmentalists felt that the GATT Panel had "given a narrow interpretation of Article XX; an interpretation that jeopardised the future efficacy of international environmental treaties by elevating free trade to a higher priority than environmental interests." (McDonald "Trade and the

and requires an analysis of environmental cases to determine whether these allegations against the WTO hold water.⁶¹

4.3 ENVIRONMENTAL CASES AND WTO RULES OF DISPUTE SETTLEMENT

The WTO rules affecting environmental measures are encompassed in Article XX of the GATT. Article XX has been the focus of disputes because of the interpretations given to the two exceptions specified in sub-sections (b) and (g), as well as the requirement that any environmental trade measure must be implemented in a non-discriminatory manner.⁶² The settlement of disputes under the WTO is governed by the Dispute Settlement Body (DSB) of the organisation that deals with all trade-related matters, meaning that the settlement of trade/environmental disputes falls under this overarching dispute settlement mechanism.

There are only a handful of cases in which the Dispute Settlement Body (DSB) of the WTO made rulings on environmental issues and these serve as landmark cases in the history of the WTO. For the purpose of this study three environmental cases concerning imported gasoline,⁶³ shrimps and turtles,⁶⁴ and asbestos⁶⁵ will be reviewed.

4.3.1 The Reformulated Gasoline Case

4.3.1.1 Facts

Following the amendment to the Clean Air Act, the Environmental Protection Agency (EPA) in the USA promulgated the gasoline rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the USA and to ensure that

Environment: Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order' (1992) 23 *Environmental Law Journal* 402 at 438).

⁶¹ An analysis of environmental cases will be done in the discussion under 4.3.

⁶² Irwin *Free Trade* 192-193.

⁶³ *United States — Standards for Reformulated and Conventional Gasoline*, Panel report and Appellate Body report 20 May 1996, adopted WT/DS2/R and WT/DS2/AB/R.

⁶⁴ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body report and Panel report 6 November 1998, adopted WT DS58.

⁶⁵ *European Communities — Measures Affecting Asbestos-Containing Products*, Appellate Body and Panel report 5 April 2000, adopted WT/DS135.

pollution from the combustion of gasoline did not exceed 1990 levels. The provisions aimed at addressing the ozone and pollution damage experienced by large USA cities as a result of car exhaust fumes.

The gasoline rule permitted only gasoline of a specified cleanliness, (reformulated gasoline) to be sold to consumers in the most polluted areas of the country. In the rest of the country, only conventional gasoline could be sold.⁶⁶ The gasoline rule applied to all USA refiners, blenders and importers of gasoline. The EPA provided two different sets of baseline emission standards.⁶⁷ First, it required any domestic refiner which was in operation for at least six months in 1990 to establish an individual baseline, which represented the quality of gasoline produced by that refiner in 1990. Second, the EPA established a statutory baseline, intended to reflect average USA 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. However the statutory baseline imposed a stricter burden on foreign gasoline producers.⁶⁸ This led Venezuela and Brazil to bring a complaint to the WTO, charging that the USA was applying a more stringent standard on imported gasoline. For this reason, the two complainants claimed that the gasoline rule was prejudicial to their exports and favoured domestic producers, making the rule inconsistent with Articles III , XXIII (1) (b) of GATT, Article 2 (2) of the Agreement on Technical Barriers to Trade (TBT Agreement); and furthermore, the gasoline rule could not be covered by Article XX of GATT.

The USA, on the other hand, argued that the gasoline rule was consistent with Article III of the GATT and was justified under the exceptions contained in Articles XX (b) and (d) and that the rule was also consistent with the TBT Agreement.⁶⁹

4.3.1.2 Ruling

The baseline establishment methods treated imported gasoline less favourably than domestic gasoline.⁷⁰ And for this reason the gasoline rule was found to be inconsistent with Article III.

⁶⁶ *Reformulated Gasoline*, Panel report para 2.2.

⁶⁷ Paras 2.6 and 2.8.

⁶⁸ Para 2.2.

⁶⁹ Para 3.4.

On the question of fitting within the ambit of Article XX, the Panel agreed that a policy implemented to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of “human, animal and plant life or health” mentioned in Article XX (b).⁷¹ However, the Panel did not find the baseline establishment method as being “necessary” under subparagraph (b), as there were other consistent or less inconsistent measures reasonably available to the USA for the same policy objective.⁷² The Panel also considered that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX (g),⁷³ but found that the baseline establishment methods used by the USA were not “primarily aimed” at the conservation of natural resources.⁷⁴ In light of these findings, the Panel ruled that the gasoline rule could not be justified under Article XX (b) and (g).

The Appellate Body determined that while the baseline establishment rules were permissible under Article XX, the USA regulation amounted to unjustifiable discrimination and to a disguised restriction on trade which therefore violated the Chapeau of Article XX. On these grounds the Appellate Body recommended that the regulation be brought into conformity with WTO obligations, but left the USA to determine how it would comply with the ruling.

4.3.1.3 Implementation and Analysis

The USA had three options: it could ignore the ruling, it could let the regulation stand but offer compensation to Venezuela and Brazil,⁷⁵ or it could bring the regulation into conformity with the WTO obligation.⁷⁶

Each option under the DSU and international trade obligations carried its own implications which the USA had to consider. To ignore the ruling, would legally give room to Venezuela and Brazil to withdraw precious tariff concessions extended to

⁷⁰ Para 6.16.

⁷¹ Para 6.21.

⁷² Para 6.28.

⁷³ Para 6.37.

⁷⁴ Para 6.40.

⁷⁵ Compensation could be in the form of lower tariffs on other Venezuelan and Brazilian products.

⁷⁶ Palmetier “National Sovereignty and the World Trade Organisation.” (1999) 2 *Journal of World Intellectual Property* 77 at 83.

USA goods equivalent in value to their lost gasoline exports.⁷⁷ The second possible avenue would have been to keep the existing regulation in place, but compensate Venezuela and Brazil by lowering tariffs against other goods. But this could only work out if compensation were acceptable to the complainants. At the same time this would also mean lowering tariffs on another industry, which the USA was highly unlikely to consider.⁷⁸ Considering these implications the USA finally chose the third option, to bring the regulation into conformity with the WTO non-discrimination requirement.⁷⁹

The Appellate Body required that the same standard be applied to domestic and foreign sources of gasoline and the EPA could have simply raised the domestic standard rather than lowering the standard of imported gasoline. In this regard the WTO ruling did not undermine domestic environmental regulation, the Global Trade Watch alleged.⁸⁰ The USA, despite losing the case, still had the system working in exactly the manner it wanted it to. This raised eyebrows as to whether the ruling had any effect on the WTO obligation violator; the USA could still invoke the same rule against discriminatory regulations in other countries. It must, however, be borne in mind that WTO rulings aim at fair outcomes that are not detrimental to the economies of concerned parties.

Although both the Panel and the Appellate Body ruled against the USA, the reason given by each of them was different. The Panel found that the regulation must be “primarily aimed” at the conservation of natural resource in order to be upheld under Article XX.⁸¹ The Appellate Body, on the other hand, recognized the USA action as primarily aimed at protecting the environment and for such purpose was in line with Article XX (g).⁸² But because the USA Act discriminated between domestic and foreign producers and violated the Chapeau to Article XX, the Appellate Body ruled against the USA. Outcomes of this nature tend to confirm allegations by free traders that the use of trade restrictions in protecting the environment continuously causes

⁷⁷ *Ibid.*

⁷⁸ Palmeto 1999 *Journal of World Intellectual Property* 86.

⁷⁹ To achieve this EPA allowed foreign refiners to use individual baselines, as domestic producers were allowed to do.

⁸⁰ Irwin *Free Trade* 196.

⁸¹ *Reformulated Gasoline*, Panel report para 6.37.

⁸² *Reformulated Gasoline*, Appellate Body report p 21.

problems of discriminating between like products and they must be done away with to give way to free trade.

4.3.2 The Shrimp-Turtle Case

4.3.2.1 Facts

The case was one which required the WTO to assess USA regulations on imported shrimp against GATT relevant provisions.⁸³ The USA Endangered Species Act of 1973 (ESA) lists as endangered or threatened the five species of sea turtles⁸⁴ occurring in USA waters and prohibits incidental capturing of sea turtles within the United States, USA territorial sea and the high seas. The USA, pursuant to the ESA, requires that shrimp trawlers use turtle excluder devices (TEDs) in their nets when fishing in areas where there was a likelihood of encountering sea turtles.

Section 609 of USA Public Law enacted in 1989, prohibits the importation into the USA of shrimp harvested in a manner that might adversely affect sea turtles, unless the harvesting nation was certified to have a regulatory programme for the conservation of sea turtles and an incidental take rate comparable to that of the USA or that the harvesting nation had a particular fishing environment that did not pose a threat to sea turtles.⁸⁵ This, therefore, meant that countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp by mechanical means and wished to be certified and export shrimp products to the USA had to impose on their fisherman the use of TEDs at all times.

The complainants⁸⁶ argued that the import prohibition on shrimp and shrimp products was inconsistent with Articles I (1),⁸⁷ XI (1)⁸⁸ and XIII (1) of the GATT as the prohibition restricted the importation of shrimp and shrimp products from countries which had not been certified, while like products from certified countries could be

⁸³ Articles XI (1), I (1) and XIII (1).

⁸⁴ Sea turtles are characterised as highly migratory species spending their lives at sea, migrating between their foraging and nesting grounds. They have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs) or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). In 1998 CITES included all species of sea turtles under Appendix I.

⁸⁵ *Shrimp*, Panel report para 2.7.

⁸⁶ The complainants were India, Malaysia, Pakistan and Thailand.

⁸⁷ *Shrimp*, Panel report para 7.11.

⁸⁸ Para 7.18.

imported freely into the USA.⁸⁹ The complainants were of the opinion that shrimp must be allowed in the USA market regardless of the “product process” by which they were caught. The USA however claimed that the measures at issue were justified under Articles XX (b) and (g) since these two provisions did not contain jurisdictional limitations or limitations on the location of the animals or natural resources to be protected and conserved.⁹⁰

4.3.2.2 Ruling

The Dispute Settlement Panel ruled against the USA on the grounds that the ban imposed was inconsistent with Article XI⁹¹ and could not be justified under Article XX. The USA ban constituted “unjustifiable” discrimination between countries where the same conditions prevailed and therefore was not within the scope of measures permissible under Article XX.⁹² The Panel further reasoned that to allow such a ban would mean undermining members’ autonomy to determine their own policies.⁹³ The Panel also stated that when considering a measure under Article XX two factors must be considered: whether the measure on its own undermines the WTO multilateral trading system and whether such measure if adopted by other members would threaten the security and predictability of the multilateral trading system.⁹⁴

The USA measure, according to the Appellate Body, qualified for provisional justification under Article XX (g) relating to the conservation of exhaustible natural resources,⁹⁵ but failed to meet the requirements of the Preamble to Article XX and for this reason could not be justified under the Article. Therefore the Appellate Body ruled against the USA on the basis that the ban discriminated between like products of certified and uncertified states. The Appellate Body also justified its ruling by stating that the regulations implemented by the USA were neither transparent nor predictable and on this basis argued that the USA could have negotiated a similar treaty to protect sea turtles in the Indian Ocean as it had done in the Western hemisphere.

⁸⁹ Para 7.20.

⁹⁰ Para 7.24.

⁹¹ Para 7.17.

⁹² Para 7.49.

⁹³ Para 7.51.

⁹⁴ *Ibid.*

⁹⁵ The Appellate Body found that the sea turtles involved constituted “exhaustible natural resources” and that section 609 was a measure “relating to” the conservation of an exhaustible natural resource. *Shrimp*, Appellate Body report paras 134 and 142.

Regarding the multilateral trading system, the Appellate Body ruled that the Panel had made an error in its analysis, and noted that “to maintain the multilateral trading system is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the Chapeau of Article XX”.⁹⁶ The multilateral trading system meant that whether an environmental protection action fell within the ambit of Article XX exception or not, it should first pass the threat to the multilateral trading system. This test, according to the environmentalists, means that under the WTO dispute settlement system, trade prevails over environmental policies in case of a conflict. However, the Appellate Body rectified this perception on trade and the environment by overruling the Panel decision and instead found the USA ban unjustifiable because it discriminated and contravened the Chapeau of Article XX and not on the basis that the ban undermined the WTO trading system.

4.3.2.3 Implementation and Analysis

The ruling did not require the USA to lift its ban on shrimp imports, but required implementation of the ban in a non-discriminatory way or in line with GATT. The USA decided not to lift the ban but elaborated on the guidelines for certification, an option that has since seen Thailand and Pakistan being certified after adopting the TED program.

The initial Panel decision in this case is legally questionable as it raises political issues that have since created problems for the WTO. This is so because the Panel’s decision created a multilateral trading system test that required scrutinizing trade-restrictive measures against the internal affairs of the invoking country and that of other states who were party to the multilateral trading system. The test would therefore mean that the WTO is forced to interfere with the internal affairs of sovereign states — an act that would go beyond the obligations of the WTO. Furthermore, the decision reached by the Panel using the multilateral trading system test created the impression that GATT is in conflict with environmental rules.⁹⁷ Such impression places the WTO in a difficult position as it aims at protecting the environment through the very same GATT rules.

⁹⁶ Para 166.

⁹⁷ Oxley “Environmental Protection and WTO”.

The Appellate Body's decision will not find support of free traders, particularly its support for the imposition of a unilateral sanction by the USA. This position has been viewed especially by developing states as having paved the way for trade sanctions to be used as coercive measures on other states to adopt policy preferences of sanctioning states. This creates room for the politically powerful to impose trade sanctions upon countries which are economically dependent on uninterrupted access to their markets.⁹⁸

The Dispute Panel and the Appellate Body assumed the competence to assess the environmental importance and effectiveness of USA measures, a duty they did not, according to Jackson,⁹⁹ effectively carry out. The USA measure was justified under Article XX (g) of the GATT that addressed conservation, but in truth the Appellate Body did not demonstrate that the USA measure would be effective towards conservation. Although the Appellate Body reasoned that the international community had agreed in CITES that migratory turtles were in danger of extinction, they judged the USA measures for their preservation value (would it save turtle lives?) and not for their conservation value (would it conserve the species?).¹⁰⁰ Scientific evidence before the Panel showed that the measures had little conservation effect since restricting shrimp from the complainants had little effect as the USA was not a significant shrimp export market for India, Malaysia, Pakistan and Thailand.¹⁰¹

4.3.3 The Asbestos Case

4.3.3.1 Facts

Chrysotile asbestos is generally considered to be a highly toxic material, the exposure to which poses threats to human health such as risk of asbestosis, lung cancer or mesothelioma.¹⁰² However, owing to their special qualities, like resistance to very high temperatures and to different types of chemical attack, asbestos fibres have found wide use in industrial and commercial applications.¹⁰³

⁹⁸ Oxley "The Environmental Threat to Development in the Doha Development Round" <http://www.apec.org.au/docs/oxley2002.pdf> (accessed 25 March).

⁹⁹ Jackson *The Jurisprudence of GATT and the WTO* (2000) 431.

¹⁰⁰ Oxley "Environmental Protection and WTO".

¹⁰¹ Oxley "Environmental Threat to Development".

¹⁰² *Asbestos*, Panel report para 3.66.

¹⁰³ Para 2.2.

In the light of these circumstances, the French government, which had previously imported large amounts of chrysotile asbestos, adopted a Decree that provided for a ban on asbestos fibres and products containing asbestos fibres. The European Communities (EC) argued that in prohibiting the use of asbestos and products containing the asbestos, the Decree sought to halt the spread of the risks due to asbestos, particularly for those exposed occasionally and very often unwittingly to asbestos when working on asbestos-containing products.¹⁰⁴ France contended that it could thereby reduce the number of deaths due to the exposure to asbestos fibres among the French population.

Canada¹⁰⁵ did not dispute that chrysotile asbestos caused lung cancer but distinguished between chrysotile fibres and chrysotile encapsulated in a cement matrix and challenged the fact that the Decree prohibited the use of chrysotile-cement products. Canada argued that the Decree altered the conditions of competition between substitute fibres of French origin and chrysotile fibre from Canada and that the Decree also violated Articles III (4) and XI of GATT and Articles 2 (1), (2), (4) and (8) of the TBT Agreement, and nullified benefits under Article XXIII (1) (b) of GATT.

The EC, on the other hand, argued that the TBT Agreement did not cover the Decree. The Panel therefore had to establish whether the Decree was compatible with Article III (4) or necessary to protect human health within the meaning of Article XX (b).

4.3.3.2 Ruling

The Panel found that chrysotile-fibre products and fibro-cement products were like products within the meaning of Article III (4) and therefore the Decree relating to the prohibiting of the marketing of chrysotile fibres and Chrysotile-cement fibres violated the Article. Nevertheless, the Panel decided that the violation of Article III (4) was justified under Article XX (b) and the measure was not in conflict with the Chapeau of Article XX.¹⁰⁶

¹⁰⁴ Para 8.85.

¹⁰⁵ Canada is the complainant in this case and was in 2001 the number two producer and number one exporter of chrysotile asbestos.

¹⁰⁶ *Asbestos*, Panel report paras 8.240-241.

Because chrysotile asbestos risked the health of those working on it, the prohibition by France fell within the range of Article XX (b) — to protect human, life or health.¹⁰⁷ Furthermore, the Decree did not violate the Chapeau of Article XX and because the Panel found that there was no other reasonable alternative available to the EC, for example, the controlled use of asbestos products as suggested by Canada, the Panel allowed the prohibition.¹⁰⁸

On appeal Canada disputed the Panel's ruling on whether the use of chrysotile-cement products posed a risk to human health and whether the measure was "necessary" to protect human life or health.¹⁰⁹ The Appellate Body, however, ruled against Canada and upheld the Panel's ruling.¹¹⁰ To determine the necessity of the measure the Appellate Body examined whether there was an alternative measure consistent with the GATT or less inconsistent with it, which a member could reasonably be expected to employ to achieve its objectives. It found that the objective of the Decree was to pursue health and ruled that the alternative proposed by Canada, of "controlled use", was doubtful in certain situations and would not allow France to achieve its chosen level of protection.¹¹¹

Regarding the question of "like products", the Appellate Body ruled that asbestos and similar products were not "like products" for the reason that users of asbestos, for example builders, were conscious of the hazards of asbestos compared with products containing asbestos.

4.3.3.3 Implementation and Analysis

The Appellate Body upheld the French Decree, meaning that France could maintain the ban placed on the use of asbestos fibres and products containing asbestos fibres. The *Asbestos* case indicates that Article XX (b) covers "product safety issues" and therefore environmental issues are not limited to human life or health issues as purported by the Article. The Appellate Body ruling in the *Asbestos* case is a clear indication that there are other environmental issues, like product safety issues, that

¹⁰⁷ Para 8.194.

¹⁰⁸ Para 8.221.

¹⁰⁹ *Asbestos*, Appellate Body report para 155.

¹¹⁰ Para 161.

¹¹¹ Para 174.

cannot be characterized as hazards to life and health and that Articles XX (b) and (g) in their current form do not cover these issues.

Although the Appellate Body in the *Asbestos* case successfully incorporated the product safety issue within the ambit of Article XX (b), the danger lies in that different Panels and Appellate Bodies are established for different cases. Circumstances differ, and another Appellate Body cannot every time interpret Article XX (b) beyond its meaning, as the Appellate Body in this case did, so as to cater for the other issues similar to the one in question. Environmentalists fuel this view by arguing that the majority of GATT provisions promote trade, yet to extend the coverage of the only environmental provision in GATT seems to be an onerous burden for the WTO because this has not been effected despite the numerous conflicts over the only environmental provision of the GATT.

4.3.4 The Significance of the Environmental Cases to the Trade/Environmental Debate

The environmental cases analysed above show that there are various issues involved in trade and environmental disputes, especially in cases where the environmental policies include trade-restrictive measures.

The *Reformulated Gasoline* and *Shrimp* cases dealt directly with environmental issues and the rulings from these two cases reveal that under the existing WTO dispute settlement system, none of the trade measures to protect the environment was successful.¹¹² Although some environmental values were recognized, they fall below the expectations of environmentalists. The two cases were dealt with in terms of Article XX (g), which exempts restrictive measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” from GATT obligations.¹¹³ It is worth noting that this Article existed since the founding of the GATT, a period when the importance of protecting the environment was not recognized to the same extent as it is today. Although the drafters of the Article might have recognized its importance by including Article XX in the GATT, it is uncertain whether

¹¹² Anonymous “Free Trade and Environmental Protection”.

¹¹³ GATT Article XX (g).

environmental issues were in the minds of the drafters,¹¹⁴ as there is no specific reference to the environment within the Article.

Times have now changed and environmental issues have become important among international states,¹¹⁵ yet a provision designed to deal specifically with the environment has not been incorporated into the GATT. Article XX (g) has been utilised because there is no effective alternative to deal with the environment. However, the problems highlighted in the first two cases relating to the interpretation of Article XX (g) indicate that the Article is not sufficient to handle all environmental matters.

