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**PROTECTING THE ENVIRONMENT
USING THE GATT ARTICLE XX:
CHASING SHADOWS**

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Dedications

I dedicate this paper and my Master of Laws degree to my Mother, my dear brother Casper, my loving sister Susan, my caring sister Juliet and to my very wonderful friend Priviledge.

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Abstract

Economic development is at the heart of the World Trade Organisation. There is little doubt that trade liberalisation has had some positive effects on the global economy. However, there is considerable agreement on the fact that economic growth may also come at the expense of environmental protection. To this end, there is also agreement on the need to protect the environment from harmful economic activities such as trade liberalisation which is one of the current multilateral trading system's main instruments for economic growth. The debate on how this can be achieved has been going on for some time and has mainly been around the use of Article XX of the General Agreement on Tariffs and Trade to protect the environment from harmful trade practices. Some piecemeal fashioned suggestions have been made on how to deal with this issue and there has been some hope in many instances that environmental protection will become accommodated within the multilateral trading system. However, as practice has shown, the use of Article XX of the GATT has not, at most, been successful for many reasons. It is these reasons and the solutions to such, which this paper seeks to address, in light of a strong view that the use of the GATT article XX, in its current state, to protect the environment is a futile process and cannot yield positive results.

List of Acronyms and Abbreviations

AB	Appellate Body
CAFE	United States Corporate Average Fuel Economy
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Communities
EPA	United States Environmental Protection Agency
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
ITO	International Trade Organisation
MEA	Multilateral Environmental Agreements
MFN	Most-Favoured Nation
MMPA	Marine Mammal Protection Act
NAFTA	North American Free Trade Agreement
NGO	non-governmental organisation
OECD	Organisation of Economic Co-operation and Development
PPMs	process and production methods
TPRB	Trade Policy Review Body
UN	United Nations
UNESCO	United Nations Economic and Social Committee
WTO	World Trade Organisation

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CHAPTER 1

INTRODUCTION

The importance of international trade in the present day can never be underestimated. Goods and services have become more accessible around the globe; cooperation amongst states on issues of international concern and economic development has found motivation, standards of living have become bettered for all nations and developing countries have found their socio economic feet, among other things.. All these gains could have been very difficult to achieve if it were not for international trade an assertion difficult to contest especially when one looks at the extent of the cooperation and forces fostering the establishment of pillars for trade across borders.¹

The term international trade is used by many authors to denote trade amongst and between different states across the globe. It seems also that this is the same meaning that the term carries in many legal documents, including conventions. However in practice most trading relations are amongst individual persons and companies including multilateral corporations of different nations. The norm is always that states create the framework and basic rules and policies that facilitate the activities of these entities. It is also correct that states do trade with other states or entities in their own name but in most instances their role is that of policy formulation and facilitation of trade, which includes the protection of national business and economic interests by creating sound trading mechanisms important for private traders. Thus the law of international trade consists in the main of numerous public law bilateral, multilateral or regional trade agreements complemented by private commercial laws and procedures binding the trading parties.

The fundamental role of states in creating the mechanisms and facilities of trade for themselves and private traders within their jurisdictions is mainly seen through the establishment of the World Trade Organisation commonly abbreviated as the WTO. Through the creation of the WTO, states have notably shown their landmark interest in using trade as one of the main pillars for economic development and globalisation. Seemingly the 'perceived economic importance of access to export markets makes it difficult for any state to stand aside from membership of the WTO'.² This further becomes more apparent if one

¹ See also Simon Lester *et al World trade law: text materials and commentary* (2008) 5.

² Sol Picciotto 'Private rights vs public standards in the WTO' (2003) 10 no. 3 (Aug 2003) *Review of International Political Economy* 377 at 381.

considers the real institution of the WTO which consolidates and drives the world trading system.

The WTO was formed in 1994 as a successor to the GATT regime that was established in 1947. The main aim of the system created under the WTO is to foster trade liberalisation and to remove all barriers to trade. It is regarded as the 'principal international institution for the management and regulation of the process of economic globalization' with the 'potential to become a key pillar of global governance'.³ This is mainly seen through the General Agreement on Tariffs and Trade commonly known as the GATT although interestingly enough, the GATT itself does not expressly make this assertion.

Trade liberalisation in the WTO system is achieved mainly through the negotiation of tariff concessions, the prohibition against discrimination and the removal of non-tariff barriers to trade. This is to ensure that goods can move freely across borders without any hindrances or restrictions from national authorities. Indeed the volume of goods that has crossed borders after the establishment of the WTO has increased remarkably as compared to the period before this regime. Access to foreign markets has also led to significant cross-border trade between smaller and underdeveloped countries and other regions.

