

TRADE PROMOTION VS THE ENVIRONMENT: INEVITABLE CONFLICT?

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ABSTRACT

In this paper, the writer unveils the trade-environment debate which has been revolving in WTO for quite a long time now. While economic integration and trade liberalization offer the promise of growth and prosperity, environmentalists fear that free trade will lead to increased pollution and resource depletion. On the other hand, free traders worry that over-reaching environmental policies will obstruct efforts to open markets and integrate economies around the world. Certainly, trade liberalization has the potential to affect the environment both positively and negatively. Again environmental rules can also affect trade. The risk of disputes is not just theoretical as a number of cases have been adjudicated upon already. Trade and environment tensions have therefore emerged as a major issue in the debate over globalisation. This paper examines the contours of these tensions and argues that trade policy and environmental programs can be better integrated and made more mutually supportive.

The writer further explores the links between trade and environment and argues that the two are highly interlinked and that the links are not only necessary but also extremely useful. Indeed, the environment is not an unwelcome-add on to the trade debate as there is undoubtedly a link between the two. What the WTO needs to do is to strike a balance between trade and environment so that trade does not supersede the environment whenever a dispute arises. The mini-thesis also establishes that sanctions are not the best way of enforcing environmental standards. Rather than encouraging international cooperation or acting as a deterrent for non compliance, sanctions leave the people worse off as they negatively affect the economy of the country concerned.

The discussion finally analyses the relevant instruments dealing with trade and environment and how the Dispute Settlement Body has applied the necessary provisions. The writer shows that Article XX of the GATT has been narrowly interpreted and that there is need to amend the article to further protect the environment. The thesis ends with an exploration of whether the conflict is inevitable and the writer concludes that it is not “inevitable”.

DECLARATION

I declare that “***Trade Promotion vs The Environment: Inevitable Conflict?***”, is my own work, that it has not been submitted before for any degree or examination in any other

university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Chandaengerwa Yeukai

May 2005

Signed.....



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DEDICATION

To my late sister Rennah, may your soul rest in peace.

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LIST OF ABBREVIATIONS

AB	<i>Appellate Body</i>
CTE	Committee on Trade and Environment
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species
DSU	Dispute Settlement Understanding
EMIT	Environmental Measures and International Trade
EFTA	European Free Trade Association
GATT	General Agreement on Trade and Tariffs
GMO	Genetically Modified Organisms
IPRS	Intellectual Property Rights
MFN	Most Favoured Nation
PPM	Product Process Measures
PIC	Prior Informed Consent
SACIM	Southern African Centre for Ivory Marketing
SACWM	Southern African Convention for Wildlife Management.
TBT	Trade Technical Barriers
TED	Turtle Excluder Device
TRIPS	Trade Related Intellectual Property Agreement
UNCED	United Nations Conference on Environment and Development
WTO	World Trade Organisation

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF RESEARCH

The trade and environment debate is not new as it dates back to the 1970s.¹ A growing international concern arose in the early 1970s over the impact of economic growth on the environment and this led to the 1972 Stockholm Conference on the Human Environment.² Before that, the GATT Director General then had presented in 1971 a study to the GATT contracting parties encouraging them to examine the potential implications of environmental policies on international trade. Notably, a study by the GATT Secretariat entitled “Industrial Pollution Control and International Trade” which focussed on the impact of trade on the environment reflected the trade officials’ concern that environmental policies could become obstacles to trade as well as constitute a new form of protectionism. Nonetheless, nothing was done to address the problem and the period between 1971 and 1991 marked the impact of trade on the environment.³ Members of the European Free Trade Association (EFTA) which consisted of Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland at that time requested the GATT Director General to convene the EMIT Group⁴ which would focus among other things on effects of environmental protection policies on the operation of the GATT. The activation of the EMIT Group was followed by the United Nations Conference on Environment and Development (UNCED) in 1992. Of importance about the conference is the Agenda 21 programme of action which was adopted to address the significance of promoting sustainable development through international trade. This concept of sustainable development has significantly established a link between environmental protection and development at large.⁵

The history of trade and environment under the WTO has not been an easy one. In the recent NGO Symposium in Geneva, remarks of both the Director General and a number of Mission Chiefs reflected a general awareness that the WTO Committee on Trade and the Environment (CTE) had not, so far, been a great success, but that a “new President had been brought to

¹ WTO “Trade and Environment- Environment Backgrounder-Brief History” Available at http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c1s1_e.htm (Accessed on 22/10/2004).

² *ibid.*

³ *ibid.*

⁴ Known as the Group on Environmental Measures and International Trade (1971)

⁵ WTO “Trade and Environment during GATT” Available at http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c1s1_e.htm (Accessed on 22/10/2004).

rejuvenate it.”⁶ Interesting to note is the fact that, even though the CTE produced a lengthy report for the Singapore Ministerial Conference, no conclusions were reached nor can it be said, in the opinion of most of the committee members that much progress had been made since Singapore. This has given rise to a continued debate between free traders and environmentalists.⁷

Trade liberalisation is however, a key feature of economic globalisation and an unmistakable link to economic growth.⁸ More trade appears inevitable as the world economy grows. What this means for the environment has been a contentious issue. The WTO has been openly criticised for failing to properly balance environmental and trade issues despite its founding agreement mandating it to use the world’s resources in accordance with the objective of sustainable development.⁹ Its agenda puts trade liberalisation on the highest pedestal since its aim is to ensure that trade flows smoothly, freely, fairly and predictably.¹⁰ Thus, the WTO aims at the promotion of international trade whereas environmental policies are enforced through ways that are trade-restrictive.

One source of inherent conflict is in light of the concept of “discrimination”. Free trade practices are based on the idea that countries should not discriminate against the products of other countries on the basis of where or how they were produced (the Product and Process Measures). This principle of non-discrimination runs counter to the basic premise of international environmental policies. In terms of the policies, countries should discriminate against products that involve processes that harm the environment and favour those that minimise harm. This conflict was brought out in the *Tuna/Dolphin*¹¹ a case which will be alluded to in Chapter four.

The most heated argument has been on the use of trade measures (sanctions) to enforce environmental standards. On this point “free traders” argue that the use of trade measures

⁶ Runnalls D “The WTO in the Trade and Environment Debate” Trade, Environment and Sustainable Development from Sub-Saharan Africa and Latin America .Edited by Konz P et al (2000) 58-61.

⁷ Unknown “Conflict between Free Trade and Environmental Protection: Where We Go and What We Do Tomorrow” Available at <http://lawbridge.tripod.com/e-environmental.html> (Accessed on 2/7/2005).

⁸ World Resources Institute “Trade and Environment in conflict?” Available at http://governance.wri.org/pubs_pubs_content_text.cfm (Accessed on 7/10/2004).

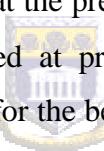
⁹ *Ibid.*

¹⁰ World Trade Organisation “The WTO in Brief” Available at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (Accessed on 23/07/2004).

¹¹ Trebilcock and Howse (2000) The Regulation of International Trade, 406. See also GATT Jurisprudence, Available at http://www.wto.org/english/tratop_e/envir_e/edisOOe.htm (Accessed on 23/7/2004).

would lead to the abuse of environmental standards, as countries will use them to protect their markets by limiting imports from non-complying countries.¹² As such, the practice would constitute an (unacceptable) obstacle to trade liberalisation. Environmentalists on their part argue that unrestricted free trade would lead to self-destruction and, therefore, demand the use of trade measures to avoid that eventuality.¹³ Developing countries have contended that if enforcement of the use of trade measures were permitted, it would be a gateway to protectionist tendencies by developed countries for their markets since rich countries have often misused environment as a protectionist tool to deny market access to developing countries.¹⁴ This would significantly affect developing countries in their endeavour to penetrate the developed countries' market.

The nexus between international trade and the environment is undoubtedly highly emotive and polarized.¹⁵ More importantly, the link between the two is complex and multifaceted. The plethora of cases¹⁶ that have been decided under the WTO have given rise to campaigns by Non-governmental Organisations to the World Trade Organisation to take environmental concerns seriously. The rationale being that the present generation in its enjoyment of natural resources must undertake measures aimed at preserving both the ecosystem and natural resources from degradation and depletion for the benefit of future generations.



1.2 RESEARCH OBJECTIVES

The study generally concentrates on the debate that has clouded the trade and environmental issues. The specific objectives being as follows:

1. Examine the nexus between trade and environment.
2. Analyse the areas of conflict between environmental policies and trade liberalisation under the World Trade Organisation.
3. Critically analyse the arguments made by “free traders” and those from the environmentalists.

¹² Unknown “Conflict between Free Trade and Environmental Protection: Where We Go and What We Do Tomorrow” Available at <http://lawbridge.tripod.com/e-environmental.html> (Accessed on 2/7/2005).

¹³ *Ibid.*

¹⁴ Bhagwati J “Multilateral Trade Versus Environment Protection: What are we doing at Home” By Mehta P S (2002) **WTO and India: An Agenda for Action in Post Doha Scenario, Centre for International Trade, Economics and Environment**, 86.

¹⁵ Trebilcock and Howse (2000) **The Regulation of International Trade**, Routledge Press, 395.

¹⁶ This consists of Shrimp/Turtle Case, Gasoline Case and Asbestos Case.

4. Explore the possibility of harmonizing the seemingly conflicting issues and in seeing whether a trade sanction is the best tool for achieving enforcement.
5. Provide suggestions for addressing the conflict to the Committee on Trade and Environment. The rationale being to contribute to the CTE's second part of its mandate which is to give recommendations on whether to modify WTO provisions in order to ensure that trade relations contribute to the objectives of sustainable development.¹⁷

1.3 PROBLEM STATEMENT

There is a conflicting relationship between trade and environmental policies. Environmentalists argue that where conflicts occur, trade commitments have the potential to trump environmental issues. In light of the above, it is worth investigating whether the trade and environment conflict represents a systematic dilemma that cannot be dismissed as an imaginary construct. Secondly, whether a balance can be reached between these interests.

1.4 SCOPE

Environmentalism and liberalisation of trade are very broad concepts and the mini thesis seeks not to deal with the issues extensively due to the limited nature of the paper. It is important to note that there are four issues involving trade and environment namely:

1. Trade promotion and environmental protection,
2. Reduction of tariffs on 'green' products and technologies,
3. Reduction of logging and fishing.
4. Finally, Intellectual Property¹⁸ protection in so far as IP protection is being extended to animals and to indigenous species of plants used in pharmaceutical products.

The scope of this discussion is thus limited to trade promotion and environmental protection. The paper therefore only covers the tip of the iceberg regarding the problem relationship between the trade system and environmental policies. The question about whether trade sanctions are an appropriate means to achieve a good end and the problem of Multilateral Environmental Agreements (MEAs) will be addressed in the paper though not exhaustively as these issues can be fully discussed independently. Further emphasis will be given to the

¹⁷ Shaw and Schwartz (2002) "Trade and Environment in the WTO State of Play" Journal of World Trade, Volume 36, Kluwer Law International, 129-154.

¹⁸ Hereinafter referred to as IP.

international trade rules under the World Trade Organisation that affect environmental concerns and to explore whether the Committee on Trade and Environment is balancing the conflict.

1.5 SIGNIFICANCE OF RESEARCH

Given the fact that there is an on-going debate around the question whether it is appropriate to deploy trade sanctions in the enforcement of environmental standards with various arguments being postulated from different angles, there is need to address the issue with circumspection. In order to achieve this goal, the research will address the conflict between the WTO rules and the environmental policies. Apparently, trade will prosper in a friendly environment and the reverse is true. It is thus important to strike a balance between trade and environment. The discussion shall also highlight most importantly to academics the need to balance the arguments, as the available literature deals with the issue but without constructively solving the conflict.

Important to note, is the fact that despite the carefully worded agreements and conventions that have resulted from the realization of the need to protect the environment whilst expanding trade, there has been considerable confusion and disagreements also on the methodology of enforcement of environmental protection policies. This is largely due to the need for the creation of international standards and adoption of measures designed to enforce those standards. The paper seeks to explore whether there is a way in which the policies could be enforced.

Bearing in mind, that the underlying principle that forms the GATT is trade liberalization, it is difficult and disturbing to accept the use of trade sanctions as a method of enforcing international environmental standards. Arguably, the sanctions will do more harm to the environment as the welfare of the people substantially declines. Because of this, there exists a potentially explosive rift in the trade-environment debate which is worth looking at. The discussion will be committed to exploring the possibility of harmonizing the two seemingly conflicting issues and in seeing whether trade sanctions are the best tool for achieving enforcement.

1.6 REVIEW OF CHAPTERS

The study is divided into six chapters preceded by an introduction. The introduction lays the background for the discussion. Chapter two addresses the nexus between trade and environment and the importance of trade promotion and environmental protection to the world at large. The chapter also discusses the areas of conflict in as far as the relationship between trade promotion and environmental protection is concerned.

Chapter three discusses the provisions relating to the environment under GATT, with an emphatic discussion on Article XX thereof. The relevance of the Committee on Trade and Environment to the debate and the challenges which the Committee have faced will further be alluded to.

Chapter four examines the recent jurisprudence with particular attention being placed to the major developments in the rulings and their implications for developing countries and Chapter five lays down recommendations which the writer intrinsically believes will assist the WTO in this intense debate. Finally, a conclusion will be drawn from the discussion.

1.7 METHODOLOGY

More use of the available literature will be made as well as various articles from journals. An overview of the most relevant GATT jurisprudence will be referred to, to substantiate some of the arguments made. The Internet will be used to access the debates that have been made recently as the debates will form the platform of the researcher's suggestions and views.

CHAPTER TWO

2. Linkages (nexus) between trade and environmental policies

2.1 Introduction

The relationship that evolves between trade and environment has been an outstanding issue in the last nine years since the establishment of the World Trade Organization, engaging Member States in debates on changing the rules of the multilateral trading system as well as gathering intense interest outside the diplomatic circles of Geneva. Addressing trade and environmental linkages at the WTO is one of its most challenging tasks. On very few occasions in the history of the post-war global trading system members have assembled to start negotiations but failed to do so.