It is true that many environmental issues, like air and water pollution, are dealt with in terms of Article XX (g), simply because air and water are exhaustible natural resources. However, with global diversity, there maybe sources affecting the environment that cannot be dealt with as natural resources. For example, noises generated by industrial plants or modes of transport like trains and trucks, are a nuisance and disturb the tranquility of life; and electromagnetic waves emanating from power transmission lines are a risk to human beings if the latter are directly exposed to them. Measures to prevent the effect of either noise emission or electromagnetic waves are indeed environmental protective measures but, can these sources be considered natural resources?

From the above analysis, it seems that the scope of environmental problems is much wider than the conservation of natural resources. It may be argued that in circumstances dealing with sources like noise or electromagnetic emissions, Article XX (b) comes into play, as in the *Asbestos* case. But this case revealed that the interpretation of Article XX (b) might also cause problems, mainly because of the narrow interpretation accorded to the term “necessary” within the provision. This was also evidenced in the *Reformulated Gasoline* case where the Appellate Body had to apply Article XX (g) instead of Article XX (b) to deal with air pollution problems because the applicability of the term “necessary” in Article XX (b) was too limited.¹¹⁶

¹¹⁴ Matsushita “Dispute Settlement and Environmental Issues: Need for Amending Article XX of the GATT 1994” <http://www.gets.org/pages/harmony/Matsushita.doc> (accessed 18 August 2005).

¹¹⁵ This is evidenced by measures incorporated at both domestic and international levels. In this regard, see Chapter 3.

¹¹⁶ *Reformulated Gasoline*, Appellate Body report para 21.

Accordingly, it follows that Article XX (b) designed to protect human life and health, is interpreted more restrictively than Article XX (g), covering the conservation of natural resources. This brings the trade/environmental tension at a higher leverage, where one argues that the conservation of natural resources is more important and should enjoy a wider exemption than measures intended to protect human life and health. In light of imbalances of this nature, arguments raised by environmentalists that the GATT environmental provision has fallacies and is inadequate are likely to hold water, resulting in the need to review the scope of Article XX (b) and incorporate a more flexible interpretation; a move which also requires the amendment of Article XX as a whole.

Although the *Asbestos* case is encouraging in that it neutralizes the view that “none of trade measures to protect the environment under the WTO has been successful”,¹¹⁷ as well as the fact that Article XX (b) was accorded a flexible interpretation, the case revealed and confirmed that the only environmental Article under GATT is inadequate to cover all environmental issues. The case covered “product safety” issues under Article XX (b), an issue that extends beyond the scope of the Article,¹¹⁸ an inadequacy which also calls for the review of Article XX (b).

Unilateral sanctions create problems, especially when used in a discriminatory manner as evidenced in the *Reformulated Gasoline*¹¹⁹ and *Shrimp*¹²⁰ cases. The gasoline rule and the ban on shrimp harvested using non-TEDs imposed by the USA were within the ambit of Article XX, but the measures failed because they were used in a discriminatory manner. Rulings of this nature find favour with free traders who argue that restrictive measures are problematic and must be done away with, but not with environmentalists who feel that the WTO in its rulings has not been fair in dealing with conflicts over the use of environmental restrictive measures. Discriminatory trade restrictions also confirm the fears raised by developing states that their developed counterparts adopt restrictive measures not to protect the environment, but for protectionist goals.

¹¹⁷ Anonymous “Free Trade and Environmental Protection”.

¹¹⁸ *Asbestos*, Appellate Body report para. 162.

¹¹⁹ *Reformulated Gasoline*, Panel report paras 3.1 and 3.2.

¹²⁰ *Shrimp*, Panel report paras 7.11-7.20.

The cases are also significant in that they reveal the problems within the WTO dispute settlement system. The WTO dispute settlement mechanism can be referred to as a watershed development dealing with trade/environmental disputes, but the system has weaknesses. First, the implementation of a Panel recommendation, although following a judicial approach, qualitatively rests on the willingness of the respondent to comply. This is a major problem considering that the dispute settlement mechanism under the WTO does not provide any safeguards in the event that compliance has not been met.

In cases where the Panel or Appellate Body has concluded that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with the agreement.¹²¹ The DSU provides possibilities for the Panel to suggest ways in which the losing party could implement the recommendations. However, the legal significance of such suggestions to the dispute settlement is questionable considering that suggestions seem to be compulsory only for violation complaints and only constitute a mere suggestion in non-violation and situation complaints.¹²² Furthermore, Panels and even Appellate Bodies are reluctant to give suggestions as these usually amount to interference with a member state's sovereignty. For these reasons Panels resort only to the obvious recommendations, namely, compliance with the WTO ruling, or maintenance of the illegal practice while compensating the losing party for its loss or a complete disregard of the illegal practice.

This position becomes problematic in that it places Dispute Panels in a restricted position. More so, WTO members remain free to choose the way in which they will bring the domestic measure at issue into compliance. Although the defaulting state must indicate the method chosen for compliance, the system creates room for too much freedom which can easily be abused especially by developed states.

The importance of the legal costs involved in WTO litigation should not be overlooked¹²³ as this has proved to be a great hindrance for developing states to make use of the DSU. Finding the necessary financial resources is a real challenge for

¹²¹ Rosas "Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective" (2004) 4 *Journal of Economic Law* 131 at 134.

¹²² Freneau "WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective" <http://www.lexana.org/memoires/pdf/200107AF.pdf> (accessed 01 July 2005).

¹²³ Mukerji "Developing Countries and the WTO: Issues of Implementation" (2000) 34 *Journal of World Trade* 33 at 69.

developing countries and, considering that only a few WTO DSU specialists are present in developing countries, the cost of hiring these specialists abroad is prohibitive. The scarcity of administrative resources to identify and prepare cases is also a major constraint for member states who intend to bring a complaint before the DSU.

In most instances challenger countries have won the great majority of WTO disputes¹²⁴ and many developing nations do not have the resources to mount or defend a case before the WTO. Because of the prohibitive cost of defence, poorer countries are more susceptible to threats which challenge their laws by wealthier states. As long as resources and money constraints preclude the full use of the DSU, most trade/environmental problems will go unchallenged and, worse still, the long-term credibility of the WTO will be at risk.

The problematic issues raised in the three cases are of importance in that they create uncertainty as to whether harmonisation of trade and the environment can ever be achieved. Environmental analysts like Schoenbaum¹²⁵ and Irwin¹²⁶ feel that trade and environmental disputes have not reached the extremes portrayed in the above discussion, as trade liberalisation is complementary of environmental goals. According to Schoenbaum trade liberalisation, whether at global or regional levels, helps develop environmental causes by: (a) fostering common standards for environmental protection that must be observed even by certain developing countries that currently ignore environmental concerns; (b) terminating subsidies, particularly in agriculture, that are environmentally destructive as well as inefficient; and (c) ensuring economic growth, which will create the financial means, particularly for developing countries to control pollution and protect the environment.¹²⁷

Accordingly, Schoenbaum advocates that those environmentalists who argue that "free trade will destroy the environment are shortsighted and wrong".¹²⁸ The *Tuna-Dolphin I* ruling has caused havoc among environmentalists who have drawn the

¹²⁴ Costantini "What is wrong with the WTO?" <http://www.speakeasy.org/~peterc/wtow/wto-dis.htm> (accessed 15 July 2005).

¹²⁵ Schoenbaum 1992 *American Journal of International Law* 726-727.

¹²⁶ Irwin *Free Trade* 48-52.

¹²⁷ Schoenbaum 1992 *American Journal of International Law* 702.

¹²⁸ *Ibid.*

conclusion that GATT is hostile to all natural resource conservation restrictions. This, according to Schoenbaum, is untrue because:

“The tuna ban violates the GATT not because of any inherent policy against conservation but because the GATT rightly protects member states from the unilateral imposition of domestic standards by importing countries through market access restrictions.”¹²⁹

Such protection is necessary even from an environmental standpoint because if every country were allowed to promote its own domestic environmental standards on other countries, the result would not be “greater environmental protection but chaos and anarchy”.¹³⁰

Irwin, on the other hand, believes that many government policies that are harmful to the environment are also those that international trade negotiators are attempting to limit,¹³¹ and cites two illustrations.¹³²

Ocean fishing is the first example where a common resource is being over-utilised by the international community, as well as where disputes have erupted between states. Yet fishing is heavily subsidised by most governments and, paradoxically, states still purport the conservation of natural resources. These subsidies have led to over fishing, thereby harming the efforts to conserve fishing stock and promote sustainable development, a clear indication that there is no trade-off in eliminating fishing subsidies and preserving the environment. However, the USA, Iceland, Australia and New Zealand have pressed WTO members to discuss an international agreement to limit or abolish fishing subsidies, not just because such subsidies distort trade, but to prevent further depletion of ocean resources.¹³³ This shows that the removal of trade restrictions does not only benefit free traders but may also have a positive impact on the protection of the environment.

Another example would be in the agricultural sector where most industrialized states have adopted import restrictions, domestic price supports and export subsidies, because these trade barriers and price subsidies intensify agricultural production for

¹²⁹ Schoenbaum 1992 *American Journal of International Law* 703.

¹³⁰ *Ibid.*

¹³¹ Irwin *Free Trade* 49.

¹³² Three cases in fisheries and agriculture are the illustrations used by Irwin, *Free Trade* 49-50.

¹³³ Irwin *Free Trade* 50.

the industrialized states as they lack comparative advantage in agricultural goods. The more a country protects its domestic agricultural producers, the more those producers rely on pesticides and fertilizers to boost yields.¹³⁴ The use of these pesticides and fertilizers, in the long run, tend to destroy the richness in the soil, leading to land degradation. Consequently trade barriers and production subsidies have

“Intensified land use, increased applications of agrochemicals, and caused adoption of intensive animal production practices and overgrazing, degradation of natural resources, loss of natural wildlife habitats and biodiversity, reduced agricultural diversity, and expansion of agricultural production into marginal and ecologically sensitive areas.”¹³⁵

On the contrary, those countries having a comparative advantage in agriculture such as Canada, Australia, Argentina and Brazil, do not depend as heavily on fertilizers and pesticides to increase production, mainly because they have favourable conditions for agriculture. By liberalising trade in agricultural goods, those states without a comparative advantage can cheaply import agricultural products from those having a comparative advantage and do away with agricultural activities, thereby reducing the use of chemicals and pesticides as well as the use of growth hormones and medicines for animals by the former states. This is so because, with free trade, states having a comparative advantage in agriculture will expand production to meet the demand from their counterparts who now rely heavily on importation of agricultural products so as to maximize their production elsewhere. It is clear that conducting free trade in circumstances like these also benefits efforts to protect the environment, therefore strengthening the argument that free trade and the environment are in harmony with each other.

The arguments presented by Schoenbaum and Irwin show that the alleged tension between trade and the environment has been taken to extremes and to some extent it is true that free trade works to the advantage of environmental policies.

4.4 CONCLUSION

This chapter has assessed and examined controversies that surround trade and the environment. In so doing, effort has been made to strike a balance between trade and

¹³⁴ Organisation for Economic Cooperation and Development (2000) in Irwin, *Free Trade* 51.

¹³⁵ Sampson *Trade, Environment and the WTO: The Post-Seattle Agenda* (2000) 55.

environmental issues by revealing that trade and the environment do at times complement each other and are not always in conflict. Balancing the two can also be possible by merging fruitful ideas advocated for by free traders and environmentalists. The merged ideas can then be analysed and, if permissible enacted into law.

The debate on the trade and environment relationship is characterised by fundamental disagreement between free traders, who believe that trade liberalisation is good for the environment, and environmentalists who on the other hand fear that the effects of trade liberalisation on the environment will be negative. Free traders believe that trade liberalisation promotes economic growth and as societies become richer, they acquire both the will and the resources to protect the environment. They further argue that, with the free flow of goods between states, international co-operation is promoted and this encourages the eradication of discriminatory and protectionist practices in environmental policies. Arguments like these, find support from analysts who feel that trade and the environment are not in conflict with each other, but other factors have contributed to the degradation of the environment. More so free trade has actually enhanced environmental goals.¹³⁶

Environmentalists, on the other hand believe that trade liberalisation and the environment are in conflict, mainly because they feel that because of competitive pressures, trade liberalisation will result in a political drag on environmental policy-making by governments, and in an environmental “race to the bottom” through competitive deregulation.¹³⁷ They also believe that such conflict is brought about by the fact that those trade rules advocating free trade may inhibit the use of trade measures in MEAs, particularly by impeding on national governments’ attempts at environmental protection, either because of possible trade effects, for example the use of TEDs, or because of perceived discrimination, for example, differentiating domestic and foreign products.

Problems may also be encountered in implementing environmental policies at national level. Even when world trade rules permit countries to protect their domestic environment, these rules do not often allow countries to protect their domestic industry from competitors who do not protect their environment and thereby gain

¹³⁶ Schoenbaum 1992 *American Journal of International Law* 726-727 and Irwin *Free Trade* 48-52.

¹³⁷ Esty and Geradin “Greening World”.

competitive advantage.¹³⁸ Such a situation may delay the implementation of environmental policies by states, giving them ample time to benefit from the competitive advantage gained from unrestricted trade. On this basis international agreements become preferable in trade as these tend to take a global approach in trade/environmental negotiations; an approach which becomes fruitful because the lack of co-operation by a few states can undermine the trade/environmental goal and interlink.

These diverging views were further confirmed in the WTO cases analysed that reveal the problems encountered in interpreting Article XX of GATT. The *Shrimp* and *Asbestos* cases, however, signal a shift in WTO jurisprudence towards the justification of environmental and health protection measures. The former case reveals that an environmental measure may be consistent with a relevant clause under Article XX but may be disregarded on grounds of discrimination, and the latter case confirmed the right of countries to discriminate in trade in order to protect public health, an exception available under Article XX but never before acknowledged in practice. To allow the *Asbestos* case ruling would therefore mean amending Article XX to include a criterion for applying the environmental exceptions, new principles of environmental protection, especially as regards the global environment, and new principles that harmonise trade and environmental concerns.¹³⁹

Even though the rulings and arguments raised in the three environmental cases reveal that there may be tensions between trade policy and environmental objectives, world trade rules are not anti-environmental. It is evident from GATT/WTO Panel reports that Article XX permits member states to maintain consistent and non-discriminatory environmental regulations.¹⁴⁰ Environmentalists must therefore realise that free trade is an essential element of the world economic progress which in some instances can be used to their advantage. For this reason, they should aim to accomplish their objectives through GATT-permissible methods rather than discriminatory measures like import bans, export prohibitions, discriminatory taxes and unilateral trade

¹³⁸ Ekins "Trade and Environment".

¹³⁹ Schoenbaum 1992 *American Journal of International Law* 706.

¹⁴⁰ The GATT Panel held in *United States — Taxes on Automobiles* 11 October 1994, not adopted DS31/R that "regulating the fuel efficiency of automobiles sold in the USA, were a perfectly acceptable form of product regulation to protect public health and environment, as long as those standards did not explicitly discriminate on the basis of country of origin". Similarly a WTO Panel upheld France's ban on asbestos imports on the grounds that they were hazardous materials, after Canada's challenge in the *Asbestos* case.

sanctions that violate GATT rules. At the same time efforts should also be made by international states to amend Article XX of the GATT as well as increase the number of environmental provisions.

WTO dispute settlement problems revealed in the three cases are also an indication of the disparities that exist between developing and developed states, disparities that give rise to different interests and therefore opposing positions relating to the trade/environmental debate.

Although the procedural requirements in resolving disputes under the WTO have been followed, the differences in opinion that exist between developed and developing countries over environmental policies have not been addressed. Firstly, developing states view the use of restrictive measures in protecting the environment as an excuse by developed states to exercise dominance. Trade restrictions do not benefit the economies of developing states, especially when products from their industries are prevented from reaching markets of developed states. The unilateral use of trade-restrictive measures by developed states is also an area of discomfort for the developing world. Unilateralism promotes protectionism and bullying of some states by other states. Developed states have continuously advocated environmental protection and set high standards to meet this goal, a subject which has placed them in a conflicting position with their developing counterparts who in most instances fail to meet the expected standards because of lack of the necessary resources.

Developing countries are in most cases unable to meet the expensive costs of litigation which has been a major drawback in bringing claims before the WTO. They have met challenges and difficulties when involved in a dispute with a developed country especially in the event that the latter is not willing to comply with a Panel or Appellate Body decision. This very scenario raises the question whether or not the WTO dispute settlement system has benefited all members in fairness and equality.

Having revealed the different attitudes and opinions on trade and environmental issues it becomes essential to focus on how the developed world on one hand and the developing world, on the other, have implemented trade restrictions in their environmental policies and what problems they have encountered in doing so.

CHAPTER 5

THE RELATIONSHIP BETWEEN TRADE AND THE ENVIRONMENT IN A DEVELOPING COUNTRY (SOUTH AFRICA) AND A DEVELOPED COUNTRY (UNITED STATES OF AMERICA)

5.1 INTRODUCTION

States have accepted that continuous degradation of the human environment has become a major concern in all parts of the world.¹ Effort has been made to safeguard the environment from further degradation, for instance the World Trade Organisation (WTO) has provided a gateway for the protection of the environment by using Article XX of the General Agreement on Tariffs and Trade (GATT) 1994 which permits the use of trade restrictive measures in exceptional cases to protect the environment.² However, global disparities in incomes, consumption and access to technologies have resulted in differing views on how and why the environment should be protected.

Developed countries have achieved economic stability and see the protection of the environment as a priority, even if it means restriction on trade. Developing countries, on the other hand, face a gloomy dilemma because in addition to economic difficulties, tragedies of hunger, disease and political instability, they still have to contend with severe ecological problems.³ Because of these unfavourable conditions, developing states place priority on the economic and social welfare of their people and would rather channel the available funds to that need and not to costly environmental projects. In Indira Gandhi's words:

¹ Sinjela "Developing Countries' Perceptions of Environmental Protection and Economic Development" (1984) 24 *Indian Journal of International Law* 489 at 493.

² The Stockholm Conference, UNCED, and the establishment of the Committee on Trade and Environment (CTE) as well as the enforcement of various Multilateral Environmental Agreements (MEA's) also evidence protection of the environment.

³ Okonman "Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 *Journal of African Law* 43 at 60.

“How can we speak to those who live in villages and in slums about keeping the oceans, and the rivers and the air clean when their own lives are contaminated? Is poverty and need not the greatest polluters?”⁴

Since time immemorial, the environment has been woven into the lives of most developing states, but because of continuous hardships⁵ and the use of disguised protectionist measures, especially by developed states, the developing states have rejected restrictive measures in trade and prefer free trade.⁶ The developing states further point out that their developed counterparts have a tendency of unilaterally imposing trade restrictive measures to their disadvantage because it gives the richer states an upper hand, resulting in a threat to poorer nations' sovereignty. The economically powerful states can even impose their political will and deny products from developing states access to their markets.

Developed states advocate stricter environmental policies even if they are at the expense of free trade called for by the poor states. This preference separates the two worlds because in most instances developing states lack the resources to meet the highly-set environmental standards. Even though developed states have indicated willingness to assist developing states with the necessary resources for implementing environmental policies, the latter states feel that this has remained mere promises. The commitments made at the Uruguay Round have also not been met; for instance, the poor countries were entitled to special and differential treatment to market access in rich country markets, but these were never implemented in letter and spirit.⁷ Under such circumstances developed states will only implement environmental policies at a pace and standard that will not constrain their economies and preference will therefore be on the less-stringent environmental trade measures.

⁴ Indira Gandhi, the late Prime Minister of India quoted in Okonman, *ibid*.

⁵ Most developing countries face hardships as they lack investment capital, appropriate resources and technology as well as poor management of trade and environmental policies.

⁶ Steinberg “Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development” (1997) 91 *American Journal of International Law* 231 at 232 points out that, developing countries have resisted the inclusion of more environment-friendly provisions in GATT/WTO.

⁷ Consumer Unity and Trust Society Zambia “Summary of Presentations and Policy Recommendations of Regional Seminar WTO Doha Ministerial and the New Trade Round: An African Perspective” 25-26 March 2002 http://www.sarpn.org.za/documents/d0000051/CUTS_Regional_Seminar.pdf (accessed 10 August 2005).

The argument between developed and developing states is further evidenced by the fact that the WTO has been continuously dominated by developed states that can even defy Panel rulings. Developing states feel that their ideas have not been accorded equal opportunity in most Ministerial Conferences held after the establishment of the WTO. For this reason they believe that campaigns launched by developed states to protect the environment are not intended for that purpose, because if they were, all concerns raised whether by a developed or developing state would be given consideration.

The WTO also permits under GATT the establishment of Free Trade Areas like Southern African Development Community (SADC) and North American Free Trade Agreement (NAFTA).⁸ This intensifies the already existing trade/environmental debate as most environmental polices include trade-restrictive measures and conflict is inevitable in the event that a country is a member to a Free Trade Regional Agreement and an MEA. Problems have also been encountered in these Free Trade Areas especially when the agreement has developed and developing states as member states, as for instance, in the case of NAFTA.