Although economic gains and achievement of developmental goals are major successes attributable to the system of trade liberalisation of the WTO regime that fosters this arrangement, the regime is not without controversy. Some of the major concerns that are seen to erode the successes of trade liberalisation are the conflicts that arise when trying to pursue the economic gains brought about by liberalising trade while at the same time protecting the environment. Issues that are trade-related but also negatively impacting on the environment have proved difficult to resolve in the current WTO regime such that the economic gains of trade liberalisation might in the end be rendered useless by the impact of this trade mechanism on the environment.⁴

There are various reasons for the environmentalists' objection to the rules of the multilateral trading system engineered by the WTO. It is argued that without environmental safeguards, trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and the generation of unmanageable waste.

³ Peter Van den Bossche and Iveta Alexovicová 'Effective economic global governance by the World Trade Organization' (2005) 8 No. 3 *Journal of International Economic Law* 667 at 667.

⁴ See generally Judith M. Dean 'Does trade liberalization harm the environment? A new test (2002) 35 No.4 (Nov 2002) *The Canadian Journal of Economics / Revue Canadienne d'Economie* 819.

Further, trade rules and trade liberalization often entail market access agreements that can be used to override environmental regulations unless appropriate environmental protections are built into the structure of the trade system. Trade restrictions should therefore be available as leverage to promote worldwide environmental protection, particularly to address global or transboundary environmental problems and to reinforce international environmental agreements. The most contentious issue is that, even if the pollution they cause does not spill over into other nations, those countries with sloppy environmental standards have a competitive advantage in the global market-place and put pressure on countries with high environmental standards to reduce the rigor of their environmental requirements.⁵ 'The contention is that a lax environmental standard in one country allows its domestic firms to invest less by avoiding setting up pollution control facilities and this could result in these firms becoming more competitive'.⁶

It is inaccurate to say unequivocally that there is a natural conflict between liberalising trade and protecting the environment. However it is true to some extent that the norms on which environmental protection and trade liberalisation are built are fundamentally different and can be a major source of conflict.⁷ Whereas environmental protection focuses mainly on the preservation of the human environment and the protection of human, plant and animal life including the conservation of living and non-living natural resources, trade is mainly rooted in principles of supply and demand. Therefore the preservation of natural resources and the protection of the human environment can be seriously and adversely affected if products with potentially harmful effects are on high demand on the market. Sustainable development becomes a significant measure in bridging the gap between trade interests on one hand and environmental protection on the other.⁸

It is mainly this conflict of fundamental norms that the system of trade liberalisation has not addressed adequately so far. In making attempts to strike a balance between the fundamental principles of the GATT that form the pillars of trade liberalisation which are non-discrimination and the prohibition against quantitative restrictions, the GATT article XX

⁵ A leading book on the subject is Daniel C Esty *Greening the GATT: trade, environment, and the future* (1994). For a brilliant synthesis of the opposing views, see Ernst-Ulrich Petersmann 'International trade law and international environmental law' (1993) 27 *Journal of World Trade Law* 46.

⁶ Biswajit Dhar 'Trade and environment: the GATT perspective' (1992) 27 No. 22 (May 30 1992) *Economic and Political Weekly* 1123 at 1124.

⁷ See Thomas J. Schoenbaum 'International trade and protection of the environment: the continuing search for reconciliation', (1997) 91 No. 2 (Apr 1997) *The American Journal of International Law* 268 at 281.

⁸ See generally Edith Brown Weiss 'Environment and trade as partners in sustainable development: a commentary' (1992) 86 No.4 (Oct 1992) *The American Journal of International Law* 728.

provides for exceptions to these general principles. In other words the exceptions can be invoked when trade liberalisation is negatively impacting the environment provided that this falls within the limits provided for in the GATT. It is important to highlight however that the GATT does not clearly provide for any unequivocal measure to protect the environment from environmental damaging trade practices.

International environmental law 'often addresses problems that have their roots in some of the unfortunate by-products of private productive activities' within the trading system. The fact that the GATT which creates trade liberalisation does not clearly provide for environmental protection has seemingly left the environment to be the prey of trade. Many multilateral environmental treaties and other environmental protection measures are largely at apparent variance with the goals and norms of trade liberalisation. Amongst the more notable are the Convention on International Trade in Endangered Species (CITES)⁹, the Basel Convention¹⁰, the Whaling Convention,¹¹ the Kyoto Protocol to the United Nations Framework Convention on Climate Change¹² and the Montreal Protocol on Substances that Deplete the Ozone Layer.¹³ Their formulation and objectives clearly show that they are inconsistent with the GATT and any measures they provide for can be easily and successfully challenged at the WTO Dispute Settlement Body. The reality is that this inconsistency reduces environmental protection to a subsidiary role, subject to over-riding trade interests.¹⁴

The role of environmental measures becomes even more subsidiary considering the fact that the issues that relate to the conflict between trade and the environment at the moment find themselves adjudicated by the Dispute Settlement Body ('DSB') of the WTO whose primary mandate is generally speaking to foster trade liberalisation amongst members, of course, within the context of the WTO system.¹⁵ The DSB has so far shown some apparent

⁹ Convention on the International Trade in Endangered Species of Wild Fauna and Flora (Washington) 993 *UNTS* 243: (1973)12 *ILM* 1075 in force 1 July 1975.