The WTO has unfortunately, tended to treat the environment as a narrow technical issue, and an opportune one despite the fact that the environment is an important aspect of economic development.¹⁹ Indeed, the environment is simply not an unwelcome add-on to the trade debate. It is central to trade and to the concept of sustainable development which the Marrakesh Agreement recognises as the main objective of the WTO.²⁰ As such, environmental issues cannot be bracketed out of the trade issues. The rationale being that the, *“environment and the economy are like Siamese twins joined at the hip, ignore one, and you will have problems with the other”*.²¹

This implies that trade and environment complement each other and hence separating the two from each other is problematic. Moreover, sound environmental policies can create new business opportunities and these in all likelihood would increase trade. Thus, links between trade and environment are not only necessary, but could also be extremely beneficial.²²

There are two possible routes under the multilateral trading system which deals with the links between trade and the environment namely; through recourse to dispute settlement procedures in the WTO and through negotiations among the member states resulting in

¹⁹ Runnalls D “The WTO in the Trade and Environment Debate” Ed by Konz et al (2000) Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America, 62.

²⁰ Marrakesh Agreement of 1995. See WTO The Legal Texts: The Result of the Uruguay Round of Multilateral Negotiations, 4.

²¹ Runnalls D “The WTO in the Trade and Environment Debate” ED by Konz et al (2000) Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America, 63.

²² Monica Araya et al “Trade and Environment at the WTO: The Need for a Constructive Dialogue” Available at <http://www.sice.oas.org/tunit/pubinfo.asp> (Accessed on 4/03/2005).

recommendations to the Ministerial Conference. To date, the CTE has focused on identifying the relationship between trade and environmental measures which is the first part of its mandate. Nonetheless, owing to the lack of suggestions from the Committee on Trade and Environment on various trade and environmental issues compounded by the delay in launching a new round of trade negotiations, it has been argued that the relationship between trade and environment in the WTO is in effect being created through disputes.²³ This is because most of the disputes in the WTO have involved environmental questions and through the varying outcomes, it has been clear that the rulings have not been encouraging.

The link between trade and environment is in threefold.²⁴ First is the relationship between trade and efficiency. The question that needs to be addressed is to what extent does international trade promote efficiency, and thereby allow us to produce more from less and minimize our impact on the natural environment. Arguably, international trade promotes sustainable development by improving efficiency and thereby reducing our use for the resources. Interestingly, principles of sustainable development form Target 9 of the Millennium Development Goals in terms of which all countries are expected to integrate the principles of sustainable development into country policies and programmes and to reverse the losses of environmental resources.

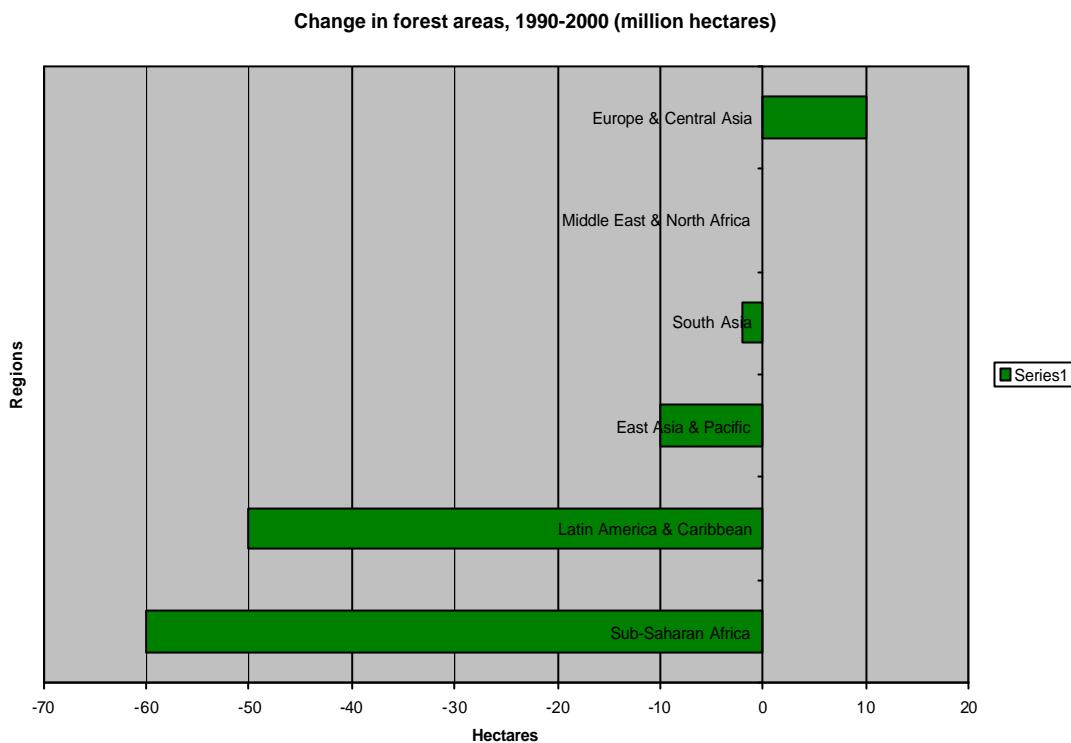


Forests have extensively shrunk by 95 million hectares in the last decade and statistics show that they only cover 30 percent of all land at the moment.²⁵ This reflects extreme loss and abuse of forests globally despite the major contributions they make such as nourishing the natural system that supports agriculture and food supplies on which many people depend on. Due to the fact that forests are still undervalued so to speak, there is need to create awareness so that they can be used for economic development which is for everyone's benefit. Below is a graph that shows the way forests are shrinking.

²³ Shaw and Schwartz (2002) "Trade and Environment in the WTO State of Play", *Journal of World Trade* Volume 36 No 1, Kluwer Law International, 129-130.

²⁴ Zaelke (2000) **Trade and the Environment in Trade, Development and the Environment**, WTO Secretariat, Kluwer Law International, 37-43.

²⁵ Unknown "Millennium Development Goals: Environment" Available on <http://www.developmentgoals.org/Environment.htm>(Accessed on 12 February 2005).



Source, Millennium Development Goals: Environment²⁶



The above graph creates the need to ask whether the loss is caused by economic activities that are justified or not. Undeniably, some loss is an inevitable part of economic development but the truth of the matter is to have good policies and economic growth which work to improve people's lives and in return profit the environment. There is no doubt that something needs to be done urgently to save the natural resources for example these forests for both the present and the next generation.

Second, is the relationship between trade liberalization, equitable wealth distribution and the demand for environmental protection. The issue that warrants our attention is whether trade promotes environmental protection by increasing the equitable sharing of wealth. From the empirical studies that have been completed, it has been submitted that as wealth increases so is the quest for a good environment.²⁷ This is explained by the environmental Kuznet curve which highlights that as;

²⁶ Unknown "Millennium Development Goals: Environment" Available on <http://www.developmentgoals.org/Environment.htm>(Accessed on 12 February 2005).

²⁷ Perez O (2004) 41.

“Society becomes richer, its members may intensify their demands for a more healthy and sustainable environment, in which case the government may be called upon to impose more stringent environmental controls.”

This should lead to the development of “cleaner” technologies.²⁸ Seemingly, this process, together with a structural change towards information-intensive industries and services lead to a gradual decline in environmental degradation.

Third, is the relationship between trade liberalisation, growth and sustainable development. In other words, to what extent does international trade allow countries to create an economic system that operates within the boundaries of her ecological systems? Conversely, where there is trade liberalisation, growth follows in addition to sustainable development as substantiated above. Since the WTO has been mandated to pursue this lofty goal,²⁹ it must embrace three key principles that are at the heart of sustainable development and these are full cost pricing and market efficiency; equitable wealth distribution and sustainable scale.

2.2 The Importance and Effects of Trade Promotion.

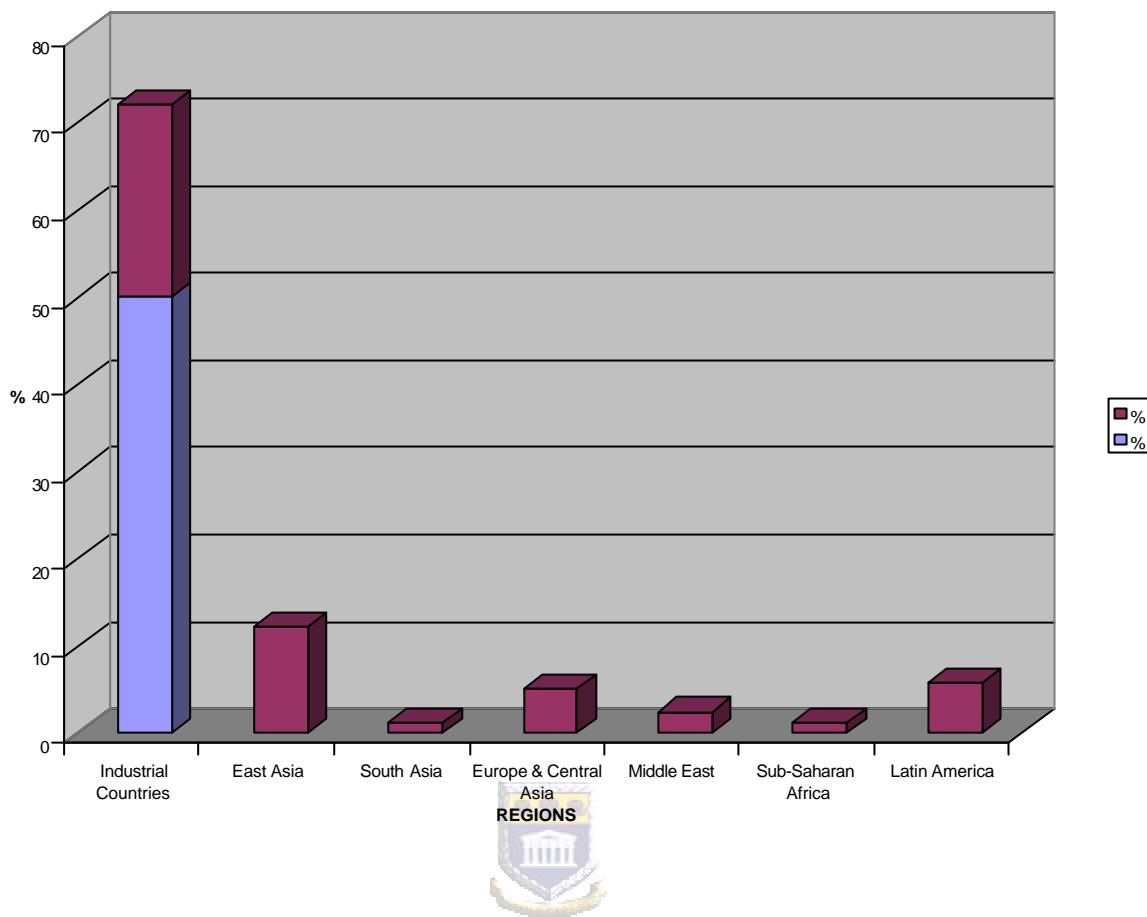


Trade is a fundamental tool for economic growth and development and as such trade promotion inextricably raises the standards of living, ensure full employment and a steady growing volume of real income. More so, it constitutes two essentials. First, it brings about a reallocation of resources towards those activities in which the country has comparative advantage. Secondly, trade promotion or liberalisation expands the consumption opportunities of countries, as more efficient production generates greater income and increased opportunities to buy goods and services from other countries. The table below illustrates the recorded gains from trade showing the necessity to promote trade at all cost.

²⁸ *Ibid.*

²⁹ Preamble to the Marrakesh Agreement Establishing The World Trade Organisation. See WTO , The Legal Texts: The Result of the Uruguay Round of Multilateral Negotiations, 4.

REGIONAL SHARES IN WORLD TRADE 1998



Source: Computed from UN Comtrade database.³⁰

Although the trade shares and trade output ratios of many poorest countries are less than 10%, in the last few years many developing countries have expanded their share of world trade. This development came about due to the integration of these developing countries into the WTO system where countries have benefited from special and differential treatment provisions and also under the Generalised System of Preferences which is meant for least developed countries like Uganda and Mozambique. In terms of the special and differential treatment principle, developed countries should not expect reciprocal concessions from developing countries. In addition, developing countries are given a longer implementation period, for example in the phasing out of quotas on textiles and apparels they have 10 years to allow a gradual phasing out of quotas. The rationale being to avoid destruction of the infant industries since the elimination of quotas will allow more imports as long as the exporter can pay the tariff. Trade to GDP have also expanded rapidly for most developing countries. However, the developed counterparts seem to be enjoying luminous trade flows as indicated

³⁰ Hoekman B M et al (2001) 443

by the high percentages of world trade. It is therefore a fact that trade liberalisation is important for the enhancement of the world economic growth and the contemporary welfare.

2.3 Environmental Protection

Environmental protection has become an exceedingly important aspect over a long time since it has dawned on people that natural resources are being increasingly depleted and the environment polluted. To argue for or against the environment is out of the question. What is significant is to strike a balance between the two. It is intriguing to note that the environment can actually be protected through trade. The rationale being that trade is a means to attain sustainable development and thus it can further protect the environment. But how can this be possible? Greater trade gives rise to greater wealth and hence the capacity and willingness to devote more resources to the environment will also increase.³¹

Restricting imports on the basis of environmental protection has been a major concern for many WTO members, and has been a factor that has led to environmental policy consideration in the WTO. A Committee on Trade and Environment was therefore created to address the perceived conflict. However, despite the renewal of the CTE's mandate at the Singapore Conference, the CTE has long continued to act mainly as a discussion forum, where lack of consensus among the parties on the most relevant issues has so far prevented the adoption of concrete recommendations.³²

2.4 The tension between trade and environment

The inescapable linkages between free trade and measures to protect the environment are undoubtedly clear, let alone that the debate is highly politicised. Delving into the issue is arduous and intricate with the negotiating fault lines along North-North as much as North-South.³³ First, the treaties liberalizing trade can harm the environment and as a result trade may conflict with environment.³⁴ If as intended freer trade leads to economic growth and expanded investment flows, the result may well be more pollution and increased consumption of natural resources. There are four ways in which tension may arise in this sense.