Differences in attitude between developed and developing countries exist; and because the availability of capital, technology and resources is unbalanced, international states tend to contract themselves in environmental activities at differing levels. This chapter will undertake a case study on coal mining in South Africa, as a developing state under SADC, and the United States of America (USA), as a developed state under NAFTA. It will analyse how the states have implemented environmental policies, how these policies have affected them and whether they have managed to fulfil their regional obligations. For the purpose of this study, coal mining is taken to represent trading activities in the two countries. South Africa, though categorised as a developing state, is exceptional in that it is industrialised ahead of most developing states. An evaluation will be made at the end of the chapter to see if the arguments raised by developed and developing states are justifiable. The selected case study has been selected on the basis that both states engage in mining of coal on a large scale and currently coal is perceived as a major contributor to global warming.

⁸ GATT Article XXIV.

In addition to global warming, coal mining impacts on the environment by physically degrading and damaging land surfaces, and the waste dumps usually result in the pollution of water sources. Also coal mining may result in trade in hazardous waste.

5.2 BACKGROUND TO SOUTH AFRICA'S TRADE AND ENVIRONMENTAL ISSUES

The trade and environmental issue has become a pertinent concern for South Africa, mainly because the country is undergoing a process of trade liberalisation. Secondly South Africa is a classical small economy dependent on its export sector for its future growth plan and, lastly, some elements of the South African economy are heavily dependant on natural resource use, high levels of energy use or polluting emissions for their competitiveness.⁹ All these factors contribute to South Africa's products being vulnerable to environmental trade restrictions; and, in an effort to improve the quality of domestic goods, South Africa may be forced to impose stringent domestic environmental regulations as well as ratify international environmental agreements that may have a negative effect on the country's trading sectors.

Because of these ongoing pressures South Africa has implemented various policies to guarantee locally-produced goods credibility in international markets. Likewise the South African Constitution is one of the few Constitutions in the world to include provisions on the environment:

“Everyone has the right

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”¹⁰

⁹ Trade and Industry Policy Secretariat (TIPS) “Trade and Environment: A South African Country Study” http://www.tradeknowledgenetwork.net/pdf/sacasefullrprt_e.pdf (accessed 01 October 2005).

¹⁰ Section 24 of the Constitution of the Republic of South Africa, 1996.

This provision undertakes to fulfil South Africa's environmental obligations in the WTO because Article XX of the GATT similarly provides for the protection of plant, animal, health and natural resources. More environmental legislation has been entrenched to emphasise the importance accorded to the environment within the country. In July 1997 a White Paper on the Conservation and Sustainable use of South Africa's Biological Diversity outlined steps in the policy formulation regarding the environment. Chapter 3 of the White Paper highlighted six specific goals, namely, to conserve the diversity of landscapes, ecosystems, habitats, communities, populations, species and genes in South Africa; to use biological resources to sustain and minimise adverse impacts on biological diversity; to ensure that benefits derived from the use and development of South Africa's genetic resources serve national interests; to expand the human capacity to conserve biodiversity, to manage its use and to address factors threatening it; to create conditions and incentives that support the conservation and sustainable use of biodiversity; and to promote the conservation and sustainable use of biodiversity at international level.

Other significant legislation aimed at the protection of the environment includes the National Environmental Management Act,¹¹ the Marine Living Resources Act,¹² the Hazardous Substances Act¹³ and the Atmospheric Pollution Prevention Act.¹⁴ Most of the environmental legislation includes a set of fundamental principles setting out the general framework upon which each piece of legislation is based, and the development of the idea or concept of trusteeship and the concept of intergenerational equity.¹⁵

In support of international efforts towards the environment, South Africa is party to several environmental protection agreements, including the Convention on International Trade on Endangered Species (CITES) 1973, the Montreal Protocol of 1987, the Basel Convention of 1993 and the Kyoto Protocol of 2005. In addition, principles primarily linked to international principles on the environment are set out to guide the South African government in achieving environmental management and

¹¹ Act 107 of 1998.

¹² Act 18 of 1998.

¹³ Act 15 of 1973.

¹⁴ Act 45 of 1965.

¹⁵ Nazeem "Recent Developments" (2000) 44 *Journal of African Law* 47 at 127.

sustainable development.¹⁶ However, some of these agreements are inequitable towards South Africa and the southern African region as a whole, because even if the region is included in the global society when it comes to assuming environmental protection obligation, it is excluded in finance, technology, export markets and aid.¹⁷ By virtue of being in the southern region of Africa, South Africa automatically faces similar economic challenges and hardships in trying to meet the highly-set international environmental standards.

5.2.1 South Africa, the World Trade Organisation and Southern African Development Community

The South African economy, like most developing countries, is going through structural changes induced by the systematic trade liberalisation programme set out by the WTO.¹⁸ Being a member of the WTO, South Africa must remain in line with the commitments and obligations laid out during the Uruguay Round in 1992. Trade policy changes in South Africa have been implemented in line with its commitment to the WTO and include acceleration of trade liberalisation in most industrial sectors, like clothing and textile, by rationalizing and reducing tariffs. In 1993 South Africa eliminated all surcharges on imports that ranged from 4% to 15%.¹⁹ As part of its obligations under the WTO, South Africa has also eliminated quantitative restrictions, import controls and export subsidies. Despite these efforts to meet WTO expectations, the case studies will reveal that South African products have not enjoyed similar advantages in international markets, especially in those of developed states.

South Africa is also a party to SADC, a Free Trade Area established under Article XXIV of the GATT. Among its numerous objectives, SADC aims at liberalising trade

¹⁶ About 23 principles are set out in the White Paper on Environmental Management Policy for South Africa (GNR749, GG18894 of 15 May 1998). Included are the "Polluter Pays Principle" that provides that "those responsible for environmental damage must pay the repair costs both to the environment and human health, and the costs of preventative measures to reduce or prevent further pollution or environmental damage" and the "Waste avoidance and Minimisation Principle", providing that "waste management must minimise and avoid the creation of waste at source, especially in the case of toxic and hazardous waste. Government must encourage waste recycling, separation at source and safe disposal of unavoidable waste." Sampson *Introduction to a Legal Framework to Pollution Management in South Africa* (2001) 45-46.

¹⁷ Kitikiti "The Use of Trade Measures for Environmental Purposes: An African View" <http://www.ictsd.org/dlogue/1999-02-10/KITIKITI.pdf> (accessed 01 October 2005).

¹⁸ Trade and Industry Policy Secretariat "Trade and Environment".

¹⁹ *Ibid.*

for all member states²⁰ so as to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and to support the socially disadvantaged through regional integration.²¹ The regional grouping hopes to achieve sustainable utilisation of natural resources and effective protection of the environment. To make this possible, SADC allows the use of environmental trade measures in exceptional cases:

- (a) in cases protecting human, animal and plant life and health;
- (b) in cases of trade in precious and strategic metals such as gold, silver and platinum;
- (c) in cases protecting the exploitation of national treasures;
- (d) in cases of protecting exhaustible natural resources and the environment; and
- (e) in cases where compliance with existing international agreements takes precedence such as the CITES accord on trade in endangered species.²²

These exceptions reveal how SADC states have tried to harmonise free trade with environmental issues, an effort that seeks to eliminate the ongoing conflict between free traders and environmentalists.

SADC has encountered a number of problems mainly because its membership constitutes developing states that have to deal continuously with challenges posed by their developed counterparts. Most policies that protect the environment have had to match international standards, which in most cases developing states have failed to do due to the lack of resources. SADC states have taken up the challenge to recognise each other's national standards with a view of developing common sub-regional environmental standards and technical regulations to trade. But even if this is done, the question is whether these regional standards and regulations equal standards set by developed states, and if not, then such policies will not be internationally-recognised and accepted. This has been evidenced by the dominating position taken by developed

²⁰ Article 2 (5) of the Protocol on Trade in the SADC Region.

²¹ Article 5 of the SADC Treaty of 1992.

²² These general exceptions are included in the Amendment Protocol (Anonymous "Amendment Protocol of 2000"

<http://www.tradescentre.org.zw/pdf/23%20Towards%20Implementation%20of%20the%20Trade%20Protocol.pdf> (accessed 05 June 2005)).

states in the WTO and the creation of imbalances in most of the multilateral trading systems — imbalances that constrain developing countries from maximising benefits from trade and accessing developed country markets.

While most of the Uruguay Round Agreements have clauses to benefit developing countries, these are not legally binding and developed WTO members have ignored these “best endeavour clauses”. SADC countries (South Africa included) have had to succumb to these unfavourable conditions and have voiced concern over their capacity constraints, both human and institutional, to implement WTO Agreements effectively. The case study in coal mining will reveal how South Africa has been affected by the existing relationship between trade and the environment.

5.3 A SELECTED CASE STUDY ON TRADE AND ENVIRONMENTAL LINKAGES IN SOUTH AFRICA

Like many developing countries, South Africa’s economy remains dependant on natural resource exports largely in minerals, coal, platinum and metals.²³ The mineral sector is an important source of tax revenue and foreign exchange which are essential to the South African economy.²⁴ Given the size of South Africa’s coal mining industry,²⁵ it is not surprising that its environmental impacts are considerable. Environmental concerns in mining are mostly export-related problems; the major issue being whether South Africa’s exports are vulnerable to environmentally-based trade barriers. Coal is worthy of attention from an environmental perspective because there are several externalities associated with its life cycle.²⁶

²³ Within the mineral sector exports gold and coal are the main players. Rough projections indicate that coal could be the main foreign exchange earner in the mineral industry beyond the year 2020, quoted in Trade and Industry Policy Secretariat “Trade and Environment”.

²⁴ The mineral sector accounts for nearly 40% of total South African exports: Trade and Industry Policy Secretariat *Ibid*.

²⁵ The country has the world’s seventh largest amount of recoverable coal reserves (54.6 billion short tons), approximately 5% of the world total. South Africa is also the sixth world’s largest producer and was the world’s third largest net coal exporter in 2002 (Energy Information Administration “Country Analysis Briefs: South Africa” <http://www.eia.doe.gov/emeu/cabs/safrica.html> (accessed 02 October 2005)).

²⁶ Anonymous “Coal Mining” http://www.info-en.com/index.php/coal_mining (accessed 28 February 2006).

In relation to trade issues greenhouse gas emissions from coal combustion are potentially a risk to the success of the industry.²⁷ Greenhouse gases are being tightly regulated internationally, making coal exports potentially vulnerable to environmentally-induced changes in global demand. The market for coal may therefore be affected by global environmental concerns. The environmental impacts of coal production in South Africa, as well as the low sulphur composition of the coal, impact on the coal trade and this may affect the country's competitiveness in the international coal market. South Africa relies on coal as a primary source for the generation of electricity. Most industries profitably depend on the cheap electricity generated from coal and the South African community enjoys the same benefit. However, the very cheap electricity produces very large levels of greenhouse gases in its production cycle.

The case study will focus on the impact coal mining has on the environment and what measures South Africa is taking to protect the environment in this sector. An analysis will be done whether the country's coal exports are vulnerable to any environmentally-induced trade pressures, which could include changes in global coal demand due to international conventions on greenhouse gases²⁸ and pressure on local producers to meet international environmental standards. Lastly, focus will be on whether the country's energy-producing sector as a whole is vulnerable to trade-related measures because of its high dependence on coal; an effect which runs through South Africa's industries relying on low electricity prices whose production, however, has high greenhouse gas emissions.

5.3.1 Coal Mining and the Environment

As an extractive industry, coal mining is by its nature environmentally damaging. Not only is the production of coal damaging, but the use of coal also has a range of environmental impacts. Because coal is a highly carbon-intensive fossil fuel, over reliance on it for energy needs can have negative environmental impacts, including air pollution due to coal combustion, groundwater pollution due to mining, and

²⁷ *Ibid.*

²⁸ For example, the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol (2005) under the Convention.

disruption of ecosystems. Therefore the process or production, and the use or consumption, of coal pose threats to the environment.

5.3.1.1 Process or Production Impacts

Mining in South Africa is either surface or underground.²⁹ Surface mining is either by strip mining, usually using draglines to remove the overburden and later replacing it in the mined-out area, or by open casting, with the overburden being removed and dumped elsewhere. Underground mining is generally by pillar support methods, with the coal being extracted between the pillars, which then remain to support the roof. A small quantity of coal is mined by long walling; when all the coal in the seam is extracted the roof is permitted to collapse behind the mined-out area.

The impacts of open cast mining include huge overburden dumps, often contaminated with waste coal spread across the horizon. The coal in such dumps may combust spontaneously and emit sulphurous fumes and smoke. The mine will invariably create a huge pit, which may either fill with water and provide recreational facilities or cause health hazards.

The environmental impacts of underground mining are equally considerable and include the effect of methane. Methane is a greenhouse gas that is more potent in its greenhouse effect than carbon dioxide and is growing in the atmosphere at a faster rate than carbon dioxide. All coal contains methane and the deeper the mine, the higher the amount of methane in the coal. As mining proceeds, the methane is released into the mine air and eventually discharged into the atmosphere. In such cases methane gases are a risk to the miners' health and are equally poisonous when emitted into the atmosphere. A further impact is the collapse of the roof between the pillars in the long term. The collapse of the roof can cause terminal damage to surface structures and even render the surface almost unusable. Even worse is the risk that the coal remaining in the pillars may heat and eventually ignite. As the burning pillars

²⁹ The technical aspects on coal mining in South Africa and its impact on the environment have been extracted from: Lloyd "Coal mining and the Environment" Energy Research Institute, University of Cape Town <http://www.eri.uct.ac.za/eri%20publications/IBA.environment.pdf> (accessed 01 October 2005) and Environmental Literacy Council "Coal" <http://www.enviroliteracy.org/article.php/18.html> (accessed 09 September 2005).

collapse, the roof falls in, admitting air and allowing the combustion products to escape. Land over the burning worked-out mines is then totally unusable.

Much coal is processed after leaving the mine to meet market quality demands. The wastes from processing can be used for power generation. However, records have shown that about 80 million tons of coal wastes are dumped annually.³⁰ Once dumped there is a risk of ignition and burning dumps are difficult and costly to put out, and some dumps left by previous generations continue to smoulder.³¹ The impact from burning dumps is the release of sulphur oxides that pollute the atmosphere. Surface dumps result in the slow oxidation of sulphur compounds and the leaching of the resultant acid by rainwater percolates through the dump, resulting in salination of the streams by dissolved sulphates, and in a water-poor country like South Africa this has incredible effect as it tends to limit drinking water sources.

Mining of coal results in occupational health hazards, for example, respiratory diseases due to prolonged exposure leading to higher morbidity and mortality rates. There is also a high risk of accidents, both during mining and transportation of the coal. And because of poor technology, explosions and mine trappings have been experienced in South African mines.

In sum, the production of coal impacts on the environment by polluting the air,³² water³³ or land.³⁴ Any genuine restrictions on coal mining based on preventing such pollutants are likely to be justified under the GATT/WTO environmental provision. However, problems only emanate when restrictions cannot be so justified and used to prevent mining activities in South Africa.

5.3.1.2 Impacts from Coal Use

The largest market for coal in South Africa is the electricity-generating industry, which releases pollutants that impact negatively on the environment. The industry

³⁰ Lloyd "Coal Mining and the Environment".

³¹ *Ibid.*

³² Air pollution results from dust, airborne particulate matter and greenhouse gases like methane.

³³ Water pollution results from leachate and underground water pollution and surface run-off.

³⁴ Land pollution results from visual intrusions and land scape destruction causing loss of productive land.

releases about 170 million tons of carbon dioxide annually, about 0.7 million tons of nitrogen oxides and about 1.5 million tons of sulphur oxides.³⁵ However most generating stations have sufficiently tall stacks that enable discharge to occur above the mixing level and the prevailing winds carry the pollutants out over the Indian Ocean where they disperse.

Air pollution from greenhouse gas emissions during power generation contributes to global warming and is a high risk to health. Electricity production from coal also affects the environment through acidic effluents and solid waste dispositions. Coal combustion for steam generation and energy requirements, as well as coal gasification for the production of metallurgical coke and “syn-gas”, all result in gaseous emissions impacting on the environment.

About 1 million tons of coal finds its way into South African homes where it is burned for space heating in open braziers for those homes without stoves. The effect of such practices on the environment are considerable: air pollution from smoke and sulphur oxides is widespread, while indoor concentrations of carbon monoxide of over 1200ppm for 8h are regularly observed; and yet the general standard internationally is a maximum of 50ppm for 1h.³⁶

5.3.2 The Legislative Environment in Coal Mining

The mineral industry in South Africa is regulated by two Acts: the Minerals Act 50 of 1991 that regulates the prospecting for and optimal exploitation of minerals, and the rehabilitation of the surface of land during and after prospecting and mining operations; and the Mine Health and Safety Act 29 of 1996, providing for protection of the health and safety of employees and other persons at mines. The Department of Minerals and Energy (DME) administers the Acts³⁷ and the government itself does not seek to participate in the exploitation of South Africa’s minerals and views its involvement in the mineral industry as being of a complementary nature only.

³⁵ Lloyd “Coal Mining and the Environment”.

³⁶ *Ibid.*

³⁷ The Constitution of the Republic of South Africa Act 108 of 1996 states that all laws and matters relating to mineral and energy are administered under the control of the Minister of Minerals and Energy in the national government.

Mining under the Minerals Act requires a prospecting permit or mining authorisation issued by the DME and an Environmental Management Programme (EMP)³⁸ that must also be approved by the DME. Mining operations cannot begin without approval, but at times approval of an EMP may take a considerable period. To safeguard against this delay being interpreted as a barrier to mining, the Minerals Act allows the granting of temporary permit to proceed with prospecting or mining operations.

The Minerals Act³⁹ further requires the holder of a prospecting permit to rehabilitate the surface of land concerned. This has been made possible by the requirement to establish a trust fund adequate to ensure decommissioning and after care set under the instruction of the Director of the Mineral Development. Rehabilitation is a good idea catering for recent mining activities, but the problem emanates from rehabilitating those mines abandoned or closed before the coming into operation of the Minerals Act. Because of lack of resources and technology, the government is actively seeking the industry's assistance in finding solutions to rehabilitate these abandoned mines.

The legislative environment in South Africa has contributed to ensuring a generally good environmental performance from the South African coal mining industry. The EMP system is also contributing strongly to the long-term sustainability of the industry.⁴⁰ However, the question is whether these legislative efforts are adequate when viewed in international markets and whether they meet the standards set out in international Conventions. Domestically, the increasing strength of local legislative pressures has been recognised as one of the forces behind the improvement in the mining industry, but international pressures, particularly from developed states, have led many mining companies in South Africa to recognise the high risk to which they are exposed if they do not meet international norms.⁴¹ Considering the fact that South Africa's coal export market is in Europe, the far and middle East, and South America, there is need for worry because South Africa's coal due to its market which places

³⁸ The EMP is based on the principles of Integrated Environmental Management laid down in the National Management Act.

³⁹ Section 38.

⁴⁰ Lloyd "Coal Mining and the Environment" The National Management Act also provides for sustainable development in sections 1 (1) (xxix), 2 (4) (a) (iv), (a) (vii), (e) and (p).

⁴¹ Trade and Industry Policy Secretariat "Trade and Environment".

environmental concerns as priority is likely to have large implications with respect to future impacts on environmental issues.⁴²

5.4 INTERNATIONAL PRESSURES ON THE COAL INDUSTRY

An industrial survey indicated that the first possible impact on South African coal exports is customer concern over the method of coal production and already customers have made informal enquiries regarding the production of coal.⁴³ The most probable concerns to be raised would be on the purchasing of products that have caused environmental damage or on the basis of competitors attempting to “level the playing fields” in terms of trying to force South African producers to meet higher environmental standards as those found in developed countries. Based on this assessment, international market pressures to a greater extent play a clear role in local environmental performance, if not protecting their markets from South African produced coal.⁴⁴ Local industries have however placed a greater stress on the domestic need to meet relevant environmental laws rather than simply meeting such laws to avoid pressures from international markets by pointing out that the increasing stringency of local environmental legislation and the need for large coal mining companies to meet legislation in terms of their own environmental management systems should be the objective.⁴⁵ (This seems to be the struggle for every developing country.)

Although companies acknowledge that international exposure creates additional pressures to ensure compliance with environmental legislation, they feel that small coalmines tend to have worse environmental performance than the larger firms since they are less exposed to international pressures and global markets. Because of this, developing states should be left to run their own environmental concerns which would focus on seeing that all companies in the sector comply with the relevant

⁴² Percentages of South African coal exported to the regions of the world: European Union — 52.5%, Far East — 36.4%, Middle East — 7.1%, USA — 0.2%, and South America — 1.1%.

⁴³ The survey revealed that if South African coal producers failed to internalise a large proportion of their externalities from coal production there would be some grounds for external pressure on the industry; Bethlehem *Catalysing Change: International Environmental Pressures on South African Exporters* in Bethlehem and Goldblatt (eds) *The Bottom Line: Industry and the Environment in South Africa* (1997) 55.

⁴⁴ Trade and Industry Policy Secretariat “Trade and Environment”.