¹⁰ (1989) 28 *ILM* 657 in force 20 May 1992 and see also The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991) 30 *ILM* 773 in force 10 March 1999 which a group of African countries created to restrict the transshipment of hazardous wastes beyond the requirements of the Basel Convention.

¹¹ International Convention on the Regulation of Whaling (Washington), 161 *UNTS* 72 in force 10 November 1948. Amended 1956, 338 *UNTS* 366 in force 4 May 1959.

¹² (1998) 37 *ILM* 22 in force 16 February 2005.

¹³ (1987) 26 *ILM* 1530 in force 1 January 1989.

¹⁴ See David M. Driesen 'Environmental protection, free trade, and democracy' (2006) 603 *Law, Society, and Democracy: Comparative Perspectives* (Jan 2006) *Annals of the American Academy of Political and Social Science* 252 at 253.

¹⁵ This is mainly because Multilateral Environmental Agreements 'have no compulsory jurisdiction or do not seem to establish a system of compulsory jurisdiction' and therefore the "responsibility will easily fall on the WTO dispute settlement system which is broadly compulsory regarding any disputed measure affecting WTO

reluctance to strike a real balance between the demands of environmental protection and the benefits of free trade because when issues of free trade on the one hand and environmental regulation on the other have come into conflict 'the Body has always found in favour of trade and against environmental regulation'.¹⁶ This is notable mainly in the cases that have come before the DSB so far. To some extent it is arguably correct that the blame on the failures of the DSB is actually misplaced because the demands and expectations trusted upon it about environmental protection are in fact mislaid and in conflict with their mandate. This further leaves environmental protection even more vulnerable, considering that there is seemingly therefore no recourse for any state that has genuine reasons to restrict trade in the protection of the environment.¹⁷

It is without doubt therefore that seeking to use the GATT exceptions from environmentally inconsistent trade-related aspects in the context of the WTO system has proved to be difficult and might ultimately prove to be impossible - despite some glimmers of hope from other authors on the subject. This hope is to an extent doused by some recent DSB decisions that, to the present author do not do much except to proliferate further concessions that are more clouded and shrouded by conditions which are impossible to meet in the true context of the social, political and economic realities of today's world. However this does not mean that trade liberalisation and environmental protection cannot be linked.¹⁸

In this paper, the initial focus is mainly on showing that the efforts that are being made by the contracting parties to the GATT to justify environmental protective measures (that, on the face of them, are inconsistent with free trade and the GATT) defy success. Despite other authors and organisations showing optimism, the paper maintains the position that protecting the environment using GATT Art XX is so difficult as to be well-nigh impossible. It is therefore tantamount to chasing one's own shadow.¹⁹ In the second chapter of the paper, a

rights and obligations.' See Macro C E J Bronckers 'More power to the WTO' (2001) *Journal of International Economic Law* 41 at 57.

¹⁶ Elaine Hartwick and Richard Peet 'Neoliberalism and nature: the case of the WTO' (2003) 590 *Rethinking sustainable development* (Nov 2003) *Annals of the American Academy of Political and Social Science* 188 at 202.

¹⁷ However some still maintain that 'the existing provisions of GATT provide considerable scope for national measures to protect the environment'. See Richard Macrory 'Editor's foreword' (2003) 15 *Journal of International Law* 111 at 111.

¹⁸ For a discussion of the possible linkages between trade and environment, see generally David W Leebron 'Linkages' (2002) 96 No.1 (Jan 2002) *The American Journal of International Law* 5.

¹⁹ Others have also noted this position before and there is no sign that there is any looming change. See generally Thomas J Schoenbaum 'Free international trade and protection of the environment: irreconcilable conflict?' (1992) 86 No.4 (Oct 1992) *The American Journal of International Law* 700. However see Pedideh Ala I 'Free trade or sustainable development? An analysis of the WTO's appellate body's shift to a more

closer look will be taken at the establishment of the WTO. This is important to see whether the system has, as it stands, any synergetic relationship with the environment. It will also assist in determining whether there are any further measures that can be taken within the same framework of the WTO to give effect to environmentally sound measures that are not consistent with the objectives of the WTO and trade liberalisation. In this chapter focus will be on the historical background, formation and structures of the WTO particularly on those aspects that are of particular importance to this discussion.

The principles of reciprocal tariff concessions, non-discrimination and prohibition against quantitative restrictions in the GATT are the foundations of trade liberalisation. Therefore their formulation and the general exceptions provided for them in Art XX are of utmost importance to this thesis. In chapter 3 an analysis is made of the text of the GATT particularly those provisions that have an impact on the environment. A broader analysis is not envisaged except to give an overview of the principles and their place in the world trading system.