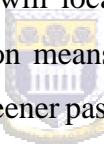
³¹ Hoekman B M et al (2001) 443.

³² *Ibid.*

³³ Shaw and Schwartz (2002) "Trade and Environment in the WTO State of Play", *Journal of World Trade* Volume 36 No 1, Kluwer Law International, p131.

³⁴ Pauwelyn J "Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO" Available at <http://www.ejil.oupjournals.org/cgi/reprint/15/3/575> (Accessed on 4/03/2005).

- The economic view is that more trade and economic activity may result in more environmental degradation. Environmentalists invoke the **pollution havens hypothesis** and argue that free trade will increase industrial pollution in developing countries through the migration of dirty industries from developed countries into developing countries.³⁵ This would arise due to the fact that developed countries have stricter environmental regulations.
- The competition brought about by free trade also put pressure on governments to lower environmental standards, the **race to bottom hypothesis**. The main idea behind this hypothesis being that international disparities in environmental standards confer a competitive advantage on low-standard countries.³⁶ Such an advantage could arguably cause developed countries to relax their environmental standards in order to avoid losing industries to developing countries. In addition, trade agreements may prevent governments from enacting certain environmental regulations and the trade rules may prohibit the use of sanctions or preferences, be it as sticks or carrots to ensure the signing up to, or compliance with international environmental standards. From this perspective, trade liberalization increases the probability that production will locate in poorer countries with less stringent environmental standards since liberalisation means that goods produced there will face low barriers on their export into “wealthier, greener pastures”.³⁷



However, these arguments are weak at best. The idea behind being that trade liberalisation can lead to environmental protection if appropriate policies are put into place.³⁸

2.4.1 The Relationship between Multilateral Environmental Agreements and World Trade Rules.

There is a clear conflict between the international legal obligations of the GATT/WTO and those found in various treaties dealing with the protection of the environment³⁹ for example the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987⁴⁰ and the Convention on International Trade in Endangered Species of Wild Flora and Fauna of 1973.⁴¹

³⁵ Perez O (2004) 34.

³⁶ *Ibid.*

³⁷ Richard H (2002) 5.

³⁸ Hoekman B et al (2001) 441.

³⁹ Booysen H (1995) 94.

⁴⁰ The Protocol aims at protecting the ozone layer and it obliges member countries to restrict the production, consumption and export of aerosols containing chlorofluorocarbons (CFCs).

⁴¹ Hereinafter referred to as CITES.

This Agreement, CITES was negotiated with a view to curbing abusive trade in endangered species.⁴² It has been somewhat successful in controlling trade particularly in well known lions' species but it has also negatively affected most African countries' trade. This topic has been vehemently debated over and over again and greater attention to the matter will be given in the following chapter. As far as the tension is concerned, it has been maintained that the GATT's dispute resolution regime does not conflict with provisions of the GATT.⁴³ Nevertheless, renewed attention to the issue arose with the adoption of the Cartegena Protocol on Biosafety in February 2002 which has been called the first trade and environment convention, and due to the ongoing divisive decisions in the *Shrimp Turtle case*⁴⁴ which will also be alluded to in Chapter 4.

The need for legal clarification of the WTO-MEA relationship, as well as for stronger dispute settlement systems within MEAs themselves have been *ad infinitum* as highlighted by the European Communities and Switzerland. The latter has even called for an interpretative understanding to create legal certainty and to prevent dispute settlement arising in the first place, a proposal which has served to bolster the debate in the CTE.



In the 1996 Annual Report concluded by the CTE, it was stated that "**further work is needed to examine the relationship between.... GATS and environmental protection policies in the sector**".⁴⁵ This is because the interrelationship between the two has reflected that there are foreseeable problems that could once again arise.⁴⁶ With regard to the TRIPS Agreement, the report showed that the TRIPS Agreement was generally pro-environment.⁴⁷ More work should thus be done to reconcile the two especially the relationship between TRIPs Agreement and the Convention on Biological Diversity.⁴⁸ Notably, the CBD's main goal is in three fold.⁴⁹ Firstly, its main objective is the conservation of biological diversity. Secondly, it aims at promoting sustainable use of resources, fair as well as equitable sharing of benefits arising out of the utilization of genetic resources. Lastly, the CBD envisages that the benefits

⁴² TED Case Studies "Thailand Bird Trade" Available at <http://www.american.edu/TED/thaibird.htm> (Accessed on 20/05/2005).

⁴³ *Ibid.*

⁴⁴ WTO Case File "The Shrimp - turtle case" Available at <http://seattlepi.nw.com/business/case1.htm> (Accessed on 10/22/2004).

⁴⁵ Macmillan (2001)13.

⁴⁶ *Ibid.*

⁴⁷ *ibid.*

⁴⁸ Hereinafter referred to as CBD.

⁴⁹ Preamble to the Convention on Biological Diversity.

accruing from commercial use of Traditional knowledge have to be shared with the people responsible for creating, refining and using this knowledge.⁵⁰

No matter how the CBD goals can be hailed or commended, the TRIPS Agreement contradicts the said objectives in that the agreement creates monopoly⁵¹ and does not recognise the rights of the country in which the biological resources or knowledge is located.⁵² There is no provision in the TRIPS to say that the applicant for patents or other Intellectual Property Rights⁵³ over biological resources have to obtain prior informed consent.⁵⁴ Whilst the CBD has set up a Prior Informed Consent system as a check against misappropriation or biopiracy, TRIPS on the other hand facilitates the possibility of such misappropriation by not recognising the need for, and thus omitting the PIC mechanism.

There are thus inherent tensions between the granting of intellectual property rights under TRIPS with the objectives of the CBD. Article 16(5) of the CBD, in fact recognised that IPRS can have a negative impact on the implementation of the CBD provisions, and thus urges parties to cooperate to ensure that IPRs are supportive and that they do not run counter to the CBD objectives.⁵⁵ Nonetheless, Article 27.3 (b) of the TRIPS Agreement requires countries to allow for patenting of biological resources and this means that the organisms should meet the patent requirements.⁵⁶ The fact that the requirements are difficult to satisfy indicates that there is a need to renegotiate for an appropriate legal criterion.⁵⁷ Developing countries particularly the African Group of countries, the Like Minded Group and the Least Developed Group of countries in the WTO, have expressed rejection of patents over life forms, and have since highlighted their deep concern over the incompatibility of the TRIPS with the CBD. There is therefore an urgent need to review Article 27.3(b) to exclude biological materials and processes. It would be critical for the WTO not to solve this conflict between TRIPS Agreement and the Convention on Biological Diversity.

⁵⁰ Article 8 (j) of the Convention on Biological Diversity states the need to respect, protect and reward the knowledge, innovations and practices of the local communities. It also places an obligation on governments to protect Traditional knowledge.

⁵¹ TRIPS Agreement gives the owner for example of patent exclusive rights over his or her creation.

⁵² Third World Network “Intellectual Property Rights, TRIPS Agreement and the CBD” Available at <http://www.twnside.org.sg/title/benefit.htm> (Accessed on 20/05/2005).

⁵³ Hereinafter referred to as IPRS.

⁵⁴ Hereinafter referred to as PIC.

⁵⁵ Third World Network “Intellectual Property Rights, TRIPS Agreement and the CBD” Available at <http://www.twnside.org.sg/title/benefit.htm> (Accessed on 20/05/2005).

⁵⁶ These are novelty, inventive step and industrial applicability.

⁵⁷ A *sui generic* interpretation of TRIPS Article 27.3 (b) can be made on plant varieties to include the protection of traditional knowledge and local community rights in line with the Convention on Biological Diversity.

2.4.2 Product and Process Standards as a Contemporary Area of Conflict.

One of the areas where trade and environment appear to conflict largely is in the area of product standards.⁵⁸ This phenomenon involves the regulation of certain characteristics of the product being offered on the market for sale. It is crucial to note that even though such standards do not directly regulate interstate trade, they maybe used as an instrument of protection, as such discriminate between domestic products from imported products.⁵⁹ Furthermore, in the absence of a discriminatory effect, inconsistent product standards impede interstate trade since the manufactures can be denied the ability to realize economies of scale in production, distribution as well as in market fragmentation.

Tension may further arise in the area of process standards. Contrary to the product standards, process standards do not regulate the characteristics of the product themselves. They rather regulate the production methods used in the manufacture of products. In the same way as product standards, the process standards do not generally impede trade but may distort it. The costs of production will vary from one state to the other as a result of the standards and as such unequal conditions might be created. The effects posed by the standards were also alluded to in the *Tuna/Dolphin* case which will be intensely discussed in chapter four.⁶⁰ There is definitely a need to reconcile these policies in the best way possible through trade and to circumvent the idea of prioritizing any of the two.

2.5 Developing Countries' Perspective.

It is worth noting that resistance to “linking” trade and environmental standards has been voiced more clearly by developing countries than by developed country governments. The immediate reason for this being that developed countries are more likely to be in compliance with environmental standards than their counterparts.⁶¹ If enforcement of these standards becomes more effective due to incorporation in the WTO regime, it is crystal clear that compliance costs would indeed accrue disproportionately to poor countries vis- a - vis rich countries. While economic consequences are at the heart of developing countries’ opposition, that alone cannot explain it.

⁵⁸ Geradin D (2002) **Trade and Environment: A Comparative Study of EC and US Law**, p3.

⁵⁹ Interstate trade refers to trade between nations, that they can import or export to other countries without restrictions.

⁶⁰ The process standards arguably give incentives to producers operating in states enforcing strict process standards to relocate in states where such standards are less stringent (race to bottom principle).

⁶¹ Thomas, C “Trade Related Labour and Environment Agreement?”(2002) Volume 5, No.4 *Journal of International Economic Law*, 817.

The resentment often at hand in such objections derives from a widely held belief, that broadening the organization's scope for addressing environmental concerns would only reinforce the existing imbalance in the trade talks. In particular, these countries fear that higher environmental standards will create new non-tariff barriers to trade that could trigger a new wave of protectionism that can counteract the gains acquired from decades of trade liberalisation efforts and negotiations.⁶² These fears have led to a highly polarized debate within the WTO, which clearly reduces the prospects for a constructive dialogue.

Some developing countries like Zimbabwe strongly believe that industrialised countries place high political priority on the inclusion of environmental and sustainable development considerations in trade negotiations.⁶³ This reflects the fact that any negotiating agenda that does not involve the environment will fail to attract political support from industrialised countries. To say the least, developing countries are less enthusiastic as they worry about the use of unilateral measures under the guise of environmental concerns and are fearful that accommodating the use of trade-restrictive measures for non-trade purposes may spill over into other sensitive areas like labour and human rights. It is also evident that these developing countries tend to see a danger to their sovereignty and to their right to exploit their own natural resources in any way they see fit.⁶⁴

By and large, developing countries particularly in Africa perceive the current debate as lacking balance.⁶⁵ This is because proposals by industrialised countries focus on accommodating measures that restrict trade as opposed to measures that promote trade. The result is scepticism on the part of developing countries especially on the sincerity of industrialised countries about their intention to advance sustainable development on the basis of the principle of common but differentiated responsibilities.⁶⁶ Doubts often expressed by developing countries over the extent to which supportive measures (for example finance, access to environmentally sound technologies, and capacity building) specified in WTO

⁶² Monica Araya "Trade and Environment at the WTO: The Need for a Constructive Dialogue"
<http://www.sice.oas.org/tunit/pubinfo.asp> (Accessed on 16/11/2004).

⁶³ Zimbabwe Herald newspaper, "Zim Sidelined from Meeting" Dated 13 December 2004, p2.

⁶⁴ Runnalls D "The WTO in the Trade and Environment Debate", Ed by Konz et al (2000) **Trade, Environment and Sustainable Development: Views from Sub-Saharan Latin America**, 61.

⁶⁵ Veena (2002) "Environmental Regulation and the WTO" **Development, Trade and the WTO: A Handbook** Ed by Hoekmann et al, 475.

⁶⁶ Jawara F and Kwa A (2003) **Behind the Scenes at the WTO: The Real World of International Negotiations**, 22.

agreements, aggravate the problem. Jackson⁶⁷ noted that environmental regulation threatens developing countries economies and starvation of their population. Oddly enough, rich countries have benefited over centuries from the freedom of environmental protection rules and that even today they are responsible for most of the world's pollution. He alludes that all this is occurring because of the already "chaotic and unstructured international system".⁶⁸ Be that as it may, compatibility between trade and environment should be the rule as opposed to conflict.

It is ironic that the very countries that appear to advocate for trade restrictions are the ones that have sought and achieved prosperity through free trade. Apparently the said countries like Canada and the United States that strongly championed for eco-labelling are now questioning its application on Genetically Modified Foods (GMOs).⁶⁹ In terms of the US argument, GMOs do not need labelling on the basis that the products are safe and that the tests for traces of GMOs would be prohibitively expensive and complicated. What is interesting is that, when developing countries raised similar concerns regarding eco-labelling on textiles and footwear their arguments were dismissed on the grounds that consumer preferences should be catered for. Surprisingly, the issue of consumer preferences have not been given much emphasis in discussions on GMOs.⁷⁰



The question whether the debate between trade and environment represents a systemic problem is clear-cut. While developing countries pay attention to trade to develop their economies, developed countries strive for environmental protection in as much as trade is vital for their development. The argument being that trade liberalisation may result in some degree of environmental degradation which can be costly to the countries and the world at large. **Bhagwati however argues convincingly that the existence of environmental externalities should not lead to the renunciation of "free trade", but rather to the adoption of appropriate environmental policy measures, leading back to "free trade" as first-best trade policy.**⁷¹ Such an argument seems appealing and attractive simply because

⁶⁷ Jackson "World Trade Rules and Environmental Policies: Congruence or Conflict?" Available at <http://www.worldradelaw.net/articles/jacksontradeenvironment.pdf> (Accessed on 4/03/2005)

⁶⁷ *ibid* note 29 at 473.

⁶⁸ Jackson "World Trade Rules and Environmental Policies: Congruence or Conflict?" Available at <http://www.worldradelaw.net/articles/jacksontradeenvironment.pdf> (Accessed on 4/03/2005)

⁶⁹ *ibid* note 29 at 473.