⁴⁵ *Ibid.*

environmental legislation, whether big or small, private or public. Furthermore, South African producers have put faith in the WTO and believe that under the organisation's rules restrictions due to domestic production methods are likely to be disallowed. But the question is whether the WTO as of today has fulfilled all promises made at the Uruguay Round. Experience has revealed that most developing states have cried foul after their demands were not met.⁴⁶

5.4.1 The Kyoto Protocol and the Demand for South African Coal

The impact of international market restrictions related to domestic environmental performance within the South African mining industry remains unclear, but fear lies in a possible threat on the shrinking of the entire global coal market due to environmental concerns.⁴⁷ The USA Department of Energy projected an increase of up to 659 million tons in the world coal trade by 2020.⁴⁸ Ironically, most industrialised countries with the exception of USA see the Kyoto Protocol as a major development in the energy market. The Protocol requires reduction in or limitation to the growth of carbon emissions within Annex 1 countries, which in turn is likely to see a reduction in the demand for coal, since coal is a major contributor to greenhouse gases. This could have profound effects on the use of coal energy in industrialized states resulting in a substantial shift from the "business-as-usual" projection.

South Africa is expected to face difficult challenges due to the foreseen reduction in coal demands.⁴⁹ Contributing to this reduction is the introduction of limits or taxes on carbon dioxide emissions. Most of South African coal markets are likely to be slammed within stringent environmental legislation, forcing them to reduce coal as an energy source. Although recent analysis of these impacts have not been undertaken, the Australian Bureau of Agricultural and Resource Economics (ABARE) has developed an economic model, the MEGABARE model,⁵⁰ which is a multi-

⁴⁶ The Cancun Ministerial Negotiations of 2003 collapsed because demands by developing states were not met.

⁴⁷ Anonymous "Coal Mining".

⁴⁸ Trade and Industry Policy Secretariat "Trade and Environment".

⁴⁹ This is so because the top eight importers of South African coal have committed themselves to greenhouse gas reductions under the Kyoto Protocol.

⁵⁰ The MEGABARE model is described in detail by Hamilton and Duiggin "Economic Analysis of Greenhouse Policy" http://www.tai.org.au/Publications_Files/DP15SUM.PDF (accessed 05 October 2005).

commodity, multi-region, computable general equilibrium model designed to conduct research on issues facing the global economy, including the impacts of climate change policies. This model has been used to run simulations of greenhouse gas reductions in the Pacific Rim countries.⁵¹ The simulation results from the ABARE model indicate that action to reduce carbon dioxide emissions in Annex 1 countries could have significant impacts on the consumption of coal and other fossil fuels in these economies.⁵² The emissions reduction has a large impact on the contribution made by coal to power generation in Annex 1 countries and as the cost of using coal increases under an emissions abatement strategy, these countries will substitute coal with less emissions intensive fuels like gas and renewable energy.⁵³

What seems to be an issue at this point is whether all coal-producing states are to face similar effects, or whether it is only developing states that will feel the impact of the Kyoto Protocol. Because the Kyoto Protocol only came into force early this year it remains to be seen, but speculation shows that developed states are equally going to share similar effects, for instance Canada's coal industry is likely to suffer as most of its exports are to Japan, where demand for coal will decline.

South African coal industries already feel the impact of the carbon taxes and other less specific energy taxation enforced in Europe. And worse still, there has been little support from government to address these issues.⁵⁴ In comparison to other major coal exporting nations, such as Australia, there has been almost no research done by government to assess the impact of these environmental issues on the coal sector. However, by virtue of being a developing state, South Africa is shielded from making formal commitments to reducing greenhouse gas emissions under the Kyoto Protocol⁵⁵ and it does not appear that the coal industry has rigorously considered their eventual participation in such international instruments as the Clean Development

⁵¹ Hamilton and Duiggin "Greenhouse Policy".

⁵² *Ibid.*

⁵³ The total demand for coal in Annex 1 countries is estimated to fall by half by the year 2010. This amounts to a reduction in coal consumption of around 600 million tons. Under the Kyoto Protocol the decline in consumption might even be greater as emission reduction targets in Japan, USA and Canada are more stringent than represented in the simulation (Trade and Industry Policy Secretariat "Trade and Environment").

⁵⁴ Trade and Industry Policy Secretariat "Trade and Environment".

⁵⁵ Articles 2 and 4.

Mechanism under the Protocol.⁵⁶ But how long this immunity is going to run is a question to be addressed in the future, considering the increase in environmental campaigns.

5.5 BACKGROUND TO UNITED STATES OF AMERICA'S TRADE AND ENVIRONMENTAL ISSUES

The current thinking in the world is that pollution — whether it is of land, air or water — can be detrimental to economic performance.⁵⁷ The USA, despite the absence of an environmental provision in its Constitution,⁵⁸ shares a similar view and believes that the conservation of the environment is important in assisting the development of economic wealth.⁵⁹ This interest in the environment is seen in the USA Constitution that provides Congress with several law-making powers “that virtually any conceivable measure intended to protect the environment can readily be sustained under one or more of the grants of authority to Congress”.⁶⁰

The USA Constitution grants Congress the power to impose and collect import duties and to regulate commerce with foreign nations.⁶¹ This Constitutional provision is essential in understanding USA trade policy and can be interpreted to mean that, first, Congress delegates negotiating authority to the executive branch and often puts conditions on the negotiations, second, Congress retains the right to approve or reject trade agreement and lastly, Congress determines the criteria by which domestic

⁵⁶ Anonymous “Coal Mining”.

⁵⁷ Napier “Constitutional Options: Economic Provisions”

<http://www.cic.nyu.edu/pdf/Economicissues.napier.pdf> (accessed 06 October 2005).

⁵⁸ The USA Constitution, Tenth Amendment hereafter referred to as the USA Constitution.

⁵⁹ To support this view, the State Department Counsellor Timothy Wirth in 1994 outlined the current thinking behind development of USA positions on trade and environment. He indicated that environmental objectives include “protecting biodiversity and endangered or threatened species; protecting the oceans and their resources; protecting the atmosphere and addressing climate change; and protecting the environment and resources that are within or partially within USA jurisdiction” and that trade objectives include “constructing a market-oriented, rules-based system for international trade in goods, services and investments; increasing market access for USA goods and services; and building confidence in the international trading system by promoting policies that conform to obligations under GATT and other international trade agreements” (Fletcher and Tiemann “Trade and Environment: GATT and NAFTA”

<http://www.ncseonline.org/nle/crsreports/economics/eco5.cfm?&CFID=698757&CFTOKEN=64529070> (accessed 05 September 2005)).

⁶⁰ Geradin *Trade and the Environment: A Comparative Study of EC and US Law* (1997) 144.

⁶¹ Article I (8) of the USA Constitution.

industries can obtain relief from foreign competition through administrative procedures such as anti-dumping.⁶²

The most significant source of Congressional authority for environmental action is found in the federal power to regulate interstate commerce (the Commerce Clause.)⁶³ The court in *Palia v Hawaii Department of Law and Natural Resources*⁶⁴ recognised that a tenuous link with interstate commerce was sufficient to validate Congressional action. Because of such rulings three examples can be noted on how the Commerce Clause applies to the environment:

- “(a) Physical transport of pollutants across states amounts to interstate commerce, thereby justifying federal legislation attempting to control, transboundary pollution. Congress might rationally conclude that the adverse effects of interstate pollution on human health, farm animals and fish, crops and natural resources have a depressive effect on production and consumption related to interstate markets.
- (b) Congress can invoke power to regulate interstate commerce to harmonize environmental product standards in order to facilitate interstate trade and avoid market fragmentation.
- (c) The Commerce Clause can also be used by Congress to harmonize environmental process standards in order to eliminate the potential competitive advantage enjoyed by producers situated in states with lax standards over firms located in states enforcing stringent standards and thus ensures that interstate commerce takes place in fair conditions of competition”.⁶⁵

The Congress also finds authority to legislate in the environmental field in three other Constitutional provisions. The Property Clause grants Congress the power to “dispose of and make all needful Rules and Regulations respecting the territory and other property belonging to the United States”.⁶⁶ Congress can find authority in this clause to enact laws necessary for the protection of the environmental resources located in

⁶² Irwin *Free Trade under Fire* (2002) 146.

⁶³ The Commerce Clause provided for under Article I (8) clause 3 of the USA Constitution.

⁶⁴ *Palia v Hawaii Department of Law and Natural Resources* 471 F Supp 985 (D Hawaii 1979) affirmed 639 F 2d 495 (9th circ.1981). The District Court reasoned that the existence of a “national programme to protect and improve the natural habitats of endangered species preserves the possibility of interstate commerce in these species and the interstate movements of persons such as amateur students of nature or professional scientists who come to a state to observe and study these species”. It concluded that the power of Congress to regulate interstate commerce offered an appropriate basis for the adoption of the Federal Endangered Species Act 16 of 1985 and (Supp.1995).

⁶⁵ Geradin *Trade and the Environment: A Comparative Study* 144-145.

⁶⁶ Article IV (3) clause 2 of the USA Constitution.

the land owned by the Federal Government. Another source of authority for federal environmental action is to be found in Article I (8) clause 1 which provides that Congress can “lay and collect Taxes, Duties, Imports and Excises to pay Debts and provide for the Common Defence and general Welfare of the United States”. These taxing and spending powers authorise Congress to adopt for example, pollution taxes and environmental subsidies. A final source of Congressional authority to legislate in the environmental field can be found in the Treaty Power,⁶⁷ by negotiating a treaty and obtaining the requisite consent of the Senate, Congress is endowed with a source of legislative authority independent of the powers enumerated in the Constitution.

The above interpretation of the Commerce Clause effectively came into force around the 1960s — a period when Congress began to appreciate the national dimension of, most environmental problems. The Congress during this time also realised the failure of non-regulatory approaches in terms of which the federal role was limited to assisting states with research grants while letting them be responsible for the adoption of pollution-control measures.⁶⁸ The realisation of the importance of the environment saw the enactment of the first major federal statute in the environmental field in 1970.⁶⁹ With the enactment of the National Environmental Policy Act (NEPA), Congress launched a succession of regulatory programmes to control pollution and protect threatened environmental resources; for example, the Clean Air Act of 1970 which provides the basic framework for modern air-pollution control, the Clean Water Act 1987, the main objective of which is to restore and maintain the chemical, physical and biological integrity of the nation’s waters, the Toxic Substance Control Act of 1976 which regulates the release of hazardous substances in all environmental media and the Endangered Species Act of 1973 which constructs a comprehensive regime for protection of wildlife.

For effective running of these statutes Congress attempts to establish a “partnership” between state and federal authorities by involving state authorities in most of its

⁶⁷ Article II of the USA Constitution.

⁶⁸ Kraft and Vig *Environmental Policy in the 1990s* in Geradin *Trade and the Environment: A Comparative Study* 151.

⁶⁹ The National Environmental Policy Act of 1970.

environmental action.⁷⁰ Congress may choose to legislate only on certain aspects of a particular environmental problem and leave other aspects of this problem to state regulation. Congress may also set standards that are general in nature or that are expressly non-pre-emptive in order to allow states to provide for local needs and ensure a higher level of environmental protection. By involving Federal Governments, Congress ensures that environmental standards are common to all states thereby guaranteeing fundamental levels of environmental quality to all citizens. Uniformity also prevents states from competing for industry by adopting lax environmental standards. More so, states have a better knowledge of local conditions and are therefore seen as best situated to carry out the practical implementation of environmental regulation.⁷¹ But state involvement may impact negatively on the implementation of environmental policies as state authorities run the risk of being pressured into subjecting to demands of local industries and this may be detrimental to environmental standards. Because of such possible threats as well as other justifications, power to regulate the environment remains in the Federal Government.⁷² It must however be noted that the USA environmental policy system accords too much power to the Federal Government as there are no judicial limits on the exercise of such power. This can be detrimental to the whole objective of setting and implementing environmental standards, especially when anti-environmentalists dominate Congress.

5.5.1 United States, the World Trade Organisation and Northern American Free Trade Agreement

Owing to its early recognition of the importance of a good environment in trade and a strong economy, the USA plays a vital role in shaping the multilateral system.⁷³ The

⁷⁰ Congress tends to favour standard setting at a federal level in most statutes, for example in the Clean Air Act, the Clean Water Act and the Surface Mining Act.

⁷¹ Geradin *Trade and the Environment: A Comparative Study* 153.

⁷² Federal intervention in the area of environmental process standards is justified mainly under two rationales: first federal intervention has often been seen as necessary to ensure that fundamental levels of environmental protection are respected throughout the nation and the transboundary pollution does not occur (Section 126 of the Clean Air Act) and second, the adoption of federal standards has also been seen as necessary to remove the distortions of competition and incentives for industrial relocation that may arise when states adopt inconsistent environmental process standards (Revesz "Rehabilitating Interstate Competition: Rethinking the Race to the Bottom: Rationale for Federal Environmental Regulation" (1992) 67 *New York University Law Review* 205 at 210).

⁷³ Irwin *Free Trade* 178.

USA and other developed states have spearheaded international agreements like the GATT/WTO Agreement. Because of a stable and powerful economy, the USA, unlike many world states, has managed to give attention to calls for the protection of the environment and should be accredited for this. Backed by such an advantage, the USA has had a great stake in dominating international policies. By virtue of being a member of the WTO, the USA must, like all other member states, adhere to the terms of the GATT/WTO Agreement, but history has shown that the USA portrays unilateralism and protectionism in implementing trade restrictive measures.⁷⁴ Because of the influence it has in the enforcement of most international agreements, the USA tends to control most policies thereby maintaining a USA modelled structure in those agreements to which it is a party. This has been witnessed in the WTO dispute settlement in instances where the USA loses a case and the WTO cannot force it to reverse the non-consistent law. The General Accounting Office points to the following:

“The United States maintains that it has the right not to comply with WTO rulings. However, the United States recognises that it may bear a penalty for not complying with WTO rulings, both in the form of retaliatory duties on U. S exports and in terms of its reputation as a key player in the world trading system.”⁷⁵

United States influence is also seen in the Uruguay Round Agreement where both the Standards Code and the Agreement on Sanitary and Phytosanitary Measures (SPS) were included largely at the insistence of the USA. Many American exporters felt they had been disadvantaged by the unfair application of technical, food and agricultural standards and they wanted such standards to be subject to WTO scrutiny. On another note, the USA has taken a leadership role within the WTO, attempting to promote increased transparency and openness. Despite strong resistance from other member states, the WTO has responded positively to the USA's call for transparency. It has invited Non-Governmental Organisations (NGOs) to participate in a number of conferences and seminars and has issued a steady stream of studies on the environmental impacts of trade liberalisation. The dispute settlement process has also

⁷⁴ In the first five years of the WTO, 35 complaints have been brought against the USA and in six out of seven cases completed in 1999 the USA trade measures were found inconsistent with WTO rules (Irwin, *Free Trade* 189).

⁷⁵ USA General Accounting Office 2000b, 16 in Irwin, *Free Trade* 190.

become more public largely through the internet which provides considerably more information on the progress of dispute settlement proceedings. In the *Shrimp* case,⁷⁶ the Appellate Body did invite the views of experts in marine biology and it also permitted representations by NGOs, though these were formally required to be part of the American legal brief.

According to Vogel, the USA believes that the current system of the WTO trade and environmental rules allows it to challenge other states' non-tariff barriers (NTBs) but does not place its own rules in jeopardy.⁷⁷ For this reason the USA has an extensive array of health, safety and environmental regulations that it wants to be protected from challenges through the WTO. The USA is a party to several Multilateral Environmental Agreements (MEAs) that reflect broad international consensus. Among these agreements are CITES and the Montreal Protocol on Biodiversity. The USA has displayed a controlling characteristic by frequently playing a leadership role and dominating these MEAs. For instance, under the Montreal Protocol the USA, as a major exporter of genetically modified foods and seeds, wanted to limit the basis on which trade in such crops could be restricted.⁷⁸ This would have been against the Bio Safety Protocol which earned a strong international consensus from the European Union (EU) and more than 130 countries that ratified it. Such behaviour has seen the USA excluding itself from significant MEAs like the Basel Convention and the Kyoto Protocol simply because it does not suit USA needs. The behaviour portrayed by the USA also creates suspicion by developing states on the benefits of multilateral negotiations creating serious obstacles to maintaining international trade and environmental policies. The position of USA in the WTO clearly is an indication that a rift exists in the international community over the impact of trade on the environment.⁷⁹

⁷⁶ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report and Panel Report 6 November 1998, adopted WT DS58.

⁷⁷ Vogel "The WTO, International Trade and Environmental Protection: European and American Perspectives" <http://faculty.haas.berkeley.edu/vogel/greengiantfeb.pdf> (accessed 21 April 2005).

⁷⁸ Pollack and Shaffer "The Challenge in Food Safety in Transatlantic Relations" in Pollack and Shaffer (eds) *Transatlantic Governance in the World Economy* (2001) 170-172.

⁷⁹ Hansen "The Interplay between Trade and the Environment within the NAFTA Framework" in Francioni *Environment, Human Rights and International Trade* (2001) 313.

Environmental issues also played a prominent role in the negotiation of NAFTA which entered into force before the WTO and to which the USA is a member state.⁸⁰ The USA has therefore shown its trade and environmental concerns at regional level through active participation in NAFTA and other regional agreements.⁸¹ The NAFTA rules on regional trade are built on the GATT model and aim at the complete elimination of tariffs on all NAFTA-originating goods by 2009.⁸²

Owing to five specific provisions integrating sustainable development and environmental concerns, NAFTA was in 1994 termed the “greenest” trade agreement ever made.⁸³ First, NAFTA was the first international trade agreement to include in its Preamble an express reference to the principle of “sustainable development”, and to recognise the objective of strengthening the “development and enforcement of environmental laws and regulations”.⁸⁴ Second, the agreement establishes the principle of paramountcy of a list of environmental treaties over itself and identifies three trade-related international environment agreements in this regard and provides that the parties can agree to add other agreements.⁸⁵ Third, sanitary and phytosanitary measures allow for countries to have the level of protection that they consider best as long as these measures do not constitute disguised restrictions on trade.⁸⁶ Fourth, the question of pollution is addressed by the rejection of the concept of lowering environmental standards as a method of attracting investment, although this does not give way to true sanctions but only to consultations. And, fifth, the trade dispute settlement system within NAFTA places the burden of proof in favour of maintaining

⁸⁰ Negotiations for NAFTA took place in 1992 and NAFTA entered into force in 1994.

⁸¹ Other Regional Agreements to which USA is a party include the USA-Canada Free Trade Agreement of 1988.

⁸² NAFTA provides for elimination of most tariffs in originating goods between Mexico and the USA within 10 years. Most USA-Canada bilateral tariffs were phased out by January 1998, according to the schedule set out in their previous bilateral agreement. See Article 401 (2) of the USA-Canada Free Trade Agreement. As of 1 January 1996, due to the phase-in of the scheduled duty reductions, the average Mexican tariff on USA products had fallen from 10% to 4.9%, and the average USA tariff on Mexican products, from 4.0% to 2.3% (Office of the USA Trade Representative, 1995 *Annual Report—Regional Negotiations 1* (1996) in Hansen “Interplay between Trade and the Environment” 313, see also in this regard Johnson and Beaulieu *The Environment and NAFTA: Understanding and Implementing the New Continental Law* (1996) 24-34).

⁸³ Kirton and Maclaren (eds) *Linking Trade-Environment and Social Cohesion: NAFTA Experiences Global Challenges* (2002) 32.

⁸⁴ Johnson and Beaulieu *The Environment and NAFTA* 25.

⁸⁵ The specified agreements are the Montreal Protocol on Substances that Deplete the Ozone layer 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 and the Convention on International Trade in Endangered Species 1973 (CITES). The USA-Canada and USA-Mexico bilateral agreements on waste trade are also included.

⁸⁶ Agreement on the Application of Sanitary and Phytosanitary Measures 1993.

environmental legislation against a legal challenge rather than on the reverse approach under GATT and takes some steps toward integrating environmental protection and sustainable development into economic decision-making.⁸⁷

In addition to all these environmental provisions, NAFTA includes a side agreement, the North American Agreement on Environmental Cooperation (NAAEC) 1993, dedicated entirely to environmental issues.⁸⁸ The side agreement includes provisions that address concerns over lax enforcement of domestic environmental laws, especially over the fear that border pollution could worsen if NAFTA was implemented without an agreement addressing the issue, and concerns over financing environmental infrastructure and cleanup in the USA-Mexico border area. The NAAEC creates a Commission on Environmental Co-operation (CEC). The CEC is a trilateral organisation headed by environment ministers of Canada, Mexico and USA. The Commission's major goal is to broaden co-operation among the parties, with emphasis placed on capacity building. Particular attention has been given to enhancing capacities for pollution prevention, environmental monitoring and law enforcement in Mexico (a developing state).⁸⁹

The Commission will also serve as a point of inquiry for public concerns about NAFTA's environmental effects and as an avenue for dispute settlement Panels to obtain environmental expertise. The Council is also given key responsibilities regarding public petitions of non-enforcement of environmental laws.⁹⁰ Under the NAAEC, such a process of direct public petitioning can lead to the drafting of a factual record on the alleged non-enforcement of environmental laws and this record can be made public. Kirton and Maclaren point out that, although, ultimately, there are no legally binding obligations imposed on the country that is object of the petition

⁸⁷ Fletcher and Tiemann "Trade, Environment, GATT and NAFTA".