In the fourth chapter attention will be turned to the environmental measures, as they manifest themselves mainly through multilateral environmental agreements that have, or are likely to be in conflict with the provisions of the GATT and its general principles on free trade. The purpose here is to expose the divergent objectives of environmental protection and free trade and to further analyse how a failure to resolve the inconsistency between the two competing priorities can render international efforts to protect the environment through the negotiation of these multilateral environmental agreements useless if the relationship between them and the WTO system is not resolved to create the necessary balance.

The exceptions in Art XX of the GATT occupy a very significant position in the relationship between trade and environmental protection. Of particular importance to this discussion is Art XX paragraphs (b) and (g) which deal with the derogation from the obligation under GATT for the reasons of protecting 'human, animal and plant life or health' and the conservation of natural resources, respectively. In chapter 5 of this paper, an analysis is made of the interpretation of these exceptions looking at the various elements that need to be

balanced approach to trade liberalisation' (1999) 14 *American University International Law Review* 1129 who was optimistic about the Appellate Body's approach. For a similar optimistic view, see also Elizabeth R DeSombre and J. Samuel Barkin 'Turtles and trade: the WTO's acceptance of environmental trade restrictions' (2002) 2 No. 1 (February 2002) *Global Environmental Politics* 12.

proved by the party asserting any one of these exceptions as a defence against the violation or derogation from a GATT obligation.

The jurisprudence of the GATT and the WTO dispute settlement mechanisms are a very important aid in assessing the possibility of using the GATT Art XX exceptions to protect the environment. Therefore a chronological analysis of the cases that have dealt with this current subject matter will be done in chapter 6. This will be coupled to a projection of the possibilities that these cases present for the future of the relationship between free trade and the environment in light of the fact that all the hope for the use of GATT Art XX as an exception to the general obligations imposed by the GATT actually centres on how the Dispute Settlement Body of the WTO will deal with cases on this subject in the future.

The central thesis of this paper is to show that the practice of protecting the environment from harmful trade practices using the GATT Art XX exceptions is in actual fact an exercise in futility and attempting the impossible, especially drawing from previous practice and the structure, history and the institution of the WTO. It will therefore be important, before concluding this discussion, to suggest some ways that are precise and more likely to achieve results in terms of protecting the environment from harmful trade than the current system. Thus chapter 7 will be devoted to recommendations that can be carried out to create a better system that recognises the importance of protecting the environment at the same time without unnecessarily undermining the trade interests of the members of the WTO.

CHAPTER 2

THE MULTILATERAL TRADING SYSTEM

2.1 INTRODUCTION

The historical background and the subsequent formation of the World Trade Organisation hold the key to the understanding of its fundamental objectives and principles. It is important to understand the institutional structure of the organisation and the general trading framework within the WTO in order to evaluate the relationship between trade pillars and environmental protection. This chapter does not intend to take a comprehensive approach in discussing the entire system of the WTO, but instead looks at those areas that are related in one way or another to the conflict between trade liberalisation and the environment. Attention will thus be devoted to the history of the WTO, its formation, institutional structure, the agreements and the operation of the organisation in general.

2.2 HISTORICAL BACKGROUND

The history of The World Trade Organisation can be traced to as early as December 1945 when the United States of America invited its World War II allies to negotiate the conclusion of a multilateral agreement for the reciprocal reduction of tariffs on trade in goods. In July 1945 the United States Congress had granted President Truman the authority to negotiate and conclude such an agreement.²⁰ The multilateral tariff negotiations took place in the context of a more ambitious project on international trade. The United States thereafter requested the United Nations Economic and Social Committee (UNESCO) to adopt a resolution calling for a conference to draft a charter for an international trade organisation. The resolution was adopted in February 1946 and a Preparatory Committee was established during the same period and held its inaugural meeting in October 1946 to work on the charter on an international organisation for trade. The negotiations for an international organisation for trade however proved to be more difficult and it was clear towards the end of the 1947 Geneva meeting that the International Trade Organisation Charter (the ITO Charter) would not be finished before 1948. However, by this period, negotiations on the General Agreement on Tariffs and Trade (the GATT) had progressed well in Geneva, and by October 1947, the

²⁰ United States of America 'Dept of State press release' 13 Dec. 1945, 13 *Dept. State Bull* 970. Among the states invited were the United Kingdom, the Soviet Union France, china, Brazil, South Africa, Australia, Canada and others.

negotiators had reached an agreement on the GATT.²¹ Although the GATT was intended to be attached to the ITO Charter, many negotiators felt that it was not possible to wait until the ITO charter was finished to bring the GATT into force. The GATT was thus brought into operation through a Protocol for Provisional Application. The ITO itself was in fact ultimately never formally rejected; it simply faded away.²²