⁷⁰ See "Committee on Technical Barriers to Trade" Bridges Monthly Review 2 (6 September 1998) p2.

⁷¹ A highly regarded trade economist. Bhagwati (2002)61-62

when trade flows smoothly, fairly, freely and predictably the world is bound to develop from the gains acquired from free trade.

In conclusion, the need to protect the environment has become exceedingly vital and promises to be more important for the benefit of future generations. Without a clean environment there is a danger of an outbreak of diseases, lack of goods and services and harsh weather conditions as a result of the depletion of the ozone layer. The world will not be a better place for anyone. As one of the chief goals of the Millennium Development Goals, managing and protecting the environment is therefore key to development.⁷² On the other hand, trade liberalisation is important for enhancing world economic wealth which in turn provides a great opportunity for billions of people to lead satisfying lives. Indeed, trade promotion is the tool for developing economies and should be used as a tool to protect the environment.



⁷² Unknown “Millennium Development Goals: Environment” Available on <http://www.developmentgoals.org/Environment.htm>(Accessed on 12 February 2005).

CHAPTER THREE

3. OVERVIEW OF INSTRUMENTS DEALING WITH TRADE AND ENVIRONMENT

3.1 RELATED PROVISIONS UNDER THE GATT

3.1.1 *Introduction*

The General Agreement on Tariffs and Trade⁷³ main concern is liberalization of international trade.⁷⁴ The GATT trade liberalisation policies that have been deemed fundamental for almost half a century include Article I, III and XI.⁷⁵ These provisions specifically prohibit border restrictions on the exportation and importation of goods. This stems out from the basic principle of non-discrimination which is enshrined in the “Most Favoured Nation” clause as well as in the National Treatment Clause.

In terms of the Most Favoured Nation principle all tariff concessions accorded to one state must be automatically extended to all other GATT contracting parties.⁷⁶ The “national treatment” clause is based on the premises that imported goods which have entered the market should be accorded the same treatment accorded to national goods, Article III. The two clauses are supplemented by Article XI which proscribes members from restricting imports from or exports to the territory of another WTO member through the use of quotas, import or export licenses or other measures intended to have the same effect. Thus, the GATT contains some element of minimum standards. Indeed, these norms aim at ensuring that trade becomes freer and fairer with the ultimate goal of furthering economic growth through the expansion of international trade.⁷⁷ The prohibitions are however, subject to a narrow range of exceptions.

3.1.2 ARTICLE XX EXCEPTIONS

Since most of the border measures connected with environmental goals is likely to violate Article XI, much of the jurisprudence has centred on whether such measures can be saved by virtue of the exemptions provided in Article XX of the GATT.⁷⁸ According to this provision,

⁷³ Hereinafter referred to as GATT.

⁷⁴ GATT 1947, Preamble.

⁷⁵ Jackson, “World Trade Rules and Environmental Policies: Congruence or Conflict?” Available at <http://www.worldtradelaw.net/articles/jacksontradeenvironment.pdf>?(Accessed on 4/03/2005)

⁷⁶ Article 1 of GATT 1947.

⁷⁷ Trebilcock and Howse (2000) 397.

⁷⁸ *Ibid.*

the burden imposed on unilateral measures taken by a contracting party with the aim of protecting one of the interests listed therein, can be held compatible with the GATT rules provided that “***such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade***”. Among the classes of measures listed are,

1. Article XX (b) which deals with the national measures “***necessary to protect human, animal or plant life or health***”;
2. Article XX (g) which provides for measures “***relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption***”.

To a larger degree, these provisions provide a softened measure of “national treatment and MFN obligations”. These require governments that take measures which arguably qualify as exceptions of Article XX to do so in such a way as to minimise the impacts that could possibly occur. This has led some panels to interpret Article XX to require nations to use the “least restrictive alternative” and again this has given rise to interpretive problems resulting in the environmental-trade liberalisation clash. Two questions particularly stand out, namely the interpretation of the word “necessary” and the question whose health, or which exhaustible natural resources can be the object of an acceptable governmental regulation.⁷⁹ The word “necessary” clearly needs interpretative attention.

Relatively, a restriction on exports of endangered species of plants and animals fall within Article XX (b) if they can be shown to be “necessary”. A measure is not necessary if the same level of protection could be achieved by a measure which is less disruptive of international trade. What this implies is that a proportionality test should be invoked to balance the regulation’s objectives against its effects on trade. Equilibrium will be achieved only if dispute panels interpret “unnecessary” in an environmentally sensitive way. Whether this is how the Panels interpret the word “unnecessary” will be shown in the preceding pages. Important to note is the fact that the word “environment” is not explicitly mentioned in the provisions. This divides commentators as they draw different conclusions ranging from the absurd ones to the logical ones. According to Massimiliano Mbntini a renowned author

⁷⁹ Jackson “World Trade Rules and Environmental Policies: Congruence or Conflict?” Available at <http://www.worldtradelaw.net/articles/jacksontradeenvironment.pdf> (Accessed on 4/03/2005)

Article XX justifies unilateral adoption of measures aimed at protecting the environment since there is no explicit reference to the environment in the GATT.⁸⁰ The problem that arises is the extent to which this exemption permits countries to restrict imports with the aim of promoting the environment.⁸¹ Unfortunately the GATT left this crucial question unanswered.

3.1.3 Application of Article XX

The chapeau which forms part of the article is interpreted by the Appellate body as embodying “*the recognition on the part of the WTO member of the need to maintain a balance of rights and obligations between the right of the member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the other hand and the substantive rights of the other members under GATT 1994, on the other hand*”.⁸² The measures must therefore be necessary and must not be arbitrary, discriminatory or unjustifiable between countries where the same conditions prevail.

3.2 MULTILATERAL ENVIRONMENTAL AGREEMENTS

Nearly 200 Multilateral Environmental Agreements⁸³ exist today with membership ranging from a small group to 170 nations. The focus in this area has been largely centred on the relationship between the WTO and the MEAs. The relationship between MEAs and the trading system is at stake as efforts to address the problem has been accentuated with the North-South divide. The Convention on International Traffic in Endangered Species, (CITES) for example use trade as a direct means of achieving an environmental purpose. As such, this treaty has badly affected countries that trade in Rhino horns, hides, shells and live animals like elephants which are perceived as endangered. Contrary to the Convention, the animals have become a menace due to alarming numbers.⁸⁴ A clear example is in the case of Zimbabwe where the Convention has resulted in extreme trade loss on elephants and rhinos. Zimbabwe has 66 000 elephants that exceed the population of 40 000 which the ecological

⁸⁰ Montini M “The necessity Principle as an Instrument of Balance” Ed by Francioni F (2003) **Environment, Human Rights and International Trade**, Hart Publishing, 151.

⁸¹ McDonald “Greening the GATT: Harmonising Free Trade and Environmental Protection in the New World Order” 23 *Environmental Law* (1999) 397.

⁸² Charnovitz S, (1991) “Exploring the Environmental Exception in Article XX”, *Journal of World Trade* 5.

⁸³ Hereinafter referred to as MEAs.

⁸⁴ A clear example of how numerous elephants can be a menace to people’s crops and homes occurred in lower Guruve, a place located north of Harare in Zimbabwe. See CAMPFIRE (September 2002), Zimbabwe, Elephants in Lower Guruve, Unpublished Paper, p2.

system can support.⁸⁵ This explains why developing countries argue against CITES. The Agreement has therefore become a battle ground between the North and the South.

Southern countries view the agreement as a platform on which developed countries assume all the authority to impose trade ban on Southern resources. Doctor Mostafa Tolba, then executive Director of the United Nations Environment Programme (UNEP) warned developed countries in 1999 that,

“There are complaints from a number of developing countries that the rich are more interested in making the Third World a natural history museum, than they are, in filling the bellies of its people”.⁸⁶

This statement in a nutshell shows that the restriction of trade due to the agreement further divides the North and South as most Africa countries like Malawi, Botswana, Namibia and Zambia lost enormous trade on ivory. As such, most of these countries have realised minimal economic growth and development from this area of trade. This resulted in these countries forming the Southern African Centre for Ivory Marketing (SACIM) which has since been broadened and hence the change of name to Southern African Convention for Wildlife Management (SACWM).



Developing countries have loudly contested the treatment MEAs have received so far and it is vital to note that developing countries do not oppose for example the ban imposed under CITES because they want lucrative trade but the argument is based on reaping financial benefit from animal management and not the other way round. Consequently, uncertainty regarding the hierarchy and compatibility between the MEAs and trade policies still exists. Conflicts therefore threaten to arise in the near future as interaction between regimes is expected to increase. A clear example of the trade and environment overlap was the Cartegena Protocol on Biosafety which regulates some biotechnology-related issues. One main point from the controversial process leading to the Protocol was that it was best to take an explicit approach to reconciling the rules of the environmental agreement and those of the trade regime despite the strong resistance of the trade community and related business

⁸⁵ SARDC “CEP FACT SHEET: Musokotwane Environmental Resource Centre for Southern Africa“Available at <http://www.sardc.net.imeresa/programs/CEP/Pubs/CEPFS/CEPFS15.htm>(Accessed on 20/05/2005).

⁸⁶ SARDC “CEP FACT SHEET: Musokotwane Environmental Resource Centre for Southern Africa“Available at <http://www.sardc.net.imeresa/programs/CEP/Pubs/CEPFS/CEPFS15.htm>(Accessed on 20/05/2005).

sectors. Unfortunately, how to address the interaction between climate change regime and the trading system still remains unresolved.

The European Communities and Switzerland continue to stand for the view that there is need for legal clarification of the WTO-MEA relationship. More so, they are strongly advocating for a strong and reliable dispute settlement system within the MEAs themselves. Switzerland has actually called for an interpretative understanding to create legal certainty and to prevent disputes from arising at all. This suggestion has attracted a debate in the Committee on Trade with respect to the vexing issue of which forum presides in the event of a dispute that involve MEA trade-related provisions and WTO rules. However, the WTO-MEA relationship has received a great deal of attention in the CTE, yet little rapprochement has been accomplished.

The proposal which New Zealand submitted lay out the need to establish a consultative mechanism through which, before a trade measure is applied under an MEA, a voluntary process could be initiated to determine whether the trade measure was the most effective instrument available to solve the environmental issue at hand.⁸⁷ Given the controversy that is likely to emerge in the application of trade rules into MEAs, the proposal from New Zealand can play a balancing role. This is because before the trade measure is applied it has to be determined whether the applicable instrument is the best to deal with the issue. Such a step is likely to dispel the apprehensions about the WTO-MEA relationship.

Other concerns include the long standing expectations about the extent to which the WTO can accommodate environmental concerns. Secondly, clarity as to whether other WTO disciplines protect the environment for example the TBT, SPS, TRIPS and Agriculture Agreements as well as the General Agreement on Services (GATS). Some of these concerns have received attention in the June 2001 CTE meeting.

With regard to the dispute system, the WTO and the MEA contain dispute settlement procedures which resort to higher international bodies of international law. These include the Appellate Body and the International Court of Justice. The WTO and MEA system to date, represent a global co-operative effort for the attainment of mutually supportive goals.

⁸⁷ Shaw and Schwartz (2002) "Trade and Environment in the WTO State of Play", *Journal of World Trade* Volume 36 No 1, Kluwer Law International, 133.

3.3 HOW THE WTO DEALS WITH THE ENVIRONMENT

The Uruguay Round introduced into the multilateral trading system some recognition of the concepts of sustainable development and environmental protection. Even if the environment was not discussed separately during negotiations, the Preamble to the Marrakesh Agreement of 1995 establishing the WTO includes in contrast to the GATT references the objective of sustainable development and the need to protect and preserve the environment. It explicitly provides that,

“Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living..., while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment...”⁸⁸

The mere mentioning of the need to protect the environment has been good enough for environmentalists to pursue pressure on governments to recognise the significant need for the conservation of the environment.

The Committee on Trade and Environment formed with the establishment of the WTO replaced the Group on Environmental Measures and International Trade (1971) which examined trade-related aspects of environmental policies that had an effect on the contracting parties.⁸⁹ The CTE has the mandate to;

1. Identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
2. To make appropriate recommendations on whether modifications of the multilateral system required is compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular;
 - a) The need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed countries among them; and
 - b) The avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration specifically Principle 12 which

⁸⁸ Unknown “Millennium Development Goals: Environment” Available on <http://www.developmentgoals.org/Environment.htm>(Accessed on 12 February 2005).

⁸⁹ Veena JHA “Environmental Regulation and the WTO” Ed by Hoekman et al (2002) **Development, Trade and the WTO: A Handbook**, World Bank, 472-473.

obligates countries to “*cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries...*”

c) Surveillance of trade measures used for environmental purposes, of trade related aspects of environmental measures which have significant trade affects, and of effective implementation of the multilateral disciplines governing those measures.

Fiona Macmillan submits that the WTO views the CTE’s work as being based on two principles, explicitly;⁹⁰

- i) The WTO is only competent to deal with trade. In other words, on environmental issues its only task is to study questions that arise when environmental policies have a significant impact on trade. The WTO is not an environmental agency. Its members do not want it to intervene in national environmental standards or to set the standards other agencies that specialise in environmental issues are better qualified to undertake.
- ii) If the committee does identify problems, the solution must continue to uphold the principles of the WTO trading system.



The CTE is the only institution charged with such responsibility.⁹¹ Its work program is driven by proposals from WTO members concerning issues on which they believe the Committee can submit recommendations to the Ministerial Conference. Their discussions are therefore usually based on market access and linkages between multilateral trade and environment agendas. Statistically, the CTE constitutes the cornerstone for most debates on trade and environment since the 1990s.⁹²

3.3.1 CRITISIMS LEVELLED AGAINST THE WTO

It is submitted that the WTO is failing to properly balance environmental, social and developmental priorities despite the earlier mentioned mandate provided by the Preamble.

⁹⁰ Macmillan (2001)12-13.