⁸⁸ In the final text, NAFTA negotiators included several environment-related provisions, including language to generally preserve participating countries' laws and regulations on environment, health and safety. Upon assuming office, President Clinton pledged he would not send NAFTA and its implementing legislation to Congress until he had negotiated side agreements addressing additional environmental and labour issues. In 1993 NAAEC was negotiated and concluded as well as Labour side accord (Fletcher and Tiemann "Trade, Environment, GATT and NAFTA").

⁸⁹ Kirton and Maclaren *Linking Trade-Environment and Social Cohesion* 33.

⁹⁰ This is a unique aspect of the NAAEC as it allows citizens or groups to file submissions with the Secretariat of the CEC alleging that a party is failing to enforce its environmental law. Such a process of direct public petitioning is rare in international institutions (Kirton and Maclaren *Linking Trade-Environment and Social Cohesion* 33).

denouncing alleged non-enforcement of domestic environmental legislation, the process facilitates the application of public pressure on the country concerned. At times this makes the country officials uncomfortable, leading them to prevent similar cases from arising in future. Public pressure can also move countries to anticipate a complaint or possible factual record and modify their behaviour accordingly; for example, from 1995 to 2000, 28 petitions had been filed — nine against Canada, eleven against Mexico and eight against the USA — and only one factual record was publicly released, implying that countries had succumbed to public pressure and acted timeously.⁹¹

The NAFTA is unique in that it comprises one overwhelming dominant power, the USA, and one developing country, Mexico, which was the initial requisitioner.⁹² This unbalanced position places the USA in yet another unpopular position. According to Stewart, the prospect of a free trade agreement with a neighbour that was far less economically developed than the USA and had far less stringent environmental standards and enforcement, coupled with environmental problems created by industrial development and urbanization in the free trade border area, raised alarm.⁹³ The major concern was whether USA had a hidden agenda besides promoting environmental awareness in a less-developed state, or whether it was genuinely concerned with the upgrading of Mexico's economy through eliminating trade barriers but still maintaining environmental concerns. The USA environmental community also raised reservations to such an agreement, their main fear being that a free trade regime would cause industries to migrate from the USA to Mexico, attracted in part by Mexico's less demanding environmental standards, rendering USA environmental legislation useless.⁹⁴ The most contentious environmental issue is whether a party's lax enforcement of domestic environmental laws widens the tension between developed and developing states or whether working together with such

⁹¹ Irwin *Free Trade* 179.

⁹² Kirton and Maclaren *Linking Trade-Environment and Social Cohesion* 319: NAFTA originated when Mexican president, Raoul Salinas, wanted to lock in his economic reforms and Mexico to become a North American investment magnet. He had gone to Europe and Japan to invite investors to enter Mexico, but was not confident they would come in the absence of a strong enticement — access to the USA market. The USA on the other hand saw Mexico as model for Latin American reform and thus also pushed for the trade agreement.

⁹³ Stewart "The NAFTA: Trade, Competition, Environmental Protection" (1993) 27 *International Lawyer* 751 at 752.

⁹⁴ Stewart 1993 *International Lawyer* 751.

states, like in the case of NAFTA, helps less-developed states. This very issue will be addressed in the evaluatory section of this chapter.⁹⁵

5.6 A SELECTED CASE STUDY ON TRADE AND ENVIRONMENTAL LINKAGES IN THE UNITED STATES OF AMERICA

For the purposes of comparison, an American case study similar to the South African case study will be undertaken. Coal is an energy-producing commodity that is essential to the economic well-being of the world.⁹⁶ The USA is no exception in the wide use of coal and is the world's largest energy producer, consumer and net importer, and ranks first in worldwide reserves of coal.⁹⁷ The major uses of coal in the USA are for the production of electricity for residential and commercial purposes, including production of coke for the steel industry. Being the world's second largest coal producer after China, USA coal mining activities are likely to have an impact on the environment. The case study will reveal the effects of USA coal mining on the environment by following the same sequence to the South African case study.

5.6.1 Coal Mining and the Environment

Coal has played an important role in the advancement of civilization, but its use has sometimes been accompanied by environmental damage usually encountered in the mining process itself as well as in the processing and final use of coal. Accordingly, a number of laws have been enacted and coal mining in the USA has become a highly regulated and technical operation that attempts to regulate environmental impacts. The discussion that follows will look at the impact coal has on the environment and the legislation that the USA has put in place to regulate coal mining activities from affecting the environment.⁹⁸

⁹⁵ Evaluation of the chapter will be done under section 5.8.

⁹⁶ Anonymous "USGS Fact Sheet FS-157-96 Assessing the Coal Resources of the United States" <http://energy.usgs.gov/factsheets/nca/nca.html> (accessed 13 October 2005).

⁹⁷ Subcommittee Country Profile: United States of America "Methane to Markets Partnership Coal Mine Methane" http://www.methanetomarkets.org/docs/us_profile.pdf (accessed 10- October 2005). The coal seams of the USA are found in four geographic regions: Appalachian Basins of the eastern USA, the Illinois Basin in the Midwest, the Rocky Mountain in the western USA and the Gulf Coast and Anadarko Basins of the south/south west.

⁹⁸ The technical description on coal mining in the USA and its impact on the environment has been extracted from: the Wikipedia Encyclopedia "Coal Mining" http://en.wikipedia.org/wiki/Coal_mining

5.6.1.1 Process or Production Impacts

The most economical method of coal extraction from particular coal seams depends on the depth and quality of the seams, and also the geology and environmental factors of the area being mined.⁹⁹ Coal beds deeper than 200 feet are usually mined by underground methods. Those that are at shallower depths are worked by surface methods. Underground mining requires digging a shaft to where the coal seam is found and is accomplished by three techniques: room and pillar,¹⁰⁰ long wall¹⁰¹ and high wall.¹⁰²

Areas where underground mining has occurred are subject to subsidence when the mine roof collapses. According to the Environmental Literacy Council, subsidence can affect buildings and other structures, and can also have hydrologic impacts disrupting the flow of water on the surface and underground. Subsidence from long wall mining is generally more uniform and more predictable because it usually begins as coal extraction progresses. By contrast, subsidence due to room and pillar mining is difficult to predict because the supporting pillars deteriorate at some later time, making it difficult to install environmental precautionary measures. Abandoned underground mines can result in fires fuelled by coal remaining in the abandoned workings. Such fires can travel long distances and endanger life and property in communities situated above the burning area.¹⁰³

(accessed 13 October 2005) and the Environmental Literacy Council "Coal Mining" <http://enviroliteracy.org/article.Php/1122.html> (accessed 08 September 2005).

⁹⁹ Wikipedia Encyclopedia "Coal Mining".

¹⁰⁰ With the room and pillar system, miners extract the coal by cutting a series of rooms into the coal bed and leaving pillars or columns of coal to help support the mine roof. When mining is completed the area is abandoned (Environmental Literacy Council "United States Coal: An Overview" http://www.eia.doe.gov/cneal/coal/coal_ref_pdf/text.pdf (accessed 20 October 2005)).

¹⁰¹ Long wall mining is conducted along the seam with the use of self-advancing hydraulic roof supports known as chocks or shields. These supports are placed in a line up to 400 metres (long wall) and as coal is removed from the front of the long wall the supports are advanced. As the long wall advances the cavity created behind the long wall known as the gob, cave in (Wikipedia Encyclopedia "Coal Mining").

¹⁰² High wall mining is a form of coal mining which a continuous miner is controlled remotely from outside the mine and is guided along the seam straight back drilling holes in excess of 5000 feet. As the coal is sheered off the face of the seam it falls below to a conveyor belt that transports the coal to the surface (Wikipedia Encyclopedia "Coal Mining").

¹⁰³ Environmental Literacy Council "Coal Mining".

Surface mining requires the removal of massive amounts of topsoil that consists of excavating the overburden from the coal bed and then removing the coal.¹⁰⁴ The process can cause erosion, loss of habitat and dust pollution. Because surface mining disturbs the land and can produce unsightly areas, surface mine operators are required to reclaim mined land by restoring natural vegetation and drainage.

Most methods used in mining causes acid mine drainage which causes heavy metals to dissolve and seep into ground and surface water. Coal mining frequently causes significant adverse environmental impacts. The Wikipedia Encyclopedia points out that all forms of mining in the USA are likely to generate areas where coal is stacked and where the coal has significant sulphur content. Such coal heaps generate highly acidic metal-rich drainage when exposed to normal rainfall. These liquors can cause severe environmental damage to local soils, rivers and streams.¹⁰⁵ The USA also includes active and abandoned mine emissions in its annual inventory of greenhouse gas emissions and sinks,¹⁰⁶ making the emission of greenhouse gases another factor having an impact on the environment. The USA ranks behind China as the second largest emitter of coalmine methane.¹⁰⁷

Waste piles from mining also create environmental problems, even though much of the material piled up during mining can be used in the reclamation process. The sulphur contained in the waste inhibits the growth of vegetation and also contributes to stream pollution. In addition, the waste heaps are subject to slipping, as in the Aberfan (North Wales) disaster that claimed 144 lives in 1966,¹⁰⁸ an effect that can similarly be expected in most mining states in the USA.

Coal mining is a dangerous activity and can have adverse effects on the miners. The principal hazards include slope failure, underground mining roof collapse and gas

¹⁰⁴ *Ibid.*

¹⁰⁵ Wikipedia Encyclopedia "Coal Mining".

¹⁰⁶ Subcommittee Country Profile: USA "Coal Mine Methane".

¹⁰⁷ The major sources of coal mine methane emissions in the USA are from the ventilation systems generating 58% of active underground emissions and methane drainage systems generating 42% of active underground mine emissions. Other sources of emission are from active mines (surface/underground) and abandoned underground mines (Subcommittee Country Profile: USA "Coal Mine Methane").

¹⁰⁸ Wikipedia Encyclopedia "Aberfan Disaster" <http://en.wikipedia.org/wiki/Aberfan> (accessed 13 October 2005).

explosions. However, most of these risks and multiple fatality incidents are now rare in developed countries because of modern technology.¹⁰⁹ The USA has made improvements in the gas drainage and ventilation system and has devised safety lamps to reduce many of these risks. Long wall mining is used in most of USA mines and the method is less risky in that it involves the use of self-advancing hydraulic roof supports. These supports are advanced and reduce the chances of collapse. These major improvements have ensured safety in USA coal-mining activities.

Chronic lung diseases such as pneumoconiosis (a lung disease contracted from prolonged exposure to coal dust in the mines) are also common to miners, causing a reduced life expectancy for those in the occupation.¹¹⁰ Despite the use of protective mining gear, miners are in one way or the other likely to be exposed to poisonous gases as well as massive heat pressures in underground mines.¹¹¹

5.6.1.2 Impacts from Coal Use

Most of the coal produced in the USA undergoes some degree of processing to make it a more marketable product and a good energy source in power plants. The use and preparation of coal can impact on the environment. The Environmental Literacy Council identifies particulate emissions (smog) and acid rain as the common environmental impacts associated with using coal. When coal is burned the sulphur in it is converted mostly into sulphur dioxide; and nitrogen oxides are produced from nitrogen in the coal. In the atmosphere the sulphur dioxide and nitrogen oxides are converted to sulphuric and nitric acids which can react with rain or snow to produce acid rain. And most of the ash produced at coal-fired powered plants is in the form of powder-like particulates called fly ash. Fly ash is composed mainly of silica and alumina and may contain potentially hazardous trace elements.¹¹²

Upon combustion, coal also produces a number of gaseous by-products, including carbon dioxide, nitrogen oxide, and sulphur oxide and methane gas. All these

¹⁰⁹ Wikipedia Encyclopedia "Coal Mining".

¹¹⁰ Subcommittee Country Profile: USA "Coal Mine Methane".

¹¹¹ *Ibid.*

¹¹² Environmental Literacy Council "Coal Mining".

compounds are greenhouse gases which are implicated in contributing to global climate change.

5.6.2 The Legislative Environment in Coal Mining

The Mining Law of 1872 governs mining activities in the USA. Although the Act requires the mining industry to comply with requirements of the Clean Water and Clean Air Acts, NEPA, state reclamation standards and state handling and disposal of certain toxic wastes, the Mining Law lacks direct statutory authority for environmental protection. Because of this shortcoming other federal and state laws have been enacted to raise standards in regulating the coal industry, to protect the environment and miners.¹¹³

The Surface Mining Control and Reclamation Act (SMCRA) of 1977 was the first of these national laws and requires mining sites to be restored to their original contours. The 1977 Act was extended and amended by the Abandoned Mine Reclamation Act of 1990 to require mine operators to maintain certain environmental standards during mining and reclamation.¹¹⁴ Under the SMCRA mining operators are required to submit a plan for restoring the land and for mitigating acid mine drainage before a permit to begin mining operations is issued. Such plan includes measures to control land subsidence, which can have a severe impact on roads, water and gas pipelines, and buildings. To help pay the costs of reclaiming land and water resources affected by past mining operations, the SMCRA provides a funding mechanism for restoring old abandoned mines by imposing a tax on current coal production, (a mechanism which is unlikely in developing states). Companies pay 35 cents per ton of coal mined by surface methods, 15 cents per ton mined underground and 10 cents per ton of lignite.¹¹⁵

¹¹³ Included among these federal laws is the National Historic Preservation Act of 1966, which governs the preservation of historic properties throughout states, the National Environmental Policy Act of 1969, which established a national policy for the environment, the Endangered Species Act of 1973, which governs the protection of endangered species, and the Toxic Substance Control Act of 1976 which requires regulation of chemicals that present risk to health or environment, among others.

¹¹⁴ The Surface Mining Control and Reclamation Act 30 of 1977 as amended.

¹¹⁵ Environmental Literacy Council "Coal Mining" notes that these fees were extended through the year 2004 by the Energy Policy Act of 1992.

The Resource Conservation and Recovery Act of 1976 regulates waste piles from mining and coal preparation. The Solid Waste Disposal Act serves a similar purpose by regulating the generating, storage and disposal of hazardous waste and also manages solid non-hazardous waste. The impact of mining on water quality is controlled by the Federal Water Pollution Control Act¹¹⁶ which sets standards for surface water quality and for controlling discharges to surface water. The Act has since been incorporated into the Clean Water Act of 1977 and its amendments. To maintain air quality emission levels for sulphur dioxide, nitrogen oxides and particulates, standards have been established by the New Source Standards of the Clean Air Act of 1970. In 1990 the Clean Air Act was amended to strengthen the national commitment to improve air quality by establishing a goal for the reduction in annual sulphur dioxide emissions to less than the 1980 level.

One of the major breakthroughs in the 1990 Clean Air Act is a permit program for power plants that release pollutants into the air. The Environmental Protection Agency (EPA) issues annual allowances to power plants, with each allowance permitting 1 ton of sulphur dioxide to be released from the smoke stack. Plants may release only as much sulphur dioxide as their allowances cover. If a plant expects to release more sulphur dioxide than it has allowances, it has to buy more allowances from brokers or from another power plant that has reduced its sulphur dioxide emissions and has allowances to trade. Such program promotes the reduction of sulphur dioxide emissions as companies try to curb expenses incurred by purchasing extra allowances and companies can also switch to using low-sulphur fuel. Programs like these require strict and constant supervision as well as technology and funding and the USA, unlike most developing states, has spent billions of dollars towards programs of this nature, which indicates its commitment to protect the environment from global warming.

The USA is a step ahead of other states by embarking on a coal bed methane outreach program and this is one of the world's leading programs in the capture and use of mine methane.¹¹⁷ Methane is a potent greenhouse gas that contributes to climate change if emitted into the atmosphere, but is a valuable fuel source when collected

¹¹⁶ Act of 1972.

¹¹⁷ Subcommittee Country Profile: USA "Coal Mine Methane".

and used for energy. The goals of the program are to reduce mining activities and promote the profitable recovery and utilization of coalmine methane. Active methane drainage has been employed at USA mines for many years and pre-mine drainage began in the 1970s.¹¹⁸ But because of poor technology at the time, the USA remained the second largest emitter of coal mine methane after China.¹¹⁹ However, there has been a 74% reduction in underground emission due to additional recovery and use of coal mine methane which is promoted by advanced technology¹²⁰ as well as internal funding.¹²¹ Unlike the USA, other states, mostly developing ones, have limited resources for recovering coal mine methane and as a result coal mining activities contribute largely to methane emissions.

Because coal is largely used for the production of electricity, the Federal Government has also initiated regulatory actions aimed at reducing emissions from power plants, improving energy efficiency and addressing greenhouse gas emissions. Included are the Multi-pollutant Legislation and Regulations¹²² and the Interstate Air Quality Rule.¹²³

In the USA the federal and state laws designed to protect the environment are often surpassed by coal mining company guidelines. Many coal mining operations conduct practices like monitoring the air in mines to help prevent lung disease, controlling coal dust by washing the coal or spraying mine walls with limestone, controlling gas emissions when coal is burned, reclaiming mined areas to restore air, land and water resources and wildlife habitats to their condition and voluntarily cleaning up

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Primarily through the Department of Energy and the National Institute for Occupational Safety and Health, the USA Government has put considerable effort toward assisting the industry develop and implement new technologies for improved methane drainage.

¹²¹ The USA does not receive foreign funding and any assistance under Multilateral Agreements for coal mine methane projects. Funding for these projects comes from internal mechanisms, for example, the USA Department of Energy, the Small Business Administration, Environmental Protection Agency's (EPA) Environmental Finance Program, Private Sector Investment and from incentives like subsidies and taxes.

¹²² Under the Multi-pollutant Legislation and Regulations, a variety of bills addressing pollution control at electric power plant were proposed in the 108th Congress but not passed into law (due, in part, to the opposition from environmentalists and President's Bush's "Clear Skies" initiative, whose stated goal is to reduce power plant emissions of sulphur dioxide, nitrogen oxide and mercury by approximately 70% over the next 15 years (Energy Information Administration "Country Briefs — United States of America" <http://www.eia.doe.gov/emcu/cabs/usa.html> (accessed 05 October 2005)).

¹²³ The Interstate Air Quality Rule will require power plants to substantially reduce emissions of sulphur dioxide by 70% and nitrogen oxide by approximately 50%.

abandoned mine lands particularly those mined before environmental legislation.¹²⁴ Guidelines like these indicate awareness of the importance of protecting the environment as well as knowledge on international environmental policy requirements; an awareness that seems to lack among most mining companies in developing states.

The above legislation and the USA's commitment in implementing it depict the USA as a state that has taken great strides in implementing environmental policies and as a state that can run its own affairs when it comes to fulfilling international obligations towards a good environment. Though such efforts are internationally commendable, USA environmental policies may come under pressure domestically and from other states because of their stringent requirements and they may also place USA industries at a disadvantage when competing with those states having fewer environmental policies.

5.7 INTERNATIONAL PRESSURES

The USA holds an upper hand in most international affairs and is therefore less prone to outside interferences. Most pressures affecting the coal mining industry seem to be exerted internally.

The USA Federal Government has spearheaded strict environmental laws that have impacted on the coal mining industry. The Clean Air Act is a solid example that requires all mining activities to comply with anti-pollutant laws so as to maintain high standards of clean air. The Clean Air Act Amendment (CAAA) of 1995 required lower sulphur emissions from low combustion. Despite its large coal resources, the USA mining industry had to increase coal imports by 48% in 2003 and a further rise is expected to meet low sulphur requirements. Because of demand for such coal, the Appalachia region, which ranked highest in coal production, faced reductions in 1998.¹²⁵ Therefore the continuous rise in USA gross coal imports is partly attributable

¹²⁴ American Coal Foundation "Coal Mining in America: Federal and State Regulations" <http://www.teachcoal.org/aboutcoal/articles/coalamer.html> (accessed 22 October 2005).

¹²⁵ Energy Information Administration "Country Briefs: USA".

to the heightened demand for low-sulphur coal as well as the need to meet the conditions stipulated under the CAAA.

Legal issues have also affected aspects of the coal industry with the greatest effect felt in 2003. For example, a lawsuit was filed in 2003 over the level of environmental review needed in the permitting system process, and there were challenges to the New Source Review Program requirements for power plants. A coalition of environmental groups filed a lawsuit stating that all applications for permits should get full environmental review, while a coalition of several states and local governments sued the EPA to block the implementation of the new rule published at the end of October 2003.¹²⁶ Also, in January 2003, the Fourth Circuit Court of Appeals ruled in favour of the coal industry and the Department of Justice by overturning a 2002 decision which banned new valley fill permits in West Virginia and Eastern Kentucky.¹²⁷ Such legacy of lawsuits, that temporarily halted the issuance of needed permits to open new mines contributed to a continuous constrain on the amount of coal produced.¹²⁸

Several other factors within the USA affected the mining industry. Among these were geological problems and underground mine fires.¹²⁹ A study by the Energy Information Administration shows that the weather, particularly the shortage of rain, leads to transportation of problems.¹³⁰ According to the study, the lack of rain in January and August 2003 led to low water levels in the river transportation system, in particular on the Mississippi river, resulting in delayed coal barge shipments. Severe rains on the other hand impacted both on coal production and transportation. In the Powder River basin heavy rains resulted in mine pit flooding and collapsing high walls as well as delays in train deliveries. Rail congestion problems continue to occur periodically in some mining states.¹³¹ Furthermore, a power black out that occurred in August 2003 also impacted negatively on exports and domestic supplies.