Although the GATT was conceived as a multilateral agreement for the reduction of tariffs, and not an international organisation, it successfully transformed itself over the years in a pragmatic and incremental manner to become a *de facto* international organisation. Furthermore, the absence of an international organisation for trade caused desperation to such an extent that from as early as the 1950s countries started turning to the GATT as the only existing multilateral international institution for trade, to handle problems concerning their trade relations. The institutional provisions in the GATT 1947 were 'very scant'. Nevertheless, over the years, through experimentation and trial and error, the GATT evolved to include some fairly elaborate procedures for conducting its business.²³ Although its institutional framework was scant,²⁴ the GATT was notably very successful in reducing tariffs on trade in goods, in particular on industrial goods from developed countries. In eight negotiating rounds between 1947 and 1994, the average level of tariffs of developed countries on industrial products is said to have been brought down from over forty per cent to less than four per cent.²⁵

The first five negotiating rounds - Geneva 1947, Annecy 1949, Torquay 1951, Geneva 1956 and Dillon 1960 to 1961 - focused on the reduction of tariffs. Negotiations then started turning towards focusing more on the non-tariff barriers to trade beginning from the Kennedy round 1964 to 1967 onwards. Non-tariff barriers earned this attention because they were rapidly becoming a more serious barrier to trade than tariffs. However, the GATT was notably less successful in the reduction of non-tariff barriers to trade than it was with the reduction of tariffs. Negotiations on the reduction of non-tariff barriers were much more complex and, therefore required, among other things, a more sophisticated institutional

²¹ Peter Van den Bossche *The law and policy of the World Trade Organisation: text, cases and materials* (2005) 82.

²² For a discussion on the fate of the ITO and the reasons of its failure see William Diebold Jr 'The End of the I. T. O.' (1952) 16 (October) *Princeton Essays in International Finance*.

²³ Some of these procedures were contrary to Article XXV. For example, in practice, under the GATT voting was very uncommon; decisions were taken by consensus.

²⁴ See J Jackson *The World Trade Organisation Constitution and Jurisprudence* (1998) 24 *Royal Institute of International Affairs*.

²⁵ Van den Bossche *supra* note 21 at 82.

framework than that of the GATT. The Kennedy round produced very few results on non-tariff barriers. The Tokyo round 1973 to 1979 produced better results compared to the Kennedy round; however, a number of agreements or codes decided upon clearly showed lack of a real consensus amongst the negotiators and proved to be a 'disappointment'.²⁶ Moreover, the Tokyo round agreements were plurilateral rather than multilateral in nature and did not bind many contracting parties.²⁷ In the early 1980s it was clear that a new round of trade negotiations would be necessary.

As the main purpose of the GATT was the reduction of barriers to trade, contracting parties continued to meet periodically to negotiate and further negotiate the reduction of tariffs and other trade barriers and necessary changes to GATT rules. As highlighted above, in these negotiations called 'rounds', negotiators dealt initially with tariffs until focus started turning to non-tariff barriers. The previous negotiations, the Uruguay Round, lasted from 1986 to 1994 and included the most encompassing set of negotiations in the history of the GATT besides the current Doha round.²⁸ On the agenda was reform of the existing GATT system, as well as expansion of rules to cover new areas such as trading in services and the trade aspects of intellectual property rights.²⁹ The agreements that resulted from the Uruguay Round also contained a built-in agenda requiring that further negotiations on agriculture, services, intellectual property rights, and government procurement begin by the year 2000. One of the most important changes that came about from the Uruguay Round was the establishment of a new trade structure, the World Trade Organization, which incorporated the many changes reached during the Uruguay Round: the former GATT was reborn with its newly negotiated reforms, bodies to oversee the new trade agreements, a stronger dispute resolution procedure, a regular review of members' trade policies, and many other committees and councils. In contrast to the GATT, the WTO was created as a permanent structure, with 'members' instead of 'contracting parties.' The WTO came into existence on the 1st of January 1995.³⁰

²⁶ Sylvia Ostry et al 'The Future of the World Trade Organization [with Comments and Discussion]' (1999) *Brookings Trade Forum* 167 at 169.

²⁷ *Ibid.* The difference is that plurilateral agreements certainly have more than two parties to them but the number of parties can be very small as compared to multilateral agreements. The term "plurilateral agreement" is used in the World Trade Organization. A plurilateral agreement implies that WTO member countries would be given the choice to agree to new rules on a voluntary basis. This contrasts with the multilateral WTO agreement, where all WTO members are party to the agreement

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ See Ostry et al supra note 26 at 171 and also Timothy E. Deal 'WTO rules and procedures and their implication for the Kyoto Protocol: a discussion paper' (2008) *United States Council for International Business* 4.