⁹¹ *Ibid.*

⁹² *ibid.*

This is clearly due to the fact that the WTO puts trade liberalisation on the highest pedestal, with developed countries seeking to gain global economic advantage.⁹³

Instances on the conflict between trade and environment agenda include:⁹⁴

- An unchecked free trade which is thus depleting natural resources such as water, forest, fisheries, minerals at a fast pace, unfortunately much faster than they can be regenerated.
- The precautionary principle, a fundamental principle of environmental health and security and one of the Rio Principles agreed at the highest political level at that United Nations Conference on Environment and Development (1992, Rio), is being threatened by the recent US case against the EU on Genetically Modified Foods. This principle needs to be directly included in the WTO rules and policies.
- The acceptance of Genetically Modified Foods by developing countries could create a chilling effect on environmental laws and regulations for example on the implementation of the Cartagena Protocol on Biosafety.⁹⁵
- A multilateral agreement on Investment could reduce the right to regulate foreign investors, which could have an adverse effect on natural resources for example giving foreign logging companies more access to native forests and preventing new laws that protect forests.
- Where trade and environmental rules conflict, trade rules tend to win for example on the issue of labelling which can be said to be discriminatory under the WTO rules.
- Countries are generally subordinating multilateral environmental agreements to WTO rules, meaning that in the event of a conflict, trade interests would override environmental priorities.

The WTO is therefore currently operating with a mandate that pursues trade maximisation and liberalisation at all costs. This however deepens the environmental crisis. There is need to redirect the WTO mandate so that it give emphasis to sustainable development.

⁹³ Green Peace “Briefing: This Question & Answer document answers questions in relation to the WTO 5th Ministerial in Cancun, Mexico” Available at http://www.greenpeace.org/international_en/multimedia/download/1/306498/0/q & A.pdf (Accessed on 10/07/2004).

⁹⁴ *Ibid.*

⁹⁵ This Protocol has been called the first trade and environment treaty. It is the first step that has been adopted to improve the WTO-MEA relationship after a long period of increased discussion and hot debates.

CHAPTER FOUR

4 The Committee on Trade and Environment vis -a -vis integration.

4.1 Challenges Faced by the committee in integrating trade and environment.

It is undeniably clear that the evolution of a global public policy that effectively integrates trade liberalisation and environmental protection is occurring slower than what many in the environmental community had hoped for.⁹⁶ The barriers the organisation faces posed by the very nature of how it is operates, its diverse membership and a clear mandate to ensure that trade flows smoothly, fairly, freely and predictably have barred substantial integration of environmental issues into trade rules since the Uruguay Round.

The Committee on Trade and Environment has not therefore achieved its integrative potential and this is also compounded by a number of factors, particularly;

- It's establishment under the WTO. This institution which was created to facilitate an integration of trade and environmental views and interests, falls within the WTO. This causes the CTE delegates to retain the same perspective which reflect primarily the WTO's dominant trade paradigm and the underlying commercial interests.⁹⁷ It is clear that despite its stated objective of considering modifications to the multilateral trading system to accommodate environmental concerns, the CTE has been reluctant to make recommendations that would in any way be inconsistent with the GATT's core principle of non-discrimination and the ongoing trade liberalisation mandate.
- Composition. The CTE's composition may not be conducive to resolving the trade – environment challenges. Its delegates are largely midlevel bureaucrats from trade ministries who are neither real decision makers nor necessarily experts on environmental issues.⁹⁸ The concerns of environmentalists are thus not adequately dealt with in the Committee.
- Lack of political commitment. Apparently, political commitment to make WTO internal decision-making processes more transparent and accountable remains absent. Unless the processes are opened up to environmental ministries, NGO'S and integrative organization, the CTE will have difficulties in integrating trade and environment.⁹⁹

⁹⁶ Richard H (2002)24.

⁹⁷ *Ibid.*

⁹⁸ *ibid.*

⁹⁹ Richard H (2002)24.

- Antiglobalisation movement. By polarizing the debate, the anti globalisation movement has a potential to hinder any steps towards trade- environment policy integration that may be on the horizon.¹⁰⁰
- Lack of consensus. The member states' unwillingness to change the WTO rules based on the fear that the environment will be used for protectionist reasons has resulted in no consensus being reached. For many developing countries members, any shift in the debate from ensuing trade liberalisation is viewed negatively and hence the countries fail to resolve the issue.¹⁰¹

4.2 Recent Jurisprudence: A Study

Having analysed the relevant provisions of the GATT in the earlier chapter and the challenges being faced by the CTE, it is important to look at the various GATT panel decisions in order to see how the provisions on environmental protection have been applied to various situations in which member states have tried to invoke them. It is submitted that the contours of trade and environment have been affected by the panel and Appellate Body decisions, some of which are quite controversial.¹⁰² It is therefore vital to analyse the cases that the DSB have adjudicated, for the purpose of checking whether there is need to rectify the imbalances which are said to have been created by the rulings. The presentation has selected only one GATT case where the trade-environment debate emanated from and three recent cases which are to be dealt with in detail.

4.2.1 TUNA/DOLPHIN I.¹⁰³

Conceivably, the most important GATT panel case on trade-environment issues is the Tuna-Dolphin case which arose in 1991 as the first case of its kind.

Facts

The US imposed a ban on tuna and tuna products in cases of where the tuna was not caught in compliance with the US environmental standards. The standards consisted of a requirement

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² Veena JHA "Environmental Regulation and the WTO" Ed by Hoekman et al (2002) in **Development, Trade and the WTO: A Handbook**, World Bank, 473.

¹⁰³ Trebilcock and Howse (2000) **The Regulation of International Trade**, Routledge Press, 406-410. See also GATT Jurisprudence, Available at http://www.wto.org/english/tratop_e/envir_e/edisOOe.htm (Accessed on 2/7/2004).

of US Marine Mammal Protection Act¹⁰⁴ compelling fisherman to use certain fishing techniques rather than the purse seine nets.¹⁰⁵ US also set the allowable catch of dolphin in the Eastern Tropical Pacific at 20 500 per annum. Pursuant to the MMPA, the US authorities could ban the importation of commercial fish caught in violation of the Act. The rationale of the MMPA was to avoid the incidental killing or accidental injury of ocean mammals during the harvesting of fish in the Eastern Tropical Pacific.

As part of the implementation of the MMPA a requirement was introduced which required that for all yellow fin tuna fish and yellow fin tuna products not of US origin to enter the US market, they had to be shown to the satisfaction of the US authorities that the overall regulatory regime of the country of origin was comparable to that of the US.¹⁰⁶

The Issue in Dispute

Mexico failed to satisfy the US authorities that its tuna was caught in a manner comparable to that set out in the MMPA and that this resulted in the ban of tuna and tuna products originating from Mexico. Mexico alleged that the ban violated Article XI¹⁰⁷ of the GATT as it prohibits imports. In response, the US argued that because the restriction applied to American tuna as well, the ban was an integral part of its internal regulations, which did not violate Article III.¹⁰⁸ The Panel first had to decide whether Article III or XI of the GATT was applicable.

The GATT Panel's Decision

In reaching its decision the panel reasoned that;

- (a) Article III allows countries to impose and subject foreign products to internal regulations provided that such regulation did not violate Article III and I.
- (b) Article XI of the GATT contains a general prohibition on quantitative restrictions on imports and exports, subject to a narrow range of exceptions like if the restriction is based on Article XX of the GATT.

¹⁰⁴ Hereafter referred to as the MMPA.

¹⁰⁵ Trebilcock and Howse (2000) 406.

¹⁰⁶ WTO, “GATT Jurisprudence”, Available at http://www.wto.org/english/tratop_e/envir_e/edisOOe.htm (Accessed on 2/7/2004).

¹⁰⁷ Article XI proscribes members from restricting imports from or exports to the territory of another WTO member through the use of quotas, import or export licenses or other measures intended to have the same effect.

¹⁰⁸ Article III requires that nations when applying domestic taxes and regulations treat imports no less favourable than their domestically produced goods.

The Panel thus ruled that what the US sought to regulate (via the MMPA) was not actual imported products but the manner in which those products had been produced in an exporting country, and that Article III concerned measures that applied to and affected the nature of the products themselves.¹⁰⁹ It was found accordingly that the US ban constituted a quantitative restriction within the meaning of GATT Article XI. The next question was then whether the ban could be justified in terms of Article XX of the GATT. The Panel considered GATT Article XX(b) and paragraph XX(g) which allows measures aimed at the preservation of exhaustible natural resources provided the same are taken in conjunction with restrictions on domestic production or consumption.

Arguments Presented

The United States' ban was aimed at enforcing the MMPA, which protected dolphins from incidental killings and therefore fell within GATT Article XX (b). The US argued that there was no alternative reasonable measure to achieve this.

Mexico on the other hand argued that GATT Article XX (b) was not applicable *in casu* as the US sought to regulate production outside its borders and the measure was not necessary as there were alternatives to protect the dolphin's health or lives. Mexico accordingly pointed out that cooperation between the two countries concerned was the appropriate solution.¹¹⁰

The Panel's Ruling

The Panel considered the drafting history of GATT Article XX (b) and found that extending the operation of GATT Article XX (b) beyond the borders of the country would be tantamount to encouraging states to unilaterally adopt environmental policies that may affect the rights of other states to determine their own environmental policies. The GATT Panel accepted Mexico's argument that multilateral cooperation between states was the only acceptable way of addressing environmental concerns where they affected the rights and/or duties of two or more countries.

Concerning GATT Article XX (g), the Panel emphasized the importance of the proviso "in conjunction with restrictions on domestic production or consumption". This was interpreted

¹⁰⁹ Trebilcock (2000) 406.

¹¹⁰ WTO "GATT Jurisprudence" Available at http://www.wto.org/english/tratop_e/envir_e/edisOOe.htm (23/11/2004).

to suggest that measures taken should be primarily aimed at conservation of exhaustible natural resources within the jurisdiction of the member states. The Panel thus ruled that GATT Article XX (g) could not have been intended to apply beyond national boundaries for the same reasons advanced by the panel in relation to GATT Article XX (b).

In conclusion, the Tuna/Dolphin 1 ruling is ostensibly not a precedent as the decision was never adopted. Mexico and the United States of America mutually agreed to settle the case through diplomatic negotiation.¹¹¹ Be that as it may, there are very important lessons to be drawn from the case as shown below.

IMPORTANT POINTS THAT ARISE FROM THE TUNA/DOLPHIN CASE.

According to Chang¹¹² the Panel's decision creates a great deal of ambiguity. Firstly, a country is not entitled under the GATT to force other countries to adopt its own domestic policies, environmental or otherwise. The Panel concluded that a country could only control the production or consumption of a natural resource if the production or consumption is within its own jurisdiction. Although many environment problems are transboundary in nature, this ruling interprets the WTO as being able to cope with national issues only.¹¹³



Secondly, the ruling suggests that countries can take action on problems outside their jurisdiction but these must be “necessary”, a term which draws controversy as to what the “necessity test” entails? The Panel in the *Tuna-dolphin* case claimed that it meant that the US would have to show that it had exhausted all options “less restrictive of trade before resorting to import restrictions”.¹¹⁴ The Panel noted that the possibility of international cooperation with respect to dolphin conservation was an option that the US had not exhausted. Through this interpretation the Panel narrowed the Article's scope resulting in less protection being afforded to the environment.

Thirdly, the Panel also ruled that the US could not implement measures unilaterally when the matter involves extra-jurisdictional activities that harm the global environment. Article XX of the GATT is completely silent on this matter and yet the environment can be extra-territorial.

¹¹¹ The case was resolved in terms of a regional trade agreement, North American Free Trade Area Agreement (NAFTA).

¹¹² Chang HF (1995) “An Economic Analysis of Trade Measures to Protect the Global Environment” *Georgetown Law Journal*, 45.

¹¹³ *Ibid.*

¹¹⁴ Trebilcock (2000) 407.

The Panel referred back to the basic principles of the GATT in concluding that a “Contracting Party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own”.¹¹⁵ The fundamental problem that arises at this point is the dividing line that the Panel picked between environmental policies for the sake of protecting one’s environment, and the policies that somehow dictate to another Contracting Party how it should protect its own environment. The panel thus adopted an extra-territorial language even if the US was not encroaching with any of Mexico’s laws or policies. This issue of extra-jurisdictional standards is therefore a moot point.¹¹⁶ Whilst trade restrictions can be regarded as an important tool kit it can still be viewed as the imposition of one country’s values on another, known as “eco-imperialism”. This might thus bore a “slippery slope” of unilateral trade measures being imposed to achieve a variety of domestic policy goals resulting in the distortion of international trade.¹¹⁷

REACTIONS TO THE DECISION.

Needless to say, the *Tuna/Dolphin* decision attracted enormous criticism with environmentalists shunning it whilst being vigorously defended by the GATT Secretariat and free traders.¹¹⁸ One of the criticisms is that there seems to be a “mischaracterisation” of the problem in that the panel sees the dividing line only between environmental policies meant to protect the environment and policies that dictate to another how to protect the environment.¹¹⁹ From the onset, it should be realised that the United States was not aiming paternalistically as it were, to dictate to Mexico how it should regulate a purely domestic environmental problem. The measure was aimed at preserving dolphins as a global common.¹²⁰ There was no jurisdiction be it on the Mexican part or otherwise which was being disturbed or encroached. At the same time, the American legislation was not interfering with any specific obligations or rights assigned to Mexican fisherman under Mexican Law. More so the lifting of the ban on tuna was not conditional upon the Mexican government adopting identical legislation to the American dolphin protection legislation but rather on compliance with the

¹¹⁵ *Ibid.*

¹¹⁶ Chang HF (1995) “An Economic Analysis of Trade Measures to Protect the Global Environment” *Georgetown Law Journal*, 45.

¹¹⁷ Citizens Guide to Trade, Environment and Sustainability “Trade Case Study: Tuna- Dolphin Dispute” Available at <http://www.foei.org/trade/activistguide/tunaban.htm> (Accessed on 20/05/2005).

¹¹⁸ Trebilcock (2000) 408.

¹¹⁹ *ibid.*

¹²⁰ A Global Common is something that falls outside the jurisdiction of all countries but which should be protected for the benefit of all for example the Antarctica and High seas.

process standards. As long as Mexican fisherman could use nets that could not harm dolphins, their products were free to enter the United States.