¹²⁶ Energy Information Administration "Annual Coal Report 2003"

http://www.eia.doe.gov/cneaf/coal/page/acr/acr_sum.html (accessed 13 October 2005).

¹²⁷ Energy Information Administration "Country Briefs: USA".

¹²⁸ Coal production in the Appalachian region declined in 2003 by a total of 376.0 million short tons, the lowest level seen since 1978, when coal production was curtailed by a United Mine Workers of America strike, partly due to the legacy of past law its and other factors like bankruptcies in the mining region.

¹²⁹ Underground fires result in temporary suspension of production.

¹³⁰ Energy Information Administration "Country Briefs: USA".

¹³¹ *Ibid.*

On the international arena, USA gross coal exports fell sharply from the mid-1990s, mainly because of a competitive environment. Due to strict environmental policies, the USA coal mining industry faces increased competition from other coal-producing nations having less strict environmental legislation — that is South Africa, China, Venezuela and Colombia. Decline in coal exports will also result from the international demand for low-sulphur coal. Although the USA has enforced laws to ensure production of this kind of coal, its low-sulphur coal resources fail to meet those of states like South Africa and China and competition on the international markets will favour the latter states. Consequently in the coming years, USA coal industry is expected to continue to face strong competition from other coal-exporting countries, with limited growth in import demand in Europe and the Americas.

The availability of natural gas, especially in Europe (an importer of USA coal) will also see a decline in USA coal exports. In Europe the availability of cheap gas has resulted in coal-fired power stations being demoted from base load to mid-merit operations and smaller less efficient stations being closed.¹³² Because coal has a high ratio of carbon to hydrogen, the burning of coal releases more carbon dioxide per unit of heat than does the burning of oil or natural gas — hence Europe's preference to the latter form of energy. The Kyoto Protocol was therefore negotiated and ratified by most international states in order to fight against the high emission of carbon dioxide and other greenhouse gases that are a threat to the environment.

5.7.1 The Kyoto Protocol and the Demand for United States Coal

The USA is the world's largest economy and remains the largest single source of greenhouse gas emissions. Projections reflect that USA emissions of carbon dioxide released into the atmosphere when fossil fuels are burned have reached 5 985 million metric tons — an increase of 1 083 million metric tons from 1990.¹³³ Carbon dioxide from coal combustion and methane from coal mines have been part of the worry that hovered among international states leading to the ratification of the Kyoto Protocol in 2005. The USA, despite being an Annex 1 state and a large emitter of greenhouse

¹³² McCloskey Group "Coal Case Study (2000)"

http://www.iied.org/mmsd_pdfs/066_mccloskey.pdf (accessed 13 October 2005).

¹³³ Energy Information Administration "Country Briefs: USA".

gases, is only a signatory to the Protocol and refuses to ratify it. The Protocol is therefore non-binding on the USA and yet the USA has not withdrawn from the Protocol. Such kind of behaviour could be interpreted as a burden on international coalitions fighting against environmental threats.

The reason for non-ratification goes back to 1997 before the Kyoto Protocol was negotiated, when the USA Senate unanimously passed Resolution 98, which stated that the USA should not be a signatory to any protocol that did not include binding targets and timetables for developing as well as industrialized nations or “would result in serious harm to the economy of the USA”.¹³⁴ However, at this point one could question the sincerity of USA’s commitment to the Rio Principles that advocate for the assistance of developing states in upgrading their environmental standards.¹³⁵

The current USA President, George W Bush, has indicated that he does not intend submitting the treaty for ratification, not because he does not support the good cause of the Protocol but because of the strain he believes the treaty will put on the economy.¹³⁶ Once again this reflects the stronghold that politics has on environmental issues within the USA. Despite cries from environmentalists to ratify the Kyoto Protocol,¹³⁷ the present government, being more concerned with the economy (capitalist state of affairs), maintains that the Protocol is detrimental to the economy and overlooks its advantages in curbing global warming. The USA has emphasized that uncertainties are present in the climate change issue and the Kyoto Protocol will not manage to meet these changes. Furthermore, the provisions of the treaty that split Annex 1 countries and others fail to find support in the USA Federal Government. On this note, Bush said of the treaty:

“The world’s second-largest emitter of greenhouse gases is China. Yet, China was entirely exempted from the requirements of the Kyoto Protocol. This is a challenge that requires 100% effort; ours, and the rest of the world’s. America’s unwillingness to embrace a flawed treaty should not be read by our friends and allies as an abdication of responsibility. To the contrary,

¹³⁴ The Byrd-Hagel Resolution 98 of June 1997.

¹³⁵ Principle 6 of the Rio Declaration 1992.

¹³⁶ Wikipedia Encyclopedia “Position of the USA: Framework Convention on the Emission Conference – UNFCCC” http://en.wikipedia.org/wiki/Kyoto_Protocol#Position_of_the_European_Union (accessed 06 October 2005).

¹³⁷ As of June 2005, 165 USA cities representing 35 millions Americans support the Kyoto Protocol.

my administration is committed to a leadership role on the issue of climate change. Our approach must be consistent with the long-term goal of stabilizing greenhouse gas concentrations in the atmosphere.”¹³⁸

In support of this view, public policy experts in the USA who are sceptical of the global warming hypothesis see the Kyoto Protocol as a scheme to either turn back the growth of the world’s industrial democracies or to transfer wealth to the third world in what they claim as a global socialism initiative.¹³⁹ Some theorists predict that even if the world’s leading industrial nations agree to reduce their greenhouse gas emissions as mandated by the Kyoto Protocol, it is likely that the amount of world emissions would not change. If the industrialized countries cut their demand for fossil fuels to meet the emission reduction responsibilities, the law of supply and demand would tend to cause the world prices of coal, oil and gas to go down, making fuel more affordable to poorer nations. Therefore, with an increased fuel use (primarily coal) in non-Annex I countries, the emission reductions of Annex I countries will be offset.

On this basis the USA has indicated that it would rather pursue other ways of addressing the climate change issue.¹⁴⁰ Several initiatives to address the greenhouse gas emissions have therefore been proposed.¹⁴¹ The USA is prepared to fund such initiatives, indicating that the USA can venture its own programs, unlike other states that lack the capital to do so. In addition, the USA also initiated the Asia Pacific Partnership on Clean Development and Climate Agreement which is seen as complementing the Kyoto Protocol.¹⁴² The Agreement allows countries to set their goals for reducing greenhouse gas emissions individually but with no enforcement mechanism.¹⁴³ In this way the pact is more flexible than the Kyoto Protocol. But how effective would it be without any enforcement measures?

¹³⁸ Wikipedia Encyclopedia “Framework Convention on the Emission Conference – UNFCC”.

¹³⁹ *Ibid.*

¹⁴⁰ Energy Information Administration “Country Briefs: USA”.

¹⁴¹ Examples of the proposed initiatives include *Greenhouse Gas Intensity* which calls for the reduction of the ratio of greenhouse gas emissions to economic output by 18% by 2012, a *Climate Change Research Initiative* of which the 2005 budget includes \$238 million for the program and *Carbon Sequestration Programs* whereby, with international and private-sector partners the USA is sponsoring a \$1 billion, 10 year demonstration project to create the world’s first coal-based zero emissions electricity and hydrogen power plant.

¹⁴² The Asia Pacific Partnership on Clean Development and Climate of July 2005 is an agreement signed between six Asia-Pacific nations: Australia, China, India, Japan, South Korea and the USA.

¹⁴³ Wikipedia Encyclopedia “Framework Convention on the Emission Conference – UNFCC”.

It can therefore be deduced from the discussion above that in theory USA coal exports are likely to meet competition especially in those markets that have ratified the Protocol, but in practice this would not affect the USA, considering that its coal imports exceed exports. In addition, clearly no measures have been taken against the USA for not ratifying the Kyoto Protocol, meaning coal mining activities remain the same and are subject to USA environmental policies.

5.8 FINDINGS AND EVALUATION

The case studies generally reveal that both developing and developed states have accepted the importance of protecting the environment in relation to trade activities. Although developing countries have become aware of the environmental standards, objectives and priorities that are needed, the lack of resources has limited the efforts by developing states to meet the rate of environmental degradation. The environmental standards applied mostly by developed countries could therefore be inappropriate and of unwarranted economic and social cost to others, particularly developing countries.¹⁴⁴ The issue at hand seems to be whether countries of the North and South should have comparable or similar standards to protect the environment, health and safety, considering that the carrying capacities vary from country to country depending on climate, geography and resources.

5.8.1 Environmental Recognition

The study has revealed that the issue relating to the relationship between trade and the environment has received prominent attention from both developed and developing states since the establishment of the WTO. Since the installation of a democratic government following the end of apartheid in 1994, South Africa has worked towards an economic transformation in all sectors, including trade and the environment.¹⁴⁵ Despite battling with the effects of apartheid, South Africa has given significant recognition to the importance of the environment within its trade industry. The

¹⁴⁴ International Centre for Trade and Sustainable Development "Trade and Environment Issues at Cancun"

<http://www.ucn.org/themes/pbia/themes/trade/training/Trade%20and%20Environment%20Issues%20at%20Cancun.pdf> (accessed 26 September 2005).

¹⁴⁵ Energy Information Administration "Country Briefs: SA".

inclusion of an environmental provision in its Constitution, which is the highest law in South Africa, evidences this. By virtue of being one of the first countries in the world to include such a provision, South Africa is seen to have given cognisance to the international call for environmental protection. This is a clear sign that developing states indeed recognise the importance of the environment. The USA, on the other hand, does not include a provision on the environment in its Constitution but invests power in the Congress to regulate and enforce environmental policies. In certain instances states can establish individual environmental legislation, but the legislation must meet the standards set by Congress and is only applicable within the state's jurisdiction.

The case studies highlight two different approaches to implementing environmental policies: the congressional system in the USA and the constitutional method in South Africa. The USA system is Congress-oriented meaning that Congressional powers are not subject to any direct judicial oversight. Vesting power in the Congress means that the strength and existence of environmental policies depend on who sits in Congress at a particular time. Such a system allows political penetration into environmental issues. As revealed in the study, the Bush administration is more concerned with economic development and has continuously criticized the Kyoto Protocol. Over the last 15 years environmental issues have continuously watered down within governmental circles and it does not come as a surprise to see environmental issues being politicised at international level. The reason why environmental concerns have remained high on the agenda in the USA is that environmental advocates have retained a strong position in Congress, and only when Congress has a majority of non-environmentalists is a reversal in Federal legislation likely to take place. The Congressional method is however effective in the implementation and running of environmental policies. This is so because the Congress provides the financial budget for environmental projects and maintains a check-and-balance relationship with Federal Governments which ensures that policies are being run effectively.

Unlike the Congressional method, the South African system constitutes a Constitutional Court oversight that involves an active role of both the Constitution and courts in environmental matters. Because the Constitution is a more enduring form of legislation (though subject to amendments), the constitutional system ensures

some degree of consistency and uniformity in implementing law policies; which is not true when power is vested in the Congress. The South African system does not prevent parliament from regulating environmental legislation, and it too can exercise jurisdiction similar to that of the USA Congress. A constitutional system by itself cannot ensure that the environmental policies are effectively being implemented on a daily basis because courts are not administrative bodies. It is therefore up to the designated authorities to ensure that environmental law and policies are effected, with the role of courts being limited to ensuring that the administrative powers are not abused.

Having more environmental advocates in Congress can also be disadvantageous in that their major concerns dwell on strengthening environmental policies. This is reflected with the stringent environmental measures that exist in the USA, as well as the fact that during President Reagan's tenure attempts were made to reduce the stringency of federal environmental requirements.¹⁴⁶ In order to do so, he cut the federal budget for environmental action programmes,¹⁴⁷ appointed several administrators who were less favourably-disposed to environmental goals than their predecessors,¹⁴⁸ imposed an extensive system of cost-benefit analysis and review to control the environmental regulatory proposals made by federal agencies and sought to delegate further implementation and enforcement responsibility.¹⁴⁹ Because a Republican Congress is largely "pro-business", it will scale back federal environmental laws in order to re-establish the competitiveness of American industry and create new jobs.¹⁵⁰ Therefore it is best to separate politics and environmental issues, though this seems to be impossible since most developed states have not separated the two.

A constitutional system of enforcing environmental laws ensures uniformity in all regions of the country. Although laws may be implemented at provincial or municipal level, the law remains the same throughout. However, such a system becomes

¹⁴⁶ Vig "Presidential Leadership: From Reagan to the Bush Administration" in Kraft and Vig "Environmental Policy in the 1990s" 38.

¹⁴⁷ *Ibid.*

¹⁴⁸ Wasserman "United States: Environmental Deregulation" (1983) 17 *Journal of World Trade* 365 at 366.

¹⁴⁹ Geradin *Trade and the Environment: A Comparative Study* 154-155.

¹⁵⁰ *Ibid.*

problematic considering that different regions have different geographical features and natural resources. It therefore helps to designate power to a responsible authority to govern necessary environmental policies as in the case of the USA. By involving state authorities in environmental issues, Congress gives each state an opportunity to exercise its expertise in locally. Though this system might on the face of it appear credible, it is outweighed by the fact that it promotes a “race to the bottom” among states. Clearly, less-developed southern states are likely to engage in strategies of deregulation in order to boost their local economies and attract new investment opportunities. To meet the competition North-eastern states will also do away with their strict laws.¹⁵¹ The same economic factors that may induce states to lower environmental standards to retain industry or increase investment opportunities also exert a compromising effect on state enforcement. And as Hodas puts it, “Can three not be a crowd when enforcement is shared by the USA, the states and their citizens?”¹⁵² This system will continue to work as long as Congress sets up standards common to all states and guarantees fundamental levels of environmental quality to prevent states from competing for industry by adopting lax environmental standards.

The South African coal mining study reveals that the country has adopted environmental legislation. However, it is not comparable to that of the USA, the main reason being that South Africa is still undergoing transformation from the years of apartheid and consequently must spread resources to other sectors of industry. And it is true that when most developing states, which are still struggling to build their economies cannot give a 100% focus on environmental issues, they do so at the expense of other economic, social and political matters; unlike the USA, which because of a stable economy can afford to give full attention to environmental issues.

5.8.2 Carrying Capacities of Developing and Developed States

The disparities that exist between developed and developing states also emanate from their differences in wealth, technology, management and enforcement regimes. Differences in capacities mean that standards of trade-related environmental policy

¹⁵¹ Geradin *Trade and Environment: A Comparative Study* 162.

¹⁵² Hodas “Enforcement of Environmental Law in a Triangular Federal System” in Geradin *Trade and Environment: A Comparative Study* 153.

would also differ for a developed state from that of a developing one. Such differences tend to fuel the existing tension between free trade and the environment.

The case studies of South Africa and USA reveal that although both states have large coal resources, mining and production of coal is much higher and better in the USA, mainly because of the availability of better resources and technology.¹⁵³ Mining and environmental programs engaged by the two countries in an effort to improve their mining industries and minimising the effect of mining on the environment largely indicate the differences in financial capacities.

Although both states have legislation providing for the reclamation of land after mining activities,¹⁵⁴ South Africa still struggles to do so when compared with the USA. South African mining companies are required to establish a trust fund towards that purpose. Mining can however begin on the acquisition of a temporary permit even if such trust has not been set up.¹⁵⁵ The USA, on the other hand, requires a reclamation plan to be in place before any mining permit is issued out to a company. In the event that the plan does not set out the environmental standards, or the budget allocated is insufficient, then a permit will not be issued.¹⁵⁶ Already this shows that mining companies in the USA need to establish adequate capital to repair the after damage of mining and they can only do so because of the availability of capital, which is most unlikely with small companies in South Africa that can only raise enough capital for the mining production without extra reserves for reclamation. The danger in issuing out a permit without guarantee of an established trust is that companies can fail to fund the reclamation projects yet the damage would have already been done. This differs from USA requirements that ensure mining does not take place without adequate planning which includes an indication of the availability of funds to undertake the projects in question. And because of better capacities in the USA, mining companies in most instances are able to meet the requirement.

Abandoned mines link with degraded land and these impact negatively on the environment causing unsightly areas. Rehabilitation of these mines is costly and needs

¹⁵³ South Africa ranks the sixth world coal producer and the USA ranks second.

¹⁵⁴ The Minerals Act in South Africa and the SMCRA in the USA regulate the reclamation of land.

¹⁵⁵ Trade and Industry Policy Secretariat "Trade and Environment".

¹⁵⁶ The Surface Mining Control Act as amended.

resources and advanced technology. South Africa has reclamation requirements for current mining activities only and it lacks the capital to reclaim the abandoned mines as no company is prepared to assume responsibility. The government has placed the burden on the mining industry that is expected to run reclamation projects of abandoned mines from its restricted budget.¹⁵⁷ The USA is way ahead of South Africa in projects like these. Because of its strict environmental policies companies are obliged to pay tax which is channelled to reclaiming of abandoned mines. Because most mining companies in the USA are financially stable they can afford to pay the required taxes without any major effects on their production. Such a program works well in developed states as they have the resources to do so, unlike companies in developing states who will find taxes straining on their production capacities. Because of such differences developed states tend to feel that developing ones do not put maximum effort in upgrading the environment and will result in the exclusion of the latter's products from the former's markets.

The USA has also managed to develop a number of projects aimed at protecting the environment. Methane, as already seen in the case studies, is a threat to the environment when emitted into the atmosphere. Because of lack of capital and necessary technology South Africa has not managed to embark on methane trapping projects. The resources lacking in South Africa are however available in the USA, enabling it to engage in methane trapping projects, thereby reducing its emission levels and at the same time convert the methane gas into a useful energy source.¹⁵⁸ In addition, the USA has set a budget of 1 billion USA dollars to sponsor a 10-year demonstration project for the world's first coal-based zero emissions electricity and hydrogen power plant.¹⁵⁹ With the difficulties faced by South Africa in sponsoring its own environmental policies, with particular reference to activities connected to mining, the country cannot venture into such big projects. This depicts that developing states still need to sort their internal affairs and problems before they can

¹⁵⁷ Trade and Industry Policy Secretariat "Trade and Environment".

¹⁵⁸ Subcommittee Country Profile: USA "Coal Mine Methane".

¹⁵⁹ Energy Information Administration "Country Briefs: USA".

afford to fully participate and contribute to the highly set out international environmental standards.¹⁶⁰

The management of environmental matters in South Africa seems to be lax when compared to USA administration. Although developing states might have environmentalists advocating for environmental rights, the governments of these states at times seem reluctant to implement the ideas. This can be attributed to their poor economies and resources resulting in preference being given to economy and social welfare of the people.¹⁶¹ The study on South Africa revealed that the government has been blamed for playing a limited role in advancing environmental interests within the mining industry.¹⁶² By failing to conduct any investigations or research regarding the impact of trade measures implemented in the coal markets particularly in Europe.¹⁶³ Consequently, the South African government is seen to have been too remote from the crucial aspects within trade industries that impact on the environment. A mechanism should thus be established to ensure that manufactures and exporters report on environment and trade issues that they encounter in their normal transactions or negotiations. The government's responsibility should therefore be to collate such feedback from industry to assist the government and stakeholders in formulating appropriate responses.¹⁶⁴ The USA has managed to overcome problems like these mainly because the government, states and citizens have worked closely with each other on environmental issues.¹⁶⁵ The reason why the Federal Government manages to upkeep stringent environmental policies is that it is well informed of trade and environmental laws within states and, because of the availability of resources, it has managed to promote projects in these states. The relationship that exists between the Federal Government, states and the citizens ensures that the government is in constant touch with the people and is aware of the problems faced by local

¹⁶⁰ For example, the Indian Environment Minister claimed, "India has very high standards that cannot be implemented, because Indian industries do not have the capacity to implement them" (Kirton and Maclaren *Linking Trade-Environment and Social Cohesion* 322).

¹⁶¹ Anonymous "Conflict between Free Trade and Environmental Protection" <http://www.law-bridge.net/english/e-environment.htm> (accessed 18 March 2005).

¹⁶² Trade and Industry Policy Secretariat "Trade and Industry".

¹⁶³ The government has not analysed the impact of carbon taxes in Europe and no research has been undertaken on possible impacts of environmental issues such as the UNFCCC within the coal sector (Trade and Industry Policy Secretariat, "Trade and Industry").

¹⁶⁴ Trade and Policy Secretariat, "Trade and Industry".

¹⁶⁵ Geradin *Trade and the Environment: A Comparative Study* 153.

manufacturers and exporters. Hence it can work towards securing local markets and producers and at the same time protect the environment.