2.3 THE WORLD TRADE ORGANISATION

There are over 150 members of the WTO, representing over 95% of world trade, currently about 29 observer governments (most of which have applied for membership in the WTO), and a number of international organization observers. All decisions are made by member countries, and decisions are usually by consensus. The WTO is located in Geneva, Switzerland. Among the various functions of the WTO, these are regarded by analysts as the most important: It oversees the implementation, administration and operation of the agreements covered by it and provides a forum for negotiations and for settling disputes³¹. Additionally, it is the WTO's duty to review and propagate national trade policies, and to ensure the coherence and transparency of trade policies through surveillance in global economic policy-making. Another priority of the WTO is the assistance of developing, least-developed and low-income countries in transition to adjust to WTO rules and disciplines through technical cooperation and training.³² The WTO is also a centre of economic research and analysis: regular assessments of the global trade picture in its annual publications and research reports on specific topics are produced by the organization. Finally, the WTO cooperates closely with the two other components of the Bretton Woods system, the International Monetary Fund (IMF) and the World Bank.³³ It thus 'completes the organizational triptych designed at Bretton Woods, with the WTO complementing the IMF's role in monetary management and that of the World Bank in development finance'.³⁴

2.3,1 The Institutional Structure of the WTO

Decisions within the WTO are made by members, not staff, and they are made by consensus, not by formal vote. The highest level body in the WTO is the Ministerial Conference, which is the body of representatives from each 'member'. The Ministerial Conference examines current programs and sets the agenda for future work and has 'the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a member,

³¹ Article III of the Marrakesh Agreement establishing the World Trade Organization LT/UR/A/2, 15 April 1994 states the functions of the WTO. See Peter Sutherland (Chair). *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. (2004) 85 World Trade Organization. Available at <http://docsonline.wto.org/gen> [accessed 13 June (2010)].

³² See Van den Bossche supra note 20 at 88 and also TJ Dillon jr 'The World Trade Organization: a new legal order for world trade?' (1995) 16 *Michigan Journal of International Law* 349 at 361-370.

³³ Ian F. Fergusson 'The World Trade Organization: background and issues.' Available at <http://ncseonline.org/nle/crsreports/07Jun/98-928.pdf> [Accessed 10 June 2010].

³⁴ Sol Picciotto supra note 2 at 377.

in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.' It must meet at least every two years.³⁵

The body that oversees the day-to-day operations of the WTO is the General Council, which consists of a representative from each member country. The Council generally meets regularly and provides a forum for countries to discuss a range of trade matters. The General Council also meets in two other, unique capacities.³⁶ One is the Trade Policy Review Body (TPRB). The TPRB was established under the Uruguay Round agreements to allow closer monitoring of national trade policies of member countries. The four countries with the largest shares of world trade are reviewed every two years, the next sixteen largest traders are reviewed every four years, and other countries are reviewed every six years, although least-developed countries might be reviewed less frequently. The trade reviews provide information on a member country's trade policies and comment on whether a country is pursuing market opening or market-restrictive policies. This public examination is a mild form of pressure for a country to avoid practices that discourage trade³⁷.

The General Council also meets in the capacity of the Dispute Settlement Body (DSB). The Uruguay Round agreements greatly strengthened the process for settlement of disputes. The first stage of the process is consultation between the governments involved. If consultation is not successful, the complainant may ask the DSB to establish a dispute panel. The dispute panel hears the case and reports back to the DSB. If the complaint is upheld, the respondent must either change its practice or negotiate an agreeable resolution. Otherwise, the complainant may request that the DSB authorise suspension of obligations, thereby giving permission for the complainant to retaliate. For example, a complainant may receive permission to increase tariffs against a respondent country that disregards a decision by the

³⁵Created pursuant to Article IV: 1 of the WTO Agreement. For an in-depth discussion of the structure and functions of the WTO see also John O McGinnis and Mark L. Movsesian 'The World trade constitution' (2000) No. 2 (Dec 2000) *Harvard Law Review* 511 at 530 and also Van den Bossche supra note 21 at 122.

³⁶ The functions specifically assigned to the General Council also cover dispute settlement and trade policy review. Article IV: 3 and 4 of the WTO Agreement.

³⁷ The General Council is established pursuant to Article IV: 2 of the WTO Agreement. See also Van den Bossche supra note 21 at 124.

DSB.³⁸ Permission is automatic unless unanimously disapproved. Procedures are clearly set out with specific timetables at each stage.³⁹

More specialised work is done in three major bodies under the General Council in particular the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS). In addition to the bodies discussed above, there are many other committees and working parties under the General Council. For example, there are working groups on trade, debt, and finance and on trade and transfer of technology. There are committees on plurilateral agreements, which are not signed by all WTO members, on civil aircraft and on government procurement. The Committee on Trade and Development often works with other international institutions on special concerns of countries in development. Working parties on accession meet with applicant countries to identify changes that are necessary to bring the applicant's trade regime into line with WTO rules and principles. The Uruguay Round also established a committee on trade and environment which is often criticised for its failure to live up to its mandate, generally, of making recommendations on bridging the trade/environment gap.⁴⁰

2.3.2 The WTO Agreements

The WTO has a number of different agreements which have the status of international legal texts. Member countries must sign and ratify all WTO agreements on accession. A discussion of some of the most important agreements follows. The Agreement on Agriculture came into effect with the establishment of the WTO at the beginning of 1995. The Agreement on Agriculture has three central concepts, or 'pillars' which are domestic support, market access and export subsidies. The General Agreement on Trade in Services was created to extend the

³⁸ In general the nature of the obligation to abide by the rules was set out in John H. Jackson 'International law status of WTO dispute settlement reports: obligation to comply or option to "buy out"?' (2004) 98 No. 1 (Jan 2004) *The American Journal of International Law* 109.