What was also questionable was the panel's view of how far a country can invoke GATT Article XX (b) and (g) to protect global commons. In such a scenario the panel held that Article XX of the GATT could not be relied on and thus limiting its application for protection of a country's domestic environment. Again the panel restricted countries to their jurisdictions in as far as production and consumption measures are concerned. Indeed, the decision puts the environment into a muddy position with trade prevailing over environmental measures. Environmentalists reject the decision as an undue restriction of the potential role of GATT in addressing global environmental concerns. Some commentators went to the extent of calling upon the GATT Council to reverse the decision¹²¹ a measure which shows how the decision was unwelcome to environmentalists. A number of other cases which are discussed below highlight the developments that have taken place so far under the WTO dispute settlement understanding especially in the way the Appellate Body interprets the GATT Article XX provision.



4.2.2 Reformulated Gasoline Case¹²²

Background

Brazil and Venezuela challenged requirements of US environmental legislation that conventional and reformulated gasoline sold in the United States had to conform to a minimum level of "cleanliness" set in terms of a 1990 baseline emissions. This baseline was determined either on a refinery-specific, individual basis, or on the basis of average 1990 US gasoline quality.¹²³ Which kind of baseline would apply solely depended upon whether an entity was a domestic refiner, importer or foreign refiner. While individual baselines were used for domestic refiners and importers, calculated on the gasoline actually sold or imported by the entity in question in 1990, foreign refiners were regulated exclusively on the basis of the constructed baseline.

¹²¹ Weiss E, D (1992) "Environmental and Trade as Partners in Sustainable Development- A Commentary", 86 *American Journal of International Law*, 728 at 731.

¹²² WTO Case Number 2 and 4: Ruling adopted on 20 May 1996. See WTO| Environment- dispute 7, Available at http://www.wto.org/english/tratop_e/envir/edis07_e.htm(Accessed on 2/7/2005).

¹²³ Trebilcock (2000) 413.

The Issue In Dispute

Venezuela and Brazil filed a case against US on the basis that the differential treatment posed by the Gasoline Rule constituted a violation of the National Treatment obligation in Article III.4 of GATT.¹²⁴ Venezuela also argued that the Gasoline Rule¹²⁵ was not covered by Article XX which provides general exceptions to the WTO rules. The US argued that the rule was consistent with Article III, and, in any event, was justified under the exceptions contained under paragraph (b), (d) or (g).¹²⁶

The Panel's Ruling

The Panel accepted the arguments but considered it unnecessary to examine whether under the “Chapeau”, the measure constituted a “disguised restriction on trade” or a “means arbitrary and unjustifiable discrimination between countries”.¹²⁷ The Panel however, found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraph (b), (d) or (g). The US was thus found to be violating WTO rules because it discriminated against the gasoline imports. The United States appealed.



Final Decision

The Appellate Body found that the baseline established rules contained in the Gasoline Rule fell within the terms of Article XX (g), but failed to meet the requirements of the “Chapeau” of Article XX.¹²⁸ The AB reached the same conclusion with the panel to the effect that the US measure was discriminatory but made some changes to the panel’s legal interpretation.¹²⁹ The Appellate Body rejected the adoption of a “least-restrictive means” test when reading Article XX (g), finding that the panel had failed to interpret the provision in line with the Vienna Convention on the Law of Treaties. The expressions “necessary to” and “relating to”

¹²⁴ The principle obligates WTO members to treat domestic and imported products equally.

¹²⁵ The Gasoline Rule was a statutory baseline which was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline.

¹²⁶ WTO Environment-disputes 7 , Available at http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm (Accessed on 2/7/2005).

¹²⁷ WTO Appellate Body Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products” Available at <http://www.ejil.org/journal/Vol10/No1/sr4.rtf>(Accessed on 2/7/2005).

¹²⁸ WTO Environment-disputes 7 , Available at http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm (Accessed on 2/7/2005).

¹²⁹ WTO Appellate Body Report: United States- Import Prohibition of Certain Shrimp and Shrimp Products, Available at <http://www.ejil.org/journal/Vol10/No1/sr4.rtf>(Accessed on 2/7/2005).

given their ordinary meaning did not imply the “same kind or degree of connection between the measure under appraisal and the state interest or policy to be promoted or realized”. The AB found that the measure in question was indeed, primarily aimed at conservation of exhaustible natural resources.

A significant finding arose concerning the “chapeau” of Article XX in determining whether the measure was illegal or justified under Article XX. A two-step approach was adopted, specifically a;

1. Provisional characterisation of the measure as falling within one or more of the exceptions in paragraphs XX (a-j);
2. “Further appraisal of the same measure’ under the criteria of the “Chapeau”.

The AB interpreted the “Chapeau” as being aimed at preservation of protectionist “abuse” of the exception in Article XX. It was held that the US’s non- pursuit of cooperation, showed that the discrimination was “unjustified”; and secondly its willingness to alleviate certain costs for domestic but not foreign entities, pointed to a “disguised restriction on international trade”.¹³⁰ The measure was as a result of this non-compliance in contravention of Article XX.



Comments

The AB’s ruling in the present case is a stride towards the development of a principal jurisprudence on the environment-trade debate. The AB adopted a mechanism which ensures that the exceptions in Article XX (b) and (g) do not lead to protectionist abuse and therewith pose a threat to the integrity of the trading system. It thus pointed out that at least one way in which this later goal could be furthered without the results-based manipulation involved in the Tuna/Dolphin case where the panel did not have a textual basis resulting in the removal of the entire classes of measures from possible justification under Article XX.¹³¹

¹³⁰ Trebilcock (2000) 415.

¹³¹ *Ibid.*

4.2.3 The Shrimp Turtle Case.¹³²

Background

Thousands of sea turtles drown every year when they are caught in shrimp nets. The United States requires domestic shrimpers to use protective technology called Turtle Excluder Devices,¹³³ which are a kind of a trap door by which turtles can escape from shrimp nets.¹³⁴ In 1989, the US Congress essentially banned the importation of shrimp caught by foreign shrimpers who do not use Turtle Excluder Devices in terms of the US Endangered Species Act [ESA] of 1973 which requires all vessels trawling shrimp in the US to use approved Turtle Excluder Devices. The ESA makes access to US shrimp markets conditional on certification that a country has adopted conservation policies that the United States considers comparable to its own regulatory programs and incidental killing of turtles.¹³⁵

How the WTO Got Involved

India, Malaysia, Pakistan and Thailand filed a complaint against the US in 1996, claiming that the US Turtle Shrimp law violated international trade law by barring the importation of their shrimp and shrimp products.



The US Argument

Her argument was that the trade measure satisfied GATT Article XX (g), which allows trade restrictions if needed to conserve an exhaustible natural resources.

The Panel rejected the argument not on the basis of its interpretation of Article XX (g) but of the chapeau to Article XX of the GATT. It found out that the US measure constituted unjustifiable discrimination between countries where the same conditions prevail. The US appealed against the reasoning.

¹³² November 23, 1999. See WTO “India etc versus US: Shrimp Turtle” Available at http://www.wto.org/english/tratop_e/envir_e/edis08_e/htm(Accessed on 20/05/2005).

¹³³ Hereinafter referred to as TED.

¹³⁴ WTO Case File “The Shrimp - turtle case” Available at <http://seattlepi.nwsource.com/business/case1.shtml> (Accessed on 10/22/2004).

¹³⁵ Veena JHA “Environmental Regulation and the WTO” Ed by Hoekman et al (2002), **Development, Trade and the WTO: A Handbook**, World Bank, 473.

Analysis of the Concerns Involved

According to **Basil Coutsoudis**¹³⁶ there are a number of concerns that arise from the shrimp turtle case. Firstly, he notes that certain nations in the world are more aware and sensitive to environmental issues and seek to regulate their commercial ventures in order to promote the protection of endangered species. These nations should be encouraged to adopt such policies and in so doing should not be placed in a weaker position to nations who completely ignore such environmental issues.

The adoption of measures such as installation of Turtle Excluder Devices is costly, and increases the running costs of individual trawling operations. Thus, it becomes more expensive to produce a certain product and nations which neglect to adopt similar measures experience a competitive advantage.¹³⁷ Indirectly countries which adopt policies protecting endangered species are penalized for so doing. The most effective way to afford protection to such nations is to impose trade restrictions such as those imposed by the United States under Section 609 of the Endangered Species Act of 1973. Part (b) (1) of the said provision prohibits shrimp harvested with commercial technology which may have an adverse effect on certain species of sea turtles.



Secondly, there are concerns over the possibility of abuse of trade restrictions which are justified in terms of environmental considerations. The GATT¹³⁸ therefore limits the type of restrictions that can be imposed by any contracting party and on the face it appears as if the ban imposed by Section 609 exceeds these limitations.

The section read in conjunction with the regulation imposed a certification regime which in effect imposed not only a policy objective but also a mechanism with which to achieve this policy objective. It also appears to negate or ignore any other measure that may have been just as effective in preventing the incidental killing of turtles. This imposition of policy is too wide and penetrates too deeply into the sovereignty of the contracting parties.

¹³⁶ Coutsoudis “The Shrimp Case- Implications for International Trade Law, and International Environmental Law” Available at <http://www.law-online.co.za/IntTradeLaw/The%20US%20Shrimp%20case.htm>(Accessed on 10/09/2004).

¹³⁷ *ibid.*

¹³⁸ Article XI, GATT 1947.

The WTO's Final Decision

The panel in the instant case found that the U.S. was unjustified within the meaning of the chapeau of Article XX, and therefore did not qualify for any exception from the prohibition of Article XI. Having addressed the chapeau of Article XX, the panel found that it did not need to address Article XX (b) or (g). The panel applied a novel requirement that the measure to be accepted under Article XX must not “undermine the multilateral trading system”.¹³⁹

The Appellate Body disqualified the panel’s interpretation and reasoning. It took Article XX (g) into consideration and criticised the panel for departing from the text of the GATT and for not examining the ordinary meaning of the text. It was held that the embargo however, served an environmental objective that is recognised as legitimate under the article.¹⁴⁰ The measure was applied in a manner that was arbitrary and unjustifiably discriminatory between WTO members, contrary to the requirements of the chapeau of Article XX. The body reasoned that unjustifiable decision includes application of trade measures like the embargo which does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries. The failure to engage in negotiations to undertake cooperative efforts before enforcing the embargo and the unilateral application of that embargo further underscored its unjustifiability. Again, the certification procedures adopted by the United States amounted to arbitrary discrimination.

The Appellate Body in the final decision found that the United States measure fell within the class of measures envisaged by Article XX and reversed the earlier Panel’s finding in this regard. The GATT Panel had held that the US could invoke Article XX (b) and (g) of the GATT which deals with the preservation of life of humans, animals and plants, the latter dealing with the exhaustion of natural resources. The Appellate Body interestingly adopted a balancing test for satisfaction of the requirements of the chapeau and proceeded to examine the US measure using means-ends analysis and a least trade restrictive alternative test analysis.¹⁴¹

¹³⁹ WTO Appellate Body Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products” Available at <http://www.ejil.org/journal/Vol10/No1/sr4.rtf>(Accessed on 2/7/2005).

¹⁴⁰ *Ibid.*

¹⁴¹ WTO Appellate Body Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products” Available at <http://www.ejil.org/journal/Vol10/No1/sr4.rtf>(Accessed on 2/7/2005).

The WTO ruled against the United States. Among its findings the United States was unequivocally found to have been actually discriminatory by giving Asian Countries only four months to comply with the Turtle Shrimp Law whilst giving the Caribbean Basin nations three years. The United States revised its guidelines on the importation of shrimp, changing both the method and the schedule by which it evaluates how well foreign shrimpers are doing at protecting turtles from drowning. Significant to note, is that the first beneficiary was Australia which was allowed under the revised guidelines to export shrimp to the United States.¹⁴²

Comments

It is worth noting that the Appellate Body did not explicitly prohibit US from regulating production methods for shrimp harvesting outside its own jurisdiction. It can thus be argued that in theory the possibility of extrajurisdictional environmental regulation will be consistent with WTO rules. Interestingly, an environmental group called the Sea Turtle Restoration Project blames the WTO ruling for the death of 13,000 sea turtles in India.¹⁴³ The rationale being that the US weakened its law protecting shrimps due to the WTO ruling. Other countries like Australia and Brazil¹⁴⁴ are thus exploiting the loophole created by the ruling for their own benefit by not taking appropriate measures that would save shrimps from incidental killings.

4.2.4 Asbestos Case¹⁴⁵

Background

The dispute involved France and Canada over the ban that was imposed by France on the use of asbestos fibres and cement products with asbestos. The Appellate body in its decision displayed its ability to further the interpretation of WTO rules triggering the trade and environment debate in that it widens the scope for interpretation. Chakravarthi Raghavan thus concludes that the ruling in the case “sow seeds of many disputes”¹⁴⁶ in that, other countries may in future argue that a ban of such a nature on imports of products like asbestos fibres

¹⁴² WTO Case File: The Shrimp - Turtle Case, Available at <http://seattlepi.nwsource.com/business/case1.shtml> (Accessed 22/10/2004).

¹⁴³ *Ibid.*

¹⁴⁴ WTO Case File: The Shrimp - Turtle Case, Available at <http://seattlepi.nwsource.com/business/case1.shtml> (Accessed 22/10/2004).

¹⁴⁵ Unknown “Canada said losing WTO asbestos case against France” Available at <http://tutb.org/uk/dossiers/files/reuters-wto> (Accessed on 20/05/2005).

¹⁴⁶ Chakravarthi Raghavan “Ruling in Asbestos case sows seeds of many disputes” Available on <http://www.twinside.org.sg/title/sows.htm> (Accessed on 3/03/2005).

cannot be construed as a technical regulation. The ban will thus be only examined in terms of GATT Article XX to determine justifiability. Indeed, such an interpretation is detrimental to the environment as both the Appellate Body and Panel adopt a narrow interpretation of Article XX of the GATT.