Another major problem identified in developing states is that representatives of the private sector rarely get the opportunity to attend the meetings on global trade policy issues, including the one on standards and related regulations.¹⁶⁶ Government officials and public sector delegates more often than not attend these meetings. As a result many of the capacity building training programmes rarely benefit the target groups.

The health and safety of workers in South African coal mines continue to be a worrying issue with over 89 explosions witnessed in the last 5 years and 15 of these occurring in coal mines.¹⁶⁷ Like in most developing states, coal mining-related deaths remain high due to lack of adequate modern technology. In comparison multiple fatality incidents like underground roof collapse and explosions have become rare occurrences in developed states, including the USA, mainly because of modern mines that have excellent technology and equipment. Establishing modern mines requires large input, bringing us back to the centre of the debate that the lack of resources in developing states is the major cause of slow development. Evidently this has affected the coal mining industry in South Africa because smaller mines are less exposed to international and global markets. Consequently these mines are unaware of the pressure required for a company to be internationally competitive, resulting in products from such mines failing to meet international environmental standards. Most companies in the USA are aware of international policy requirements, as they have been exposed and governed by stringent domestic environmental laws that resemble those set at international levels. This difference emanates from differing management skills as well as the capabilities in developing and developed states.

The problems elucidated in the discussion above can be confirmed by the reservations surrounding the formation of NAFTA. A treaty between a developing country and two developed countries having strong environmental constituencies presents potentially sharp conflicts between trade and environmental objectives.¹⁶⁸ Firstly, a

¹⁶⁶ Consumer Unity and Trust Society Zambia "WTO Doha Ministerial and New Trade Round".

¹⁶⁷ Trade and Industry Policy Secretariat "Trade and Environment".

¹⁶⁸ Stewart 1993 *International Lawyer* 760.

free trade regime between such countries would be influential in causing company migration into Mexico where there are less stringent environmental laws. Environmentalists were also concerned that a free trade agreement would lead to an influx from Mexico of fruits, vegetables and other farm products with high pesticide residues; weakening of USA efforts to bar imports of goods, such as Mexican-caught tuna, because of the environmental harm caused by their means of production.¹⁶⁹ Secondly, product standards may differ because of differences in local circumstances. For example, Mexico would lack some pesticide residue standards that the USA has implemented. These differences are due in part to differences in crops and local growing conditions.¹⁷⁰ Lastly, countries may disagree about the appropriate level of environmental health and safety protection.¹⁷¹ Such differences may reflect disagreement over the level of risk that producers ought to tolerate. Differences over the appropriate level of risk in a developing and developed state are likely to be because of the differences in wealth and the relative priority accorded to environmental goals.

Resolving differences in the NAFTA states would mean environmental standards in Mexico must be upgraded and enforced to assure that USA product standards are not compromised. Achieving this entails that there must be an extension of the existing co-operative efforts in order to strengthen Mexico's enforcement capabilities — meaning assistance must also be provided by the USA to help Mexico reach the required standards. This is true of other developing states, as further evidenced by SADC, to which South Africa is a party. Although the regional agreement consists of only developing states that are approximately at par in terms of wealth the environmental activities within SADC are still limited due to financial constraints.

The problem created by differing capacities seems to revolve mainly on the poverty of developing countries confirming the argument that these states have raised regarding financial assistance from their developed counterparts. Developing countries have openly demanded financial and technological assistance from developed countries and at times have made this a condition to joining multilateral agreements on process

¹⁶⁹ Stewart 1993 *International Lawyer* 752.

¹⁷⁰ United States General Accounting Office, Pesticides: Review of USA and Mexican Pesticide Standard and Enforcement (1992) in Stewart 1993 *International Lawyer* 756.

¹⁷¹ Article XX (b) of GATT.

standards.¹⁷² They have cited their own poverty and the dominant responsibility of developed countries for past and present degradation, particularly where protection of the global commons or preservation of biodiversity within developing countries is at stake, and “assistance may be in the developed countries’ self interest as well equitably appropriate”.¹⁷³ Therefore as long as developed states fail to assist the poor countries, they should not expect the latter countries to meet high levels of environmental standards. If developed states attempt to use restrictive measures they will only widen the gap of poverty within economies of their developing counterparts and the latter countries will see these as protectionist measures resulting in more sour relations between the two.

5.8.3 Global Co-ordination on Trade and Environmental Issues between Developing and Developed Countries

While some environmental problems are limited geographically and can be addressed on a national or local basis, other challenges are worldwide in scale and cannot be adequately managed by individual countries acting alone. Environmental problems with transboundary effects therefore require “collective action” at an international level.¹⁷⁴ International efforts will however remain fruitless as long as the mistrust that exists between developed and developing states persists.

Both countries that have been studied are members of the WTO, an international organisation that deals with trading relationships and also includes the relation between trade and the environment. The position of these countries in the organisation differs in several aspects on the basis that South Africa is a developing country and the USA is a developed country. The case study on South Africa reveals the country has in most instances complied with the obligations of the organisation; an organisation that has unfortunately been dominated by developed states, among them the USA.¹⁷⁵ The USA has been the centre of the organisation’s disputes resulting from the application of unilateral restrictive measures that excluded most imports

¹⁷² Stewart 1993 *International Lawyer* 759.

¹⁷³ Anonymous Free Trade and Environmental Protection”.

¹⁷⁴ Esty “Strengthening Global Environmental Governance: A Critical Counterpart to a Vibrant International Trading System” <http://www.gets.org/pages/harmony/esty.doc> (accessed 05 August 2005)

¹⁷⁵ Consumer Unity and Trust Society Zambia “WTO Doha Ministerial and New Trade Round”.

particularly those from developing states into its market on the basis that these products fail to meet USA environmental standards.

The problems raised by WTO member states due to the disparities among them include, firstly, developing countries fear that developed countries may expand the use of existing environmental trade measures in a protectionist way, which would be to the disadvantage of most developing countries as they lack the resources to adhere to strict environmental measures.¹⁷⁶ Additionally, promises have been made by developed states but these have never materialised.¹⁷⁷ Developing states also feel that their decisions have not been afforded enough recognition and worse still there are problems with the dispute settlement. Although provision for legal assistance in respect of dispute settlement to developing countries has been made,¹⁷⁸ these countries feel that the provision has not been effective and operational.¹⁷⁹ As long as these and other problems remain unresolved the WTO will continuously be dominated by a few elite; but with the growing numbers of developing countries in the organisation, worse problems should be anticipated, because of the large numbers developing states will be able to block any decision that is contrary to their interests. This will have an impact on trade policies, including environmental issues.

In terms of the WTO regime, market access is supposed to be based on multilaterally-agreed principles of international trade and not to be determined by the unilateral measures of certain developed countries. It seems, however, that the situation in practice is different due to the fact that the functioning of the WTO indicates that market access is still primarily influenced by measures of protectionism and

¹⁷⁶ Scholtz "The Relationship between the Environment and Trade in the WTO: Prolonging the Conflict between North and South" (2005) 18 *Speculum Juris* 250 at 253. Also see cases like the *United States — Restrictions on Imports of Tuna*, 3 September, not adopted BISD 39S/155 and the *Shrimp* case.

¹⁷⁷ Promises were made at the Uruguay Round and later in the Doha Ministerial Declaration of 2002. Paragraph two of the Preamble of the Declaration reads as follows: "The majority of WTO members are developing countries. We seek to place their needs and interest at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play."

¹⁷⁸ Article 27 (2) of the Dispute Settlement Understanding (DSU).

¹⁷⁹ Scholtz 2005 *Speculum Juris* 253.

discrimination.¹⁸⁰ Because South African environmental policies fail to meet those of the USA, the USA can simply implement restrictive measures that bar coal from South Africa into its markets. For example, in 2002 the USA slapped anti-dumping tariffs on South African ferrovanadium, because the USA concluded that this product did not match its policies and considered the large imports from South Africa as dumping.¹⁸¹ Situations like these tend to promote unilateralism and presumably this means that other countries must follow USA environmental policies if their goods are to find a place in the USA market. This raises the issue of extra-territoriality, which has been at the centre of WTO disputes.¹⁸²

A logical response to these problems is to harmonise the product standards imposed by different nations.¹⁸³ The coal case studies reveal that harmonisation is a possible solution. For instance, the international requirement is to use low-sulphur coal to reduce greenhouse gas emissions. Because this applies to all coal producing countries there is nothing restrictive about it. The case study shows that already exports in both South Africa and the USA have reduced due to the harmonised environmental requirement for low-sulphur coal. Problems will however result in instances where other states refuse to ratify international environmental agreements as the case with the Kyoto Protocol.

The USA has not ratified the Protocol because it does not suit its economic development policies and because it places developing states at an advantage. The latter reason presented by the USA holds water on the basis that pollution from greenhouse gases is a transboundary problem which requires efforts from all countries of the world whether developed or not. The USA claims that reduction of greenhouse gases in Annex 1 countries will not address the problem of global warming. But as the case study reveals, requiring developing states to abide by the Kyoto Protocol will mean the reduction in the use of coal as a source of energy. This will evidently be difficult for South Africa and other developing states, because most of South Africa's domestic industries and communities rely on the cheap electricity produced from coal

¹⁸⁰ Mukerji "Developing Countries and the WTO Issues of Implementation" (2000) 34 *Journal of World Trade* 33 at 39.

¹⁸¹ Mbendi Information for Africa "A Profile — South Africa Mining: Vanadium Mining" <http://www.mbendi.co.za/indy/ning/vand/af/sa/p0005.htm> (accessed 02 November 2005).

¹⁸² *Shrimp* case and *Tuna-Dolphin* cases.

¹⁸³ Stewart 1993 *International Lawyer* 755.

combustion and switching to another source of energy having low emission levels will be costly. Developed states however are capable of reducing or even eliminating coal use as already evidenced by the high use of natural gas in Europe. This once again points out to the fact that developed states need to assist the poor states if harmonisation, and other trade and environmental policies, are to be achieved.

The case studies have revealed issues that reflect on the dependency of developing and developed states on each other. International efforts to safeguard the environment through trade restrictive measures require total participation by all countries. This means that for developed states to achieve this they need co-operation from their developing counterparts and for developing countries to comply they need assistance from the developed countries.

5.9 CONCLUSION

A link between the trade/environmental debate and the conflict between developing and developed countries is evident. The relevance of this recognition is that it could assist in finding solutions to the trade/environmental debate, meaning that the conflict between developed and developing states must be addressed first in order to find solutions to the trade/environmental debate.

The disparities that exist between developing and developed countries give rise to different interests and therefore opposing positions relating to the trade/environmental debate. Economists reason that nations differ in their capacity to assimilate forms of environmental degradation.¹⁸⁴ These differences are attributed to various factors such as size, geography, population density, extent and nature of existing economic development, wealth, and the value placed on environmental quality. Countries with a higher assimilative capacity can be expected to have less stringent environmental standards to the extent that their industries enjoy a competitive advantage.¹⁸⁵ On this view, it is understandable that developing countries may regard efforts by developed countries to impose higher environmental standards on them as disguised

¹⁸⁴ Stewart 1993 *International Lawyer* 757-758.

¹⁸⁵ *Ibid.*

protectionism or a form of eco-imperialism.¹⁸⁶ Because of the fear for eco-imperialism, developing countries resist the inclusion of more environment-friendly provisions in the GATT.¹⁸⁷

Developing countries also argue that, with the acquisition of wealth, a state will adopt high standard environmental policies. As a result most developing countries are of the opinion that developed countries have had the chance to achieve economic growth without paying attention to environmental matters in the process and it is only fair that they enjoy the same privileges. Developed states on the other hand appear not to have accorded their counterparts such opportunity as they continue investing resources in environmental protection ensuring stricter environmental standards that must be complied with globally. But at the same time developed countries fear that such developments will place them at a competitive disadvantage with developing states which have lax environmental policies. Because of this fear they tend to exert pressure on developing states to comply by imposing unilateral restrictive measures. They however fail to realise that a shift in development priorities is not an option for developing countries which place higher value on the welfare of their citizens and economic affairs.¹⁸⁸

Inevitably in a world between the poor and the rich, developing states cannot avoid the burden of adjustment and have to a greater extent oblige to international goals even if this impacts on their economies. This will only fuel the conflict with developed states, thereby destroying the possibility for the desperately needed co-operation. The inequalities between developed and developing states must therefore receive immediate attention if the trade/environmental debate is to achieve a constructive solution.

The disparities, mistrust and arguments raised by developing and developed states impact on the relationship between trade and environment. Focus must thus be placed on developmental issues to ensure that the conflict between developing and developed countries is minimized and “this may have a spill-over effect on the

¹⁸⁶ *Ibid.*

¹⁸⁷ Scholtz 2005 *Speculum Juris* 253.

¹⁸⁸ Kitikiti “Use of Trade Measures”.

trade/environmental debate as a focus on development may alleviate the fears of developing countries that environmental measures might be used to their detriment. It is accordingly impossible and unrealistic to address the trade/environment challenge in isolation from the division between developed and developing countries”.¹⁸⁹

¹⁸⁹ Scholtz 2005 *Speculum Juris* 265.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSIONS

“Trade is not an end in itself; rather, it is a means to an end. The end is environmental economic development.”¹ Accordingly, Scholtz maintains that trade and the environment cannot be divorced and that the trade and environmental debate is very much alive in the World Trade Organisation (WTO).² Analysis in this thesis has shown that controversial issues surrounding the debate emanate from:

- (a) The interpretation accorded to Article XX (b) and (g) of the General Agreement on Tariffs and Trade (GATT);
- (b) Differing opinions from proponents of trade and environmentalists;
- (c) The possible clash between WTO rights and obligations and those of Multilateral Environmental Agreements (MEAs); and
- (d) The economic disparities existing between developed and developing states.

Concluding remarks and recommendations will therefore be made in light of these issues dominating the trade/environmental debate.

6.1.1 Trade/Environmental Debate and the Interpretation of Article XX³

Article XX makes provision for general conditional exceptions that override obligations imposed under GATT by permitting the use of trade-restrictive measures in exceptional cases. Environmental trade measures in international trade serve as instruments for attaining objectives in internationally-agreed environmental protection

¹ Dunkel, Director-General of GATT in Weiss “Environment and Trade as Partners in Sustainable Development: A Commentary” (1992) 86 *The American Journal of International Law* 728 at 728.

² Scholtz “The Relationship between the Environment and Trade in the WTO: Prolonging the Conflict between North and South?” (2005) 18 *Speculum Juris* 250 at 263.

³ These topics were discussed in full under Chapters 2 and 4.

agreements as well as national environmental standards and preferences. This study has however shown that a number of cases that have come before the GATT and WTO have challenged the unilateral standards set by importing states that compel exporting states to emulate production standards of the importing states. These challenges have led to different interpretations of Article XX by both member states and Dispute Settlement Bodies (DSBs), thereby causing problems in ascertaining a single meaning for the interpretation of Article XX as an environmental provision.

Conflicting views have been inevitable between GATT member states, because of the unilateral use by some party states of Article XX in a protectionist manner that violates either the National Treatment Principle⁴ or the Most Favoured Nation Clause (MFN).⁵ The WTO, through its DSBs, has strived to resolve disputes of this nature. From the various adopted DSB reports, it appears that the most common practice by Panels has been to interpret Article XX narrowly and to require the invoking party to justify its actions.⁶ Kitikiti qualifies this common practice by stating that, in addition, trade-related measures, for example, environmental taxes, export and import bans, must conform to the generally-accepted provisions and must have the least trade-distortive effect. The reason for his argument is that the WTO does not have explicit provisions which deal with environmental issues outside Article XX and related Panel decisions. The common practice has however been insufficient to accord Article XX a dispute-free and uncontroversial interpretation.

The question of jurisdiction has also complicated the interpretation of Article XX. The issue of extra-territorial application of Articles XX (b) and (g) was disputed in the two *Tuna-Dolphin* cases⁷ and re-surfaced in the *Shrimp* case.⁸ The Panel in the first *Tuna-Dolphin* case rejected an extra-jurisdictional application on that basis that such an interpretation would encourage a unilateral interference by a state in the internal affairs of other states. In this sense the GATT would then no longer constitute a

⁴ Article III GATT.

⁵ Article I GATT.

⁶ The World Trade Organisation *GATT Analytical Index: Guide to GATT Law and Practice: Articles I-XXI* 6 ed (1995) 563.

⁷ *United States — Restrictions on Imports of Tuna*, 3 September 1991, not adopted, DS21/R and *United States — Restrictions on Imports of Tuna*, 16 June 1994, not adopted DS29/R.

⁸ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body report and Panel report 6 November 1998, adopted WT/DS58.

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 having identical internal regulations.⁹ The Panel in the second *Tuna-Dolphin* case concluded that extra-territorial measures would only be enforceable against the nationals and vessels of the state in question.¹⁰ Effectively, a country cannot initiate trade measures for the purpose of attempting to enforce its own laws in another country.¹¹ Although the Appellate Body in the *Shrimp* case explicitly refused to rule on the issue of jurisdictional limits of Article XX,¹² it accepted that extra-territorial measures do not imply that a measure is justifiable under Article XX.¹³

The rulings given by the different Panels clearly reflect that the question of extra-territoriality is a matter of concern in interpreting Article XX. The Analytical Index of the GATT however stipulates that the drafting history of Article XX (b) should be borne in mind when interpreting the Article. Firstly, the proposal for Article XX (b) dated from the Draft Charter of the International Trade Organization (ITO) which stated in Article 32:

“Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures :... (b) necessary to protect human, animal or plant life or health.”¹⁴

The Index further indicates that the New York Draft of the ITO Charter stated that subsection (b) should read: “For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country.” However, this clause was dropped since it reflected concerns regarding the abuse of sanitary regulations by importing countries. The record therefore indicates that the concerns of the drafters of Article XX (b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country. Impliedly, the question of extra-

⁹ Para 5.27 Panel report *Tuna-Dolphin* I.

¹⁰ Para 5.20.

¹¹ This is a governing principle of international law (Brownlie (ed) *Principles of Public International Law* (1998) 310).

¹² The Appellate Body stated in paragraph 133 that: “We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature or extent of the limitation”.

¹³ Para 121 *Shrimp-Turtle* Appellate Body report.

¹⁴ The World Trade Organisation *GATT Analytical Index* 569.

territoriality is to be addressed in such a manner though Panels will deal with each case accordingly.

The problems experienced in interpreting Article XX are good indications that it would be difficult for an environmental regulation to meet the standards established by DSBs. Difficulties of this nature result in two different opinions within the trade-environmental debate; that of free traders and that of environmentalists. Proponents of trade liberalisation maintain that free trade is necessary to stimulate economic growth, and they therefore fear that trade measures aimed at the protection of the environment may act as trade barriers. Environmentalists believe that an amicable solution is possible and thus hold the view that trade measures are an important mechanism that can ensure environmental protection.

6.1.2 Multilateral Environmental Agreements and the World Trade Organisation¹⁵

Given the fact that trade and the environment are inextricably linked; MEAs and the WTO necessarily touch on the same subject matter, namely trade-restrictive measures, albeit known different perspectives.

The rules established by MEAs and the WTO intersect in a number of areas. This intersection gives rise to a range of legal and practical challenges. Two issues in particular have been identified, the first being the compatibility of MEAs with WTO rules and the second being the issue of measures regarding non-parties to an MEA, which are designed to prevent benefits flowing from MEAs to non-parties that have incurred no corresponding obligation.

A potential basis for conflict between MEAs and the WTO would be the use of trade-restrictive measures by the former and trade liberalisation obligations under the latter organisation. Trade-related measures incorporated in MEAs may at one point prove essential for creating market opportunities and incentives to use or dispose of a good

¹⁵ The topic was discussed in full under Chapter 3.

in an environmentally-sound manner,¹⁶ but may at the same time restrict or place a ban on trade. This paradoxical state of affairs is enough ground for conflict between MEAs and the WTO.

Disputes between WTO members and non-party members to an MEA are likely to erupt over measures contained in an MEA.¹⁷ This is so because non-party members enjoy a competitive advantage which, however, is at the expense of those parties taking on environmental obligations under an MEA; for example, the requirement under the Basel Convention¹⁸ providing that trade in waste can only occur with non-parties if a bilateral or regional agreement that provides for disposal in an environmentally-sound manner is concluded. Accordingly, non-party members to the Basel Convention benefit from the trade in waste material that has the potential to pollute the environment.

Although there has not yet been a formal WTO dispute involving an MEA, the potential is high, especially with the decision by some countries to remain outside recent environmental instruments such as the Kyoto¹⁹ and Biosafety²⁰ Protocols, as well as the development of new trade rules and environmental obligations. For this reason rules must be put in place to address tensions between the WTO and the use of trade measures in MEAs because trade-restrictive measures remain an important tool in preserving the environment.²¹

6.1.3 Disparities between Developed and Developing States²²

The divide between free traders and environmentalists is also to an extent mirrored in the division between developed and developing states. Because developing states fear that trade measures will be used in a protectionist manner by their developed counterparts, developing states are reluctant to use these measures. Worse still, the

¹⁶ Stilwell and Tarasofsky "Towards Coherent Environmental and Economic Governance" http://www.ciel.org/Publications/Coherent_EnvirEco.Governance.pdf (accessed 31 March 2006).