³⁹ The procedure under the DSB provided for in the Understanding on Rules and Procedure Governing the Settlement of Disputes normally referred to as the DSU which is attached to the WTO Agreement as Annex 2

⁴⁰ The Committee was established at the same meeting of the General Council on 31 January 1995, at which the Committee on Trade and Development, the Committee on Balance of Payments Restrictions and the Committee on the Budget, Finance and Administration were established. See (*WT/GC/M/1*) and Fergusson *supra* note 33 at 4. See also Jennifer Schultz 'The GATT/WTO Committee on Trade and the Environment--toward environmental reform' (1995) 89 No. 2 (Apr 1995) *The American Journal of International Law* 423 for some of the expectations from the CTE. However as early as the late 90s hopes in the committee had already been dashed. See Steve Chamovitz 'A critical guide to the WTO's report on trade and environment' (1997) 14 No. 2 *Ariz. J. Int'l & Comp. L.* 341 at 342.

multilateral trading system to the service sector, in the same way the General Agreement on Tariffs and Trade (GATT) provides such a system for the trade in merchandise. The Agreement entered into force in January 1995. The Agreement on Trade-Related Aspects of Intellectual Property Rights sets down minimum standards for many forms of intellectual property regulation. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.

The Agreement on the Application of Sanitary and Phytosanitary Measures which also known as the SPS Agreement was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade, and entered into force with the establishment of the WTO at the beginning of 1995. Under the SPS agreement, the WTO sets constraints on members' policies relating to food safety as well as animal and plant health. The Agreement on Technical Barriers to Trade is an international treaty of the World Trade Organization. It was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade, and entered into force with the establishment of the WTO at the end of 1994. The object ensures that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary 'obstacles to trade'. The Agreement on Customs Valuation, formerly known as the Agreement on Implementation of Art VII of GATT, prescribes methods of customs valuation that Members are to follow. Chiefly, it adopts the 'transaction value' approach.

2.3.2.1 The GATT 1994

Of particular important to this discussion of all the WTO Agreements is the General Agreement on Tariffs and Trade (the GATT).⁴¹ The classical body of GATT law is based on the philosophy of progressive liberalisation. Subsequent rounds of multilateral trade negotiations have served the purpose of progressively and individually lowering tariff rates and domestic support of member states in a process of squaring market access and domestic needs of protection, including the needs of social and economic development. The diplomatic process has been driven by economic and political interests. The law of GATT provided the

⁴¹ The General Agreement on Tariffs and Trade 1994 LT/UR/A-IA/II/GATT/I 15 April 1995. See John H Barton et al *The evolution of the trade regime: politics, law and economics of the GATT and the WTO* (2006) for a more comprehensive discussion on the evolution of the GATT to the WTO system.

framework and operating system, within which this process of gradual liberalisation has taken place⁴².

GATT rules are designed to promote free trade with, transparency, predictability and fair competition. Its cornerstones are the most favoured nation principle (MFN) which requires the equal treatment of all sources of imports; and the national treatment principle, whereby domestic goods and imports should be subjected to the same treatment. Border protection against imports is based on the binding tariffs' schedules which have regularly been lowered in the successive rounds of negotiations. By binding its tariff, a member of GATT commits itself not to increase them without compensation. Quantitative restrictions on imports and exports are as a matter of principle, forbidden. Subsidies are tolerated if they do not have trade effects. The GATT however recognises the importance of other non-trade matters and therefore provides some exceptions to its basic principles. The exceptions most relevant for this discussion the protection of the environment are obviously those contained in Art XX (b) and (g) which relate to the protection of human, animal and plant life or health and the conservation of exhaustible natural resources.⁴³

2.4 CONCLUSION

The history and formation of the World Trade Organisation provides a very important framework from which to understand the relationship between trade in the context of the Organisation on the one hand and environmental protection on the other. The philosophy behind the formation of the WTO and its evolution from the GATT system convincingly shows that the 'members' are motivated by nothing else except economic growth via trade. It is hard to conceive any element of environmental protection in the whole process from the mid 20th century. The negotiating rounds and their agendas to date are enough proof that the heart of the WTO is trade and more trade. The most important elements of the Organisation in the discussion that follows are mainly the provisions of the GATT and its fundamental principles as the basis for analysing the substantive relationship between trade and the environment. This relationship will inevitably have to be considered in the light of the dispute settlement mechanisms provided in by the WTO as these shed more light on the procedural

Thomas Cottier 'From progressive liberalization to progressive regulation in WTO law' (2006) 9 No. 4 (Nov 2006) *Journal of International Economic Law* 779.