Final Decision

The Appellate Body in its ruling¹⁴⁷ reversed the panel's finding that the French decree banning the imports and marketing of asbestos fibres and products was not a technical regulation, and therefore not covered by the WTO's Technical Barrier to Trade Agreement. Article 1(2) of the said agreement defines a technical regulation as one that lays down product characteristics or their related processes and production methods, including applicable administrative provisions with which compliance is mandatory. The AB held that there was nothing in the TBT requiring the technical regulations to name or otherwise expressly identifies a product or products. It stated that "...we do not have an adequate basis properly to examine Canada's claims under Article 2.1, 2.2, 2.3, 2.4 and 2.8 of the TBT and, accordingly, we refrain from so doing." The AB reversed the panel rulings on the non-applicability of TBT to the particular regulation, reversed the panel view that health risks may not be taken into account in judging likeness; and that the two fibres and products were "like".

The Appellate Body nonetheless agreed with the panel that France's ban on asbestos imports was justified under GATT Article XX (g) as a measure necessary to achieve the legitimate goal of protecting human life or health.¹⁴⁸ The AB accordingly disagreed with Canada's contention that the panel had erred in holding chrysotile fibres and their carcinogenic effects as proving a health risk. Nonetheless, the Appellate Body could not complete the analysis of "like product" as Canada had not provided any evidence of consumers' tastes and habits and due to the lack of evidence it concluded that Canada had not established that the asbestos ban by France was inconsistent with Article III.4 of GATT.

¹⁴⁷ *Ibid.*

¹⁴⁸ Shaw and Schwartz (2002) "Trade and Environment in the WTO: State of play" *Journal of World Trade*, Vol 36 No 1, 150.

Comments

The decision in Asbestos is notable for several reasons, namely **its analysis of the “like product” in Article III of GATT**. In the decision, the Appellate Body cited the approach of “likeness” set out in the Report of the Working Party on Border Tax Adjustments. The Appellate Body arguably expanded the test for physical characteristics to include toxicity. The focus on physical characteristics in the Appellate Body Report contrasted with the panel’s earlier decision. According to the Appellate Body,

*“... In particular, panels must examine those physical properties of products in the market place. This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres”.*¹⁴⁹

This emphasis on physical characteristics led the Appellate Body to reverse the findings of the panel that asbestos fibres and cement-based products used in France as its substitute, were “like” under GATT Article III.4.

The decision is notable as it was the first time for the WTO judicial body to examine the TBT Agreement comprehensively. The AB disagreed with the panel approach when examining the asbestos decree. The panel had looked at this measure in two stages and concluded that Canada’s claims related solely to the part of the decree that contained prohibitions and that these prohibitions were not a technical regulation. The AB reversed this two-stage approach and examined the EC measure as a whole. The decree which was on the face of it a ban hence not a technical regulation in fact laid down administrative provisions for products that contained asbestos fibres. Consequently, the AB concluded that since the decree included administrative provisions it was a measure that constituted a technical regulation under the TBT Agreement.

The recognition that toxicity a determining factor in the “likeness” of a product leads to the question posed by many environmentalists over why health effects like toxicity and environmental effects of production methods cannot be considered by the WTO in the “like product” determination.¹⁵⁰ Accordingly, there is need to revisit this question as suggested by Shaw in his article.¹⁵¹

¹⁴⁹ *Ibid.*

¹⁵⁰ Shaw *ibid.*

¹⁵¹ Shaw and Schwartz (2002) “Trade and Environment in the WTO: State of play” *Journal of World Trade*, Vol 36 No 1, 150.

4.3 Comments on the Rulings.

It is commendable that recent rulings have altered the nature of the trade and environment debate even though the “urgency remains” in dealing with the problem. Indeed, so much “...dynamics have evolved”¹⁵² as reflected in the decisions namely that;

1. The Gasoline Case brought out the two tiered approach to analysing Article XX which has been adopted in the cases that followed.
2. The Asbestos case has changed the analysis of the “like products”.
3. The Shrimp-Turtle decision has arguably brought the WTO a step closer to reality as the decision could be interpreted as allowing members to take unilateral actions based on the way in which products are produced and that these actions are justified under Article XX of the GATT as long as they are not implemented in an arbitrary or discriminatory manner.



¹⁵² *Ibid.*

CHAPTER FIVE

5. RECOMMENDATIONS AND ALTERNATIVE SOLUTIONS

It is imperative and relatively important to recognise from the onset that the common objective of trade and environment can only be achieved through consensus and negotiation in an appropriate forum. In the presence of negotiations for example on relations between international treaties, the adoption of new treaties or the elimination of unsustainable subsidies, WTO members are bound to achieve predictability which is not provided by dispute rulings but through negotiations. This may cater for WTO members who are advocating for change of WTO rules in order to allow wider use of trade restrictions for environmental purposes by convincing the other members through negotiations or a broader interpretation of existing WTO provisions.

5.1 Moving Ahead at Doha

The reason of unfolding environmental considerations into the international trading regime has recently been confirmed in the Doha Declaration launching a new round of multilateral trade negotiations at the WTO.¹⁵³ The agenda for the upcoming talks commits the parties to a more overt focus on trade and questions are rising on environment particularly in the wake of the Doha Declaration.¹⁵⁴ Many observers have termed the environmental negotiating objectives in the Doha Declaration paragraph 31 as being limited in scope or circumscribed in that they cover only the relationship between WTO rules and specific trade obligations set out in MEAs, procedures for regular information exchange between MEA secretariats and the relevant WTO Committee ad finally the reduction or elimination of tariff and non-tariff barriers to environmental goods and services.¹⁵⁵ Developed countries are therefore pressing hard to seeing environmental issues being addressed in this new round of negotiations. Similarly, most WTO members have begun to realise that in our highly interdependent world, there is no choice about whether to address the links between trade and the environment.¹⁵⁶ Such links are a matter of fact. The question that lingers on is whether the policies put in place to respond will be designed openly, explicitly and thoughtfully with an eye to economic

¹⁵³ Daniel Esty “Free Trade and Environmental Protection” Available at http://www.aspeninstitute.org/aspeninstitute/files/Img/pdf/free_trade_env_esty.pdf (Accessed on 4/03/2005).

¹⁵⁴ *Ibid.*

¹⁵⁵ See Bridges Weekly, 5 March 2002.

¹⁵⁶ *Ibid.*

efficiency and political logic or rather on an ad hoc and unsystematic basis without attention to the demands of good policymaking.¹⁵⁷

Paragraph 32 of the Doha Declaration offers developing countries a logical starting point for the elaboration of an offensive approach to the *demandeurs* for rules on measures that can limit market access of developing country exports. This would ensure that when paragraph 32 eventually becomes integrated in the WTO negotiating agenda, the interests and concerns of the South will be reflected.¹⁵⁸ So far, discussions in the WTO Committee on Trade and Environment have stressed the need to examine how importing countries could design environmental measures in a manner that is consistent with WTO rules and that takes into account the capabilities of developing countries as well as the legitimate objectives of the importing country. Developing countries should therefore focus on elaborating rules that diminish the risks and uncertainties springing from rule and standard setting processes currently biased in favour of unilateralism and industrialised country interests.¹⁵⁹

5.2 Suggestions

5.2.1 Greening the GATT by amending Article XX.

It is possible and necessary to re-orient the GATT Article XX so that the provision can at the very least lend its support to the resolution of trade-environment problems. Article XX is not sufficient to cover the environmental problems that arise and there is a need to amend the provision or else enact a subsidiary agreement that will cover the environment substantially. Article XX of the GATT leaves unanswered the crucial question as to what extent this exemption permits countries to restrict imports with the aim of protecting the environment. What merits consideration is also the traditional GATT distinction between product regulation (permitted) and PPM standards (forbidden). Clarification of the GATT provisions at this point is important because the GATT framework cannot take environmental concerns into consideration in the same proposed manner as it does trade matters and that's why this argument holds water.¹⁶⁰ Dismissing this suggestion as political cannot help as the WTO may not escape its responsibility for long.¹⁶¹ Either Article XX of the GATT itself should be

¹⁵⁷ *Ibid.*

¹⁵⁸ Pedro da Motta Veiga "Trade and Environment Negotiations: A Southern View" in Bridges, Year 8 Number 4, April 2004.

¹⁵⁹ *Ibid.*

¹⁶⁰ MacDonald(1999) 397

¹⁶¹ Cameron (1993)100.

amended or rather the interpretation of the said provision should undergo some serious reform.¹⁶²

From the plethora of cases covered in chapter four, it is irrefutable that the language in Article XX is vague and that a narrow interpretation has been the norm rather than an exception for the Panel and the Appellate Body when adjudicating the cases. Article XX of the GATT therefore becomes difficult for a country to use as a safeguard to protect the environment. Amending this GATT provision is thus highly commendable as it will seek to address the ongoing problem, now that the present environmental laws are mostly declarations which are not binding but merely regulations. It is thus imperative that the GATT be amended since nothing else seems likely to be a panacea to the pending conflict.

Professor David Pearce¹⁶³ sees danger in as far as the restriction of trade is concerned. He further adds that environmentalists have a “difficult assignment” as their case need to undergo a certain criteria namely to,¹⁶⁴

1. Show that the environmental degradation brought about by free trade is truly brought about by trade rather than from some of the other factors and that they are “of greater consequence than the losses of human well-being that would ensue from restricted trade”;
2. Show that production-related damage is a legitimate feature of the importing nation’s loss of well-being.
3. Show that a trade restriction is the most cost-effective way of bringing about change in the process used to produce the product giving rise to externality.

The extent of the WTO’s competence on environmental issues needs to be clearly spelt. This is because the persisting confusion has hampered progress in trade-environment debate.

5.2.2 Enactment of a subsidiary agreement

If the GATT/WTO finds it difficult to amend the provisions of Article XX the other option could be to enact a subsidiary agreement that gives particular attention to environmental

¹⁶² See Constance Stropp, (1999) LLM Environmental Law, “Unpublished Thesis”, University of Cape Town, Cape Town.

¹⁶³ McDonald J (1999) “Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order” 23 *Environmental Law*, 397.

¹⁶⁴ *Ibid.*

concerns but at the same time aligned to trade rules. The SPS Agreement¹⁶⁵ which is viewed by certain critics as an extension of the Article XX does not cover the environment per se and cannot be seen as an agreement that was meant for environmental protection. Sanitary and phytosanitary measures are requirements imposed by governments to ensure the safety of products for human or animal consumption or to protect the environment. What governments then do is to establish minimum standards which products, plants or animals must meet in order to be allowed to enter their territory. As with the case with product standards, sanitary and phytosanitary measures can easily be abused, as they can be defined so strictly that no import ever satisfies them.¹⁶⁶ Although the SPS measures are valuable, they cannot solve the trade and environment saga and hence a separate agreement is still vital.

5.2.3 Creation of World Environmental Organisation

Another option to think about is for the establishment of a World Environmental Organisation. The idea here is to create an effective institution other than the WTO that will specialise in dealing with the protection and conservation of natural resources and the environment. This has been supported by Renato Ruggeiro¹⁶⁷ (then WTO Director-General) who took a clear position on the environment and global governance. The WTO, he claims, is a strong institutional friend and supporter of the environment. Be that as it may, he concluded that the task of strengthening bridges between trade-environment policies would be immeasurably easier if,

“We could also create a house for the environment to help focus and coordinate our efforts”¹⁶⁸

He admittedly said that the arguments about the extent of the WTO’s competence on environmental issues, and how far it can go in accommodating environmental concerns have hampered progress in the trade-environment debate. This is also viewed positively by Macmillan who advocates for the creation of a new World Environment Organization that “*unites and transcends the WTO system and the public international environmental system*”.¹⁶⁹ She also points to ‘*a wide range of areas in which amendment or clarification*

¹⁶⁵ Referred to as the Agreement on the Application of Sanitary and Phytosanitary Measures.

¹⁶⁶ Hoekman B M et al (2001) **The Political Economy of the World Trading System: The WTO and Beyond**, Oxford University Press Inc, New York, p195.

¹⁶⁷ Ward H and Brack D (2002) **Trade, Investment and The Environment**, Earthscan Publication Ltd: USA, p xix. See also The Economist (October 1999) “Why Greens Should Love Trade: The Environment Does Need to Be Protected but Not from Trade”, p18.

¹⁶⁸ *Ibid.*

¹⁶⁹ Macmillan (2001)272.

would be desirable and would considerably constitute towards the greening of the WTO.¹⁷⁰ The idea seems prudent and reasonable considering the fact that the WTO has a variety of issues to deal with as envisaged earlier on. Nonetheless, the matter needs to be viewed with circumspection as putting the environment under a separate institution can result in ultimate destruction of the environment.

The question that concurrently emerges is whether the creation of a global environmental organization will help to address the problem? Again Mr Ruggiero¹⁷¹ points to the International Labour Organisation and asks whether it has made any progress. In conclusion he asserts that it is not clear that the establishment of such an organisation would in fact resolve the trade-environment clashes unless WTO rules themselves are modified. Shaw and Schwartz¹⁷² reiterates this idea as they strongly believe that the proposed organization would not provide a quick fix to settling trade and environmental issues as pointed out by Konrad von Molktke and others who strongly argue that this would represent an “**organization of the impossible**”.¹⁷³ This is based on the reason that it is doubtful that another organisation can be able to tackle the complex relationship between trade and environment better than the WTO since it also receives specialised knowledge from the UNEP¹⁷⁴. Weirs have the same line of thought.¹⁷⁵ He accepts the status quo of the WTO unlike Macmillan who perceives such a step as untenable.¹⁷⁶ Instead Macmillan hold on to the fact that the environment needs its own institution which specifically deals with it, certainly in line with WTO rules. The argument that the environment can be protected through trade is obviously flawed and unsound in the eyes of Macmillan due to the fact that trade rules will always supersede everything under the WTO, like the way it has been over the years.

Accordingly, the WTO cannot be the best organisation to regulate the trade-environment clash. An analysis of what is being covered by the WTO currently reveals that the WTO is dealing with other issues such as Intellectual property (TRIPS) besides trade which is its

¹⁷⁰ *Ibid.*

¹⁷¹ Ward H and Brack D (2002) **Trade, Investment and The Environment**, Earthscan Publication Ltd: USA, p xix. See also The Economist (October 1999) “Why Greens Should Love Trade: The Environment Does Need to Be Protected but Not from Trade”, p18.