¹⁷ *Ibid.*

¹⁸ The Basel Convention on Hazardous Wastes 1989 Article 11.

¹⁹ The Kyoto Protocol 1997.

²⁰ The Biosafety Protocol was adopted on 29 January 2000 but entered into force on 11 September 2003.

²¹ Stilwell and Tarasofsky "Environmental and Economic Governance".

²² The topic was discussed in full under Chapter 5.

use of trade-restrictive measures, according to developing states, is a strong hindrance to economic growth as most of their goods are bound to be barred from international markets of developed states for having failed to meet the strict environmental standards. Though the arguments raised by developing states are sound, eliminating trade-restrictive measures in environmental policies is practically impossible, as doing so will be going against environmental principles already implemented by most developed states and in a way will fuel environmental degradation.

Developed states argue that allowing developing states to maintain lax or no environmental policies would also disadvantage commodities from developed state industries when placed in the same market with those from states having less stringent environmental laws, resulting in developed states heavily subsidising affected industries. Consequently, developed states advocate for equilibrium in the use of trade-restrictive measures towards the attainment and preservation of a natured environment, though in most instances these states have a tendency of unilaterally abusing the trade measures as evidenced by most disputes brought before the GATT/WTO dispute settlement bodies.²³ When unilateral actions are evaluated, it is not always clear what the intent behind these actions is. In this instance where a developed country implements trade measures, aimed at environmental protection, the perception of developing countries will mostly be that it is done for protectionist reasons. The developed country may, however, have legitimate reasons for its actions. The problem of such mistrust may accordingly be one of conflicting perceptions between developed and developing countries.

These perceptions have been fuelled by certain factors. A history of inequity exists between developed and developing countries. Even if the developing states have the will to accept environmental policy proposals made by the developed states, the case studies reveal that the lack of resources to do so is the major hindrance. Evidently, the economic disparities that exist between developed and developing states will continue to widen the difference in opinion between these states thereby intensifying the trade-environmental debate.

²³ Examples of cases where states have abused trade-restrictive measures include among others, the two *Tuna-Dolphin* cases and the *Shrimp* case.

Because of these uncertainties and the fear for eco-imperialism, developing countries are likely to resist the inclusion of more environment-friendly provisions in the GATT. Such stance by developing states is justified by their opinion that none of the Uruguay Round,²⁴ the Doha Round Negotiations,²⁵ and the Cancun Ministerial Discussions²⁶ represented an equitable deal, as most incentives promised by developed states and the demands made by developing states were not met.²⁷ Although the recently-concluded Ministerial discussions in Hong Kong²⁸ met some expectations and provided some success for developing countries, these were limited and coupled with political motives, leaving developing countries concerned that they could be pressured into accepting new obligations which they were not willing to take up.²⁹ According to the Trade Lawyers Advisory Group, the European Union (EU) made an early commitment in Hong Kong to provide duty-free, quota-free access for all goods from Least Developed Countries (LDCs),³⁰ partly because “the EU wanted to shift attention away from its stance on agriculture³¹ and towards the USA and others, where certain sensitive products are not presently part of duty-free programmes for LDCs”.³² Similarly, the USA which already provides duty-free, quota-free access to many LDC products under preferential trade programs, only preserved the most politically-sensitive aspects of these programmes, by capping the new market access commitment at 97% of LDC products to protect sensitive products such as sugar.³³ The USA further negotiated some flexibility on rules of origin, a move made in an effort to preserve rules in current programmes that prohibit the use of third-country fabric in apparel products qualifying for preferential access.

²⁴ The Uruguay Round of September 1986.

²⁵ Doha Round Negotiations of November 2001.

²⁶ Cancun Ministerial Discussions of June 2003.

²⁷ Mukerji “Developing Countries and the WTO: Issues of Implementation” (2000) 34 *Journal of World Trade* 33 at 70 points out that “Despite the objectives of the WTO to bring about economic liberalization and raising living standards, the commitments given to developing countries in the Uruguay Round have not been implemented adequately.”

²⁸ Hong Kong Ministerial Conference of December 2005.

²⁹ Trade Lawyers Advisory Group “Update on the Hong Kong Ministerial Conference and Next Steps in the Doha Round — January 2006”

<http://www.uscc.gov/researchpapers/2006/updatehongkongministerialconference.htm> (accessed 11 February 2006).

³⁰ This was an issue identified in the Doha Declaration but for which the EU sought an early harvest in Hong Kong (Trade Lawyers Advisory Group “Hong Kong Ministerial Conference”).

³¹ EU stance on agriculture focuses on high domestic support in agriculture (domestic subsidies).

³² Trade Lawyers Advisory Group “Hong Kong Ministerial Conference”.

³³ *Ibid.*

Little progress was also made on Non-Agriculture Market Access in Hong Kong. The outstanding issues that members were unable to resolve include how to treat unbound tariffs and provide flexibilities under the tariff-cutting formula, the extent of product coverage, and how to implement special and differential treatment for developing countries. It is therefore evident that significant progress is unlikely in Ministerial Conferences of this nature unless developing countries are satisfied and willing to engage more actively in the requests made by their developed counterparts. Likewise, developed states have an equal responsibility and have to genuinely provide assistance and market-access programmes that are free of political motives.

As long as developed states continue to have an upper hand over developing states, the mistrust held by the latter states regarding the former will persist. And with such mistrust it becomes very difficult to put an end to the disputes created by trade/environmental issues. Soured relations between developed and developing states will definitely encroach into the existing difficulty of interpreting Article XX as well as the problems revealed by the use of trade-restrictive measures in MEAs. Therefore addressing the conflict between developed and developing states will promote the finding of solutions to the trade/environmental debate in the WTO.³⁴

6.2 RECOMMENDATIONS

6.2.1 Trade/Environmental Debate and Interpretation of Article XX

Conflict between trade and environmental issues should not force us to choose between environmental protection and free international trade: both values are essential to our future survival and well being. Accordingly, it is recommended that international trade and the protection of the environment be viewed as complementary, not conflicting values.³⁵ It has been evident for some time that

³⁴ Scholtz 2005 *Speculum Juris* 264.

³⁵ Agenda 21 United Nations Conference on Environment and Development (UNCED) 1992 states that "Environment and trade policies should be mutually supportive".

proponents of trade and the environment can no longer ignore each other's existence.³⁶ In Agenda 21 this mutual support is illustrated by the following example:

“An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributing to an increase in production and incomes and to lessening demands on the environment. It thus provides additional resources needed for economic growth and development and improved environmental protection. A sound environment, on the other hand, provides ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.”³⁷

The interdependence of trade policy and environmental policy was further re-affirmed at the Fourth WTO Ministerial meeting in Doha. Similarly, at the World Summit on Sustainable Development governments underlined the need to enhance mutual supportiveness of trade and environment.

In order to achieve this integrity and equality between environmental principles and GATT principles and to enjoy the fruitful outcome, Weiss points out that governments should be able to encourage GATT, WTO and other relevant international and economic institutions to establish a “framework for environmental development”.³⁸ Such a framework, according to Schoenbaum, should be examined in light of the following propositions and principles:

- “(a) Elaborate adequate studies for the better understanding of the relationship between trade and environment for the promotion of sustainable development;
- (b) Promote a dialogue between trade, development and environment communities;
- (c) In those cases when trade measures related to environment are used ensure transparency and compatibility with international obligations;
- (d) Deal with root causes of environment and development problems in a manner that avoids the adoption of environmental measures resulting in unjustified restrictions on trade;

³⁶ The International Centre for Trade and Sustainable Development (ICTSD) “High – Level Roundtable on Trade and Environment <http://www.ictsd.org/biores/03-09-12/story1.htm> (accessed 06 February 2006).

³⁷ Schoenbaum “Free International Trade and Protection of the Environment: Irreconcilable Conflict?” (1992) 86 *American Journal of International Law* 700 at 727.

³⁸ Weiss “Environment and Trade as Partners in Sustainable Development: A Commentary” (1992) 86 *American Journal of International Law* 728 at 729.

- (e) Seek to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences in environmental standards and regulations, since their application could lead to trade distortions and increase protectionist tendencies;
- (f) Ensure that environment-related regulations or standards, including those related to health and safety standards, do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade;
- (g) Ensure that special factors affecting environment and trade policies in the developing countries are borne in mind in the application of environmental standards, as well as in the use of any trade measures. It is worth noting that standards that are valid in most developed states may be inappropriate and of unwarranted social cost for the developing countries;
- (h) Encourage participation of developing countries in multilateral agreements through such mechanisms as special transitional rules;
- (i) Avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country;
- (j) Ensure that environmental policies provide the appropriate legal and institutional framework to respond to new needs for the protection of the environment that may result from changes in production and trade specialization.³⁹

Because of the problems encountered in interpreting Article XX due to the vague language used, it is suggested that both the GATT and the environmental provisions be amended. To erase any uncertainties as to the intention of Article XX, subsections (b) and (g) should explicitly include the term “environment”. In addition GATT should re-negotiate Article XX and consider a side agreement that would give express provision to exempt environmental protection action. The side agreement should be designed in such a manner that it “fleshes out the criteria for applying the various exceptions, particularly those in subsections (b) and (g); incorporate new principles of environmental protection, especially as regards the global environment; and develop principles that harmonize international trade and environmental concerns”.⁴⁰

A mechanism for reconciling the interests of contracting parties in the event of trade-damaging acts should also be considered. Such a mechanism could fall under a crisis management body which would ensure that measures adopted by any state would be

³⁹ Schoenbaum 1992 *American Journal of International Law*.

⁴⁰ *Danish Bottles — Commission of the European Community vs Kingdom of Denmark* (1992) ISBN: 1-56973-136-5.

kept within the dimension of the real threat. The Analytical Index of the GATT recommends guidelines to be used in the event of a trade-damaging act:

“A measure taken by an importing contracting party should not be any more severe and should not remain in force any longer than necessary to protect the human, animal or plant life or health involved; the importing contracting party should notify contracting parties in writing of the measure taken; and the importing party would be expected to agree to expeditious informal consultations with the principally concerned contracting party as soon as a trade-damaging act has occurred, with a view to reaching a common view about the dimension of the problem and the best way to deal with it effectively.”⁴¹

It is therefore proposed that the outlined principles be observed in cases of reconciliation of states over disputing opinions regarding the use of trade-restrictive measures.

Issues raised by developing states over unfair treatment and influential characteristics portrayed by developed states before the Panels of the DSB could be addressed by implementing procedural changes to the dispute settlements under the GATT/WTO that ensure that future WTO Panels are more conducive to fair and informed decision-making. For example, the selection of panellists could be reconsidered. In light of the view that the objective of panellists is to create a sufficiently diverse background and a wide spectrum of experience,⁴² one can therefore recommend that WTO Panels should include experts in the realm of environmental protection. Accordingly a Panel member should be knowledgeable on both trade and environmental issues.

The question of influence over the DSB by some member states, could be minimised by changing the dispute settlement forum from the WTO to another international body,⁴³ for example, to the International Court of Justice (ICJ) which would be more neutral and likely to be more fair to both sides. A change of forum could even cultivate the idea of setting up a new global environmental organisation equal to the WTO, which would specifically deal with environmental issues. Narrowing down the responsibilities of the WTO by transferring environmental conflicts to another

⁴¹ The World Trade Organisation GATT *Analytical Index* 572.

⁴² Anonymous “Conflict between Free Trade and Environmental Protection” <http://www.law-bridge.net/english/e-environment.htm> (accessed 18 March 2005-03).

⁴³ Anonymous “Free Trade and Environmental Protection”.

organisation will lessen the burden for the WTO ensuring efficiency and closer attention being placed on environmental matters.

6.2.2 Multilateral Environmental Agreements and the World Trade Organisation

Although no conflict has arisen thus far between states over the relationship of MEAs and the WTO, the link between the two will inevitably evolve and deepen over time as new trade rules are negotiated and as the international community responds to growing environmental challenges through the new MEAs.⁴⁴ The effect will be that the problematic relationship between trade measures in MEAs and WTO rules will remain unresolved and may erupt into the much avoided conflict. Therefore, possible conflicts between the rights and obligations of WTO and those of MEAs should be prepared for. Presently, the relationship between WTO agreements and MEAs in the context of the relationship between WTO members that are members of MEAs and those that are non-members of the MEAs is not included in the Doha Declaration. Some ways should therefore be explored to deal with possible conflicts between WTO agreements and the MEAs. The use of a waiver permissible under Article IX: 3 of the Marrakesh Agreement⁴⁵ is, according to Matsushita, one way in which WTO members can avoid the said conflict.⁴⁶ If a waiver is granted, the member's obligations under the GATT or any other WTO agreement are waived to the extent of conditions incorporated in the waiver.⁴⁷ Such a waiver would require a 3/4 majority vote at the General Council of the WTO, so as to guard against abuse of the system by member states.⁴⁸ The waiver is however a temporary relief towards the resolution of conflict between WTO and MEAs as it must terminate after a stipulated period.⁴⁹

⁴⁴ Still and Tarasofsky "Environmental and Economic Governance".

⁴⁵ Article IX: 3 explicitly allow parties to waive GATT obligations in exceptional cases.

⁴⁶ Matsushita "Dispute Settlement and Environmental Issues: Need for Amending Article XX of the GATT 1994" <http://www.gets.org/pages/harmony/Matsushita.doc> (accessed 19 August 2005).

⁴⁷ *Ibid.*

⁴⁸ Marrakesh Agreement Article IX: 3, however, a decision to grant in respect of any obligation subject to a transition period or a period for staged implementation that the requesting member has not performed by the end of the relevant period will be taken by consensus.

⁴⁹ Marrakesh Agreement Article IX: 4.

A more permanent resolution advocated for by some authors⁵⁰ and recommended in this discussion would be to consider an addition to Article XX exempting measures implementing environmental protection and MEAs from GATT provisions. This route would only be possible by consensus of WTO members to amend Article XX. Although some member states are likely to oppose such an amendment on the grounds that it falls outside the scope of the Doha Declaration, it is an option worth considering.

A third option proposed by Matsushita would be to adopt an “Understanding of Interpretation” regarding the applicability of Articles XX (b) and (g) to measures designed to implement provisions of an MEA.⁵¹ The adoption of an Understanding of Interpretation for WTO agreements by member states would mean that a measure taken by a WTO member for implementing an MEA would be presumed as falling under Article XX (b) or (g). Certain conditions must be met for such a presumption to come into effect as a decision or declaration by the WTO under Article IX: 1 of the Marrakesh Agreement or Article XXV of GATT. Included among the conditions for the presumption are the following:

- (a) any country should be allowed to join the MEA as long as it shares the common objectives of the MEA and there should be a sufficient number of participants in the MEA;
- (b) the content and scope of trade measures which will be used to implement the MEA should be clearly defined and the procedure for executing such measures should be clear and transparent;
- (c) trade measures implementing the MEA should not be arbitrary and discriminatory for countries having the same or similar conditions and should not constitute a disguised restriction of international trade; and
- (d) the purpose of the MEA should be protection of life and health of humans, animals or plants as well as the conservation of exhaustible natural resources and therefore trade measures employed to implement the MEA should be related to the objectives of environmental

⁵⁰ These authors include among others: Schoenbaum 1992 *American Journal of International Law*, Weiss 1992 *American Journal of International Law*, and Scholtz 2005 *Speculum Juris*.

⁵¹ Matsushita “Dispute Settlement and Environmental Issues”.

protection and this relationship should be reasonably close and real and not too wide.⁵²

Although such an understanding would be non-binding and exhortative it would serve as a guideline for DSBs dealing with disputes over the relationship between WTO agreements and MEAs. Member states are also expected to abide by the conditions of the presumption, giving room for a better and similar understanding of the relationship between MEAs and WTO trade measures, thereby working towards harmonisation of the two and lessening the outbreak of disputes. Accordingly, Matsushita points out:

“Recognizing this non-binding understanding of interpretation is not a complete answer to the question of how to resolve conflicts between the disciplines of WTO agreements and measures implementing MEAs, this is probably as much as one can accomplish given sharp tensions among WTO on this issue today.”⁵³

Another possible solution to work on and modify in relation to the trade-environmental debate regarding MEAs is the eco-labelling scheme. Because in the states where it is being implemented eco-labelling has proved effective in protecting the environment and impacted less negatively on free trade,⁵⁴ and is also voluntary, methods must be designed to counteract the doubts and insecurities raised by developing states over the scheme being discriminatory. Aiming at the effectiveness of eco-labelling schemes, this study proposes a further incorporation of four guiding principles into the eco-labelling program, namely, harmonisation, mutual recognition, transparency, and technical assistance.

Because there are many different eco-labelling scheme standards among different countries, and some even diverse, harmonising standards would be advantageous for states. This is so because different standards increase costs for producers if they have to meet a variety of labelling requirements in different countries. Harmonisation can help mitigate the adverse effects and decrease the cost of products while maintaining

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ The CTE recognises the effectiveness of the eco-labelling programme by stating that “well-designed eco-labelling schemes/programs can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer.”

the environmental goal. Harmonising programs are important to small foreign suppliers as well as to developing countries and should therefore be encouraged among states.

Mutual recognition takes cognisance of the validity of divergent environmental criteria and ensures that trade interests are not unduly affected by its diversity and will be much easier if exercised between countries having compatible levels of economic development.⁵⁵ If eco-labelling schemes are mutually-recognised they can escape the condemnation of discrimination and extra-jurisdiction.

Eco-labelling primarily focuses on the domestic condition, and this makes it difficult for foreign producers to gain access to the necessary information on compliance with domestic schemes. Promoting transparency to all interested parties, including exporting and developing countries could educate other countries on the condition of domestic products and would also facilitate environmental objectives and trade. Such form of transparency can be of use in alleviating political pressures among countries.

Providing technical assistance to developing countries may help reduce the potential negative effects of environmental labelling on developing countries as assistance will play an important role in helping developing countries establish their own eco-labelling programs.

6.2.3 Disparities between Developed and Developing States

Last but not least, the two case studies reveal that the debate on trade and environment-related issues, of particular concern to developing countries, has been given little recognition. For example, past Ministerial Conferences have continuously ignored concerns by developing states and in this regard Scholtz points out that, unless and until the inequalities between developing and developed states have been given immediate attention (implying that the issue has not received much attention as it should), addressing the trade/environment challenge becomes impossible and

⁵⁵ Anonymous "Free Trade and Environmental Protection".

unrealistic.⁵⁶ It is therefore recommended that closer attention be placed on the needs of developing states and effort be made to address this gap. This could be possible by dissolving the mistrust that exists between developing and developed states. How does one achieve this?

Developed states must in future adhere to their promises and give room for objective and fruitful suggestions made by their developing counterparts. To oversee this, international organisations serving in the interest of developing countries must be independent of state governments in order to curtail the powers of some states over others.

Help from developed countries to developing ones should not have strings attached. In this way perhaps the latter states will rebuild the lost trust. Developing states must in this regard be allowed to prove themselves and be given an equal opportunity to develop their economies. On this note it is also important to advocate for the phasing out of all environmentally-harmful subsidies in order to cultivate a healthy competition on the market. In particular, those subsidies that distort trade must be done away with as these hinder chances of awarding developing states equity towards economic development.⁵⁷ To avoid disputes, the phase-out process must be accompanied by the strengthening and increased collaboration of relevant institutions, the recognition of the role played by MEAs' and their equal status with WTO rules, the development of supporting environmental policies, and a transparent and open process that involves all stakeholders.⁵⁸

Market access opportunities for developing states must also be preserved but at the same time room must be maintained for implementing measures aimed at addressing legitimate environmental objectives. To achieve this it is proposed that the burden placed on developing states in complying with environmental requirements due to lack of technical and institutional capacities be taken into account when assessing products from these states. This therefore calls for a balance at the multilateral level

⁵⁶ Scholtz 2005 *Speculum Juris* 264-265.

⁵⁷ Subsidies are of importance in a number of sectors notably agriculture and also fisheries, forestry, energy, mining and transport. However developed countries have a tendency to use subsidies to their advantage, noting that developing countries often lack the financial capacity to support their industries and agricultural sectors.

⁵⁸ ICTSD "Trade and Environment".

whereby increased co-operation among institutions and ministries within and between countries having effective involvement with developing countries is encouraged. Co-operation should be earmarked for progress in liberalising environmental goods and services, based on common and transparent classification and definitions, and in a way that maximises environmental and trade benefits for both developed and developing countries as aimed under the GATT/WTO. Standards must therefore be set to ensure substantive equality of treatment between states.

Although proposals laid out in this discussion may be theoretically viable, most suggestions may in practice prove very difficult to implement. But it is evident that a conflict does exist between trade and environmental issues, and attempts must be made to protect the environment and still promote trade.

In conclusion, therefore, it is only when the following is achieved that the ongoing debate can be laid to rest:

- (a) Article XX begins to meet the standards advocated for,
- (b) relations between developed and developing states regarding trade/environmental policies are repaired,
- (c) clash between MEA rights and obligations and those of the WTO is avoided, and
- (d) workable trade/environment mechanisms are discovered, enhanced and well-administered.