¹⁷² Shaw and Schwartz (2002) “Trade and Environment in the WTO: State of play” *Journal of World Trade*, Vol 36 No 1, p150.

¹⁷³ *Ibid.*

¹⁷⁴ Referred to as the United Nations Conference on Environment Programme.

¹⁷⁵ Weiss B E (1992) “Environment and Trade as Partners in Sustainable Development-A commentary” 86 *American Journal of International Law*, 728-731.

¹⁷⁶ *Ibid* note 72.

fundamental mandate. Removing the environment from the WTO will actually serve a useful purpose in that the organisation will concentrate on its mandate. The WTO though it appears to be green, it is not “green enough” and hence establishing another organisation that specifically deals with the environment is most likely to bring good results as long as it is run effectively and efficiently.¹⁷⁷

The challenges mentioned earlier on, in the preceding chapter which the CTE is facing currently indicate that the CTE has been functioning mainly as a “discussion forum” and that no concrete recommendations have been made. To argue that the trade and environment debate will be solved under the WTO, when the committee that has been set has not produced anything fruitful since its establishment is close to fallacy. With a view also to the mandate of the WTO which is to ensure that trade flows smoothly, freely, fairly and predictably, the trade and environment debacle will be difficult to deal with under the WTO due to the fact that trade will always supersede any other issue including the environment.

Since most developed countries insist on the WTO addressing the environment due to the fact that there are sanctions which could be used to enforce protection, incentives should be given to encourage developing countries to conserve and preserve the environment rather than subjecting developing countries to sanctions for failing to meet the requirements. Certainly, these countries lack resources and have other pressing issues like poverty, HIV and AIDS to deal with. Rather than making such countries worse off by imposing sanctions in the WTO, the World Environment Organisation may play a vital role by educating them on the importance of the environment. The organisation would then be involved more in the programmes designed for the environment rather than leaving it to States to control their environment.

The Global Environment Organisation should nonetheless complement and counterbalance the WTO. It is explicitly clear that economic integration has important environmental repercussions, although not all of them favourable. Notwithstanding the negative side, trade liberalisation and environmental protection efforts need to reinforce each other. The reasons being that social welfare could be maximised if both trade and environment goals are strengthened. Secondly, an effective trade and environment approach at the WTO would help

¹⁷⁷ Richard H (2002) 280.

maintain a drive for trade liberalisation and restore confidence in the organisation. Developing countries still have to recognise that it is preferable to try to influence the debate rather than to have the difficult issues resolved through the dispute settlement mechanism. There is definitely a need to realise the synergies created by the interaction between trade and environment even if the later is addressed with a different institution. To ask for a separate institution to deal with the environment from the WTO should not be too much since the organisation has a lot to deal with currently as mentioned earlier on. Let the WTO worry about reducing trade barriers and the World Environment Organisation work on protecting the environment.

5.2.4 Incorporation of MEA's into the WTO.

Due to the fact that Multilateral Environmental Measures do not have self-standing value before a WTO panel, the WTO should try to incorporate such measures under the institution. After incorporation there should be no need to still subject an environmental treaty to Article XX test and hence the WTO panel will be able to apply the agreements single-handedly as any other agreement covered by the WTO. This will expand the jurisdiction of the panel which so far is limited only to matters involving violations of WTO obligations. It will also be a source of law for the panel to refer to and apply when examining the validity of those WTO claims.

At this point, it is essential to note that the recommendation for MEAs is not that the regimes be made into one. Clearly, they address different issues and must keep a certain distance. What is needed is to reduce the likelihood of future clashes and to have agreements that are in the best interests of both the trade and the environmental communities. Proposals have thus been put forward by other WTO members to adopt an Understanding or Guidelines on the WTO-MEA relationship. To allow for predictability in the guidelines, a procedural and substantive criterion should be adopted.¹⁷⁸ This maybe a gateway to achieving a balancing act towards the trade and environment conflict.

Professor Jackson¹⁷⁹ a leading authority on international trade suggests that first there should be a waiver for listed environmental agreements which would trump the GATT, along with

¹⁷⁸ Shaw and Schwartz (2000) "Trade and Environment in the WTO: State of play' *Journal of World Trade*, Vol 36 No 1, 150.

¹⁷⁹ Cameron J (1993) "The GATT and The Environment" **Greening International Law**, Ed by Sands P, p121.

procedures for adding to the list. Secondly, interpretative notes or solutions regarding some standard texts including the Uruguay Round drafts, possibly with a few wording changes to accommodate the idea of permissive higher standards, is crucial.¹⁸⁰ By and large, better transparency can be introduced into the dispute settlement process to be developed by the WTO. Such an approach is indeed favourable to sustainable development and now that there is a Committee reserved for trade and environment it is supposed to “mix the promotion of free trade and environmental considerations”.¹⁸¹ The Committee should ensure that trade-environment disputes or tensions do not unnecessary arise and when they do, the WTO should become a trusted umpire. Trade should not just trump over the environment but a fair assessment should be drawn out.

5.2.5 Enforcement through Sanctions

With regard to trade sanctions which include trade embargoes, these appear to be very good and potentially a useful means of providing enforcement for international cooperation vis-a-vis environmental standards. It is not however, adequate in the writer’s view to simply say that trade should be used as a sanction for environmental purposes to force countries to comply with the standards. Regrettably the implication of such action draws the writer to view sanctions negatively. One of the detestable results of the imposition of sanctions is lower exports as well as less investment from other countries giving rise to poor welfare. As such, the measure affects not only the country at large but even the ordinary person in the street and hence it will be commendable to address the enforcement issues through other means like giving incentives to countries that uphold the environment.

5.2.6 Agreement on Production Processing Methods [PPMs].

Trade conflicts may arise in the near future from environmental policies that distinguish between identical products on the basis of how they are produced. It is clear that such products would be considered “like” for the purpose of Article I and III, GATT 1994. Important to note, is the fact that it is not evident whether discrimination between such products for environmental reasons would qualify for an exception under Article XX, and especially whether or not such regulations were put in place for protectionist purposes.¹⁸²

¹⁸⁰ *Ibid.*

¹⁸¹ Cameron J (1993) “The GATT and The Environment” **Greening International Law**, Ed by Sands P, p121.

¹⁸² World Trade Report 2003: Trade and Development, The Doha Development Agenda, Available at D:\t\pub\world_trade_report_2003_e.pdf (Accessed on 10/04/2005).

Indeed, this debate is not going to disappear and it is therefore advisable for the WTO to negotiate an agreement on the matter. Developing countries accordingly do not need to be branded anti-environment in order to defend their legitimate trade interests. They need to take part in the negotiations and in ensuring that their interests are reflected in the agreement.



CHAPTER 6

6. CONCLUDING REMARKS

The trade-environment conflict does not prove to be inevitable as a balance can be struck between the free trader's and environmentalists' arguments. From a broader perspective, it seems there is a great deal of congruence some of which is derived from economic and welfare enhancement of trade liberalisation policies. Such welfare enhancement can in turn lead to enhancement of environmental policy objectives. It is irrefutable that each player is pushing for the balance to be struck in a favourable way but what is needed is a change within the institution of the GATT rules. A win-win situation could certainly be achieved through well designed policies in both the trade and environment fields.¹⁸³.

WTO members have unquestionably been circumventing the idea of renegotiating GATT exceptions, let alone to engage in an attempt to harmonise the WTO rules with Multilateral Environmental Agreements. If member states have been willing to modify the rules to cater for the environment, the debate could easily be tackled. Clearly, the WTO is not an environmental forum and should not become one, but it can possibly do its best to promote a trading regime that is environmentally sensitive and responsible, thereby contributing to other common global goals.¹⁸⁴ Apparently deeper integration of the rules may allow the WTO to be "greener" as growth is achieved in an environment that is environmentally friendly. The burden is therefore on the WTO members to harmonise trade rules and the environment. The conflict is not inevitable as the environment is central to trade and sustainable development as asserted by the Preamble to the Marrekesh Agreement. Indeed, the environment is an important aspect of economic development and as such the WTO should seriously aim to incorporate trade and the environment together for the benefit of all nations.

The CTE needs to make a recommendation for an appropriate modification of Article XX to explicitly provide for the conservation of the environment. WTO panels have constantly interpreted the exceptions in a narrow way and in so doing limiting the scope of environmental protection. Reconciling trade and the environment has thus been problematic because the trouble lies at the heart of GATT rules. There is no express reference for the protection of the environment also under the WTO and hence the existing substantive and

¹⁸³ WTO "WTO Report: The need for environmental cooperation" Available at http://www.wto.org/english/tratop_e/envir_e/stu99_e.htm (Accessed on 16/02/2005).

¹⁸⁴ Monica Araya et al "Trade and Environment at the WTO: The Need for a Constructive Dialogue" Available at <http://www.sice.oas.org/tunit/pubinfo.asp> (Accessed on 4/03/2005).

procedural provisions for the integration of the environment with trade disciplines are fairly limited in their reach.

More so, the trade-environmental debate is rather evitable as trade liberalisation and environmental protection can proceed in *tandem*. However, the potential of having trade policies and environmental programs that reinforce each other will not happen by accident. Careful policy coordination and attention to the links between trade and the environment are necessary to generate positive results. Opportunities abound to make progress in the trade-environment interface and to promote an approach to globalisation that is greatly sensitive to environmental needs and values. Trade can unambiguously raise people's welfare if proper environmental policies are put into place. On the other hand, trade barriers make for poor environmental policies. As a result of this, targeting trade as a cause for environmental degradation can only partially correct policy but at a higher price to society since less trade results in minimal economic growth and development. What is needed is to reconcile the trade and environmental policies for the benefit of all, both at macro and micro level. However, for this to work out the rules should be agreed upon by all parties.¹⁸⁵



The question that remains unanswered is whether the WTO should be a “super body” that should deal with every “hot” issue? Indeed, the WTO is a strong institution especially with regard to its power to sanction non-complying countries but that should not blind us into allowing the institution to deal with every issue. Clearly, trade cuts through a number of areas like labour and human rights but that does not mean that all such issues have to fall under the WTO. It's high time that other institutions such as the International Labour Organisation as well as the United Nations should brace themselves and start to function effectively.

The environment can thus be optionally placed under a new institution that will specifically deal with it. It is therefore arguable that there is a need for a Global Environmental Organisation that would complement and counterbalance the WTO. Interestingly, several international leaders appear to be increasingly supporting this view as a long-term goal.¹⁸⁶ The trade and environment debate can actually be dealt with by an independent body for full consideration as well as effectiveness and efficiency. A World Environment Organisation

¹⁸⁵ The parties involve free traders and environmentalists.

¹⁸⁶ Monica Araya et al “Trade and Environment at the WTO: The Need for a Constructive Dialogue” Available at <http://www.sice.oas.org/tunit/pubinfo.asp> (Accessed on 4/03/2005).

with a proper mandate is equally essential than what is most perceived by many WTO fanatics as a panacea such as leaving the environment under the WTO. In the absence of such a global counterpart, the WTO increasingly faces the challenge of having member countries build confidence in the multilateral trading system especially, if the WTO fails to respond to the legitimate concerns of other member states in the area of environmental protection.

It will be seemingly outrageous for developing countries to let their developed counterparts talk them into making the WTO a “super body” for such countries need trade to develop their respective economies. With trade sanctions as a means for achieving enforcement of environmental standards, development through trade will remain a dream that will never come true for developing countries. Be that as it may, it is prudent to advise the WTO Committee on Trade and Environment to make a recommendation for the amendment of GATT Article XX as this is apparently the best option that could further protect the environment¹⁸⁷ but if resistance to amend the GATT still persists from other countries then creating a World Environmental Organisation will be the answer.

The defensive approach which developing countries have been using by being “reluctant to address” the environment should be turned into participation with influence. There is a great need to “swim with rather than against the current”,¹⁸⁸ lest developed countries’ interests are only taken care of. It is crucial however, to note that from an economic perspective, **“If environmental spillovers are not dealt with in the trade context, we risk market failure, reduced gains from trade and lower social welfare not to mention ecological degradation.”**¹⁸⁹

Free trade should thus remain the first best trade policy and environmental problems should be addressed through trade but the fact remains that there should be a balance between the two.

In dealing with the concept of sustainable development, the WTO sooner or later will have to come to terms with the issue of production and processing methods (PPMs) which it has not yet incorporated. There has to be a way in which the WTO should include PPMs into the

¹⁸⁷ The environment can be protected through trade.

¹⁸⁸ Tussie D and Lengyel M.F “Developing Countries: Turning Participation into Influence” Edited by Hoekman B et al (2002) in **Development, Trade and the WTO: A Handbook**, World Bank: Washington DC, 486.

¹⁸⁹ Daniel Esty “Free Trade and Environmental Protection” Available at http://www.aspeninstitute.org/aspeninstitute/files/1mg/pdf/free_trade_env_esty.pdf (Accessed on 12/02/2005).

trading system as this practice is becoming rampant particularly from countries in the North. An international agreement on the subject should thus be negotiated immediately. The world will be better off with a set of rules on PPMs rather than having to face a head on collision with a succession of unilateral actions, consumer boycotts and the so-called “voluntary actions”. Such a suggestion remains forever noble and laudable as long as developing countries are going to take part in the negotiations.

In conclusion, it is evident that the WTO has a long way to go in the trade and environment debate and indeed its failure to address the conflict poses serious economic and political repercussions. The WTO has not yet achieved a balance between trade and environment as the Committee on Trade and Environment has continued to act mainly as a discussion forum. Lack of consensus among the parties has so far prevented the adoption of concrete recommendations. Indeed, the WTO may not be an environmental agency, not now and probably not ever, but the institution can offer immeasurable protection for the environment through trade only if the recommendations brought forward by the CTE are put into consideration. The burden still lies on the WTO to balance trade and environmental issues. It is however, plausible and commendable to note that the conflict is not inevitable. There is room for striking a balance since there is a higher degree of congruence that exists between the two subjects. With the amendment of the GATT Article XX to provide more protection for the environment, the GATT will achieve both trade enhancement and environmental protection. The clash between trade and the environment is therefore not “inevitable” as a balance can be reached between the two.

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