⁴³ Piritta Sorsa *The environment a new challenge to GATT?* (1992)7.

and technical hurdles that exist in any attempt to harmonise trade liberalisation and environmental protection.⁴⁴

⁴⁴ For more on the history and evolution of the world trading system see Anna Lanoszka *The World Trade Organisation Changing Dynamics in the Global Political Economy* (2009).

CHAPTER 3

TRADE LIBERALISATION THROUGH THE GATT PRINCIPLES

3.1 INTRODUCTION

Trade liberalisation is an inevitable result of the WTO system whether or not this is its stated intention. The principles that embody the current system unequivocally call for the opening of markets and freeing of trade. In fact a quick browse through the general provisions of the GATT creates an arguable impression that free trade is the rule with a few remote exceptions probably just to lure states to join in the system. The results of trade liberalisation might be noble, but their effect on the environment can be unfavourable, to say the least. Environmentalists have constantly argued that trade liberalisation will always be 'ecologically damaging'⁴⁵ It is worth looking at trade liberalisation and discussing how it is achieved by the GATT. The relevant provisions and principles of the GATT that underlie this movement towards trade liberalization will be looked at in this chapter in a quest to lay a foundation for the analysis of their impact on the environment which will be done in the chapters that then follow.

3.2 TRADE LIBERALISATION

There are various trade liberalisation techniques and among these the most common is easier market access. Easier market access coheres with the principal aims of the WTO which promote freer trade and more predictable international trading relationships. Perplexing as it is, it is interesting to note that neither the GATT itself, nor the WTO agreement mentions in its provisions, the attainment of free trade as its overall objective. Instead, the emphasis is upon the creation of rules for the fair conduct of trade between countries and the liberalisation of trade. Intervention is allowed within the rules agreed upon by consensus. While average industrial tariffs have fallen, most non-tariff barriers have been eliminated and clearer rules now govern international trade, the preceding review of protection shows that there is still considerable scope for further liberalisation and for greater transparency and predictability in the use of trade measures.⁴⁶ Although trade liberalisation does not

⁴⁵ Suman Sahai 'Appropriating environmental concerns' (1995) 30 No. 30 (Jul 29)1995) *Economic and Political Weekly* 1907 at 1907.

⁴⁶ On tariffs alone, it has been estimated that a forty per cent reduction in tariff protection for manufactured goods would yield approximately US\$70 billion in global income gains in 2005, while the potential gains from

necessarily imply faster export growth, in practice the two appear to correlate. The liberalisation of trade has led to a massive expansion in the growth of world trade relative to world output. While world output, or GDP, has expanded fivefold, the volume of world trade has grown sixteen times at an average compound rate of just over seven per cent per annum.⁴⁷ The impact of trade liberalisation on economic growth works mainly through improving efficiency and stimulating exports which have powerful effects on both supply and demand within an economy.⁴⁸ This is one of the reasons why the GATT is under attack by some in the environmental community who charge that international free trade blindly fosters the exploitation of natural resources. The GATT is depicted as a sinister charter that allows 'big business' a free hand to plunder the bounty of the natural world. In certain environmentalists' view, 'free trade can destroy the environment.'⁴⁹

3.3 THE GATT

As highlighted earlier, the WTO's primary responsibility is administering the complex web of legal rules, political relationships and economic policy instruments that govern world trade. In addition to overseeing the member countries' contractual commitments and obligations, the WTO sponsors periodic rounds of negotiations aimed at reducing tariffs and also reducing or eliminating non-tariff barriers to trade. This is done in terms of the GATT commitments to continuously reduce tariffs and non-tariff barriers to trade i.e. to open markets for imports. Contracting parties are obliged to enter into tariff commitments, to extend 'most favoured nation' (MFN) treatment to imports from other GATT parties, to give imported goods 'national treatment' once they have cleared customs and border procedures and to eliminate quantitative restrictions on imports and exports. To facilitate compliance with these obligations, the WTO administers a procedure for settling disputes between member countries.⁵⁰

One of the most important issues that have recently come to the fore, in the context of free trade, is environmental protection. It is apparent that the drafters of the GATT had not

similar cuts in agricultural tariffs would add US\$60 billion and a further US\$10 billion from similar cuts in subsidies. See Paper presented at the 4th Annual World Free Zone Convention, Cape Town 28-30 October 2004.⁴⁷ Ibid.

⁴⁸ Ibid. In certain individual countries, notably in South-East Asia, the growth of exports has exceeded ten per cent per annum. Exports have tended to grow fastest in countries with more liberal trade regimes, and these countries have experienced the fastest growth in GDP.

⁴⁹ See Martin Kohr 'The GATT and environmental protection' (1990) Sep - Oct *Greenpeace* at 14, 15. See also Virginia I. Postrel 'The big green trade-killing machine' 1990 Sept 21 *Wall St. J* Sept. 21, 1990 A 18.

⁵⁰ Schoenbaum supra note 19 at 705.

sufficiently addressed the problems that could arise in the relationship between increased world trade and the environment. Thus, while reduction of tariffs has increased the level of international trade, it has also instrumentally increased the rate of natural resource exploitation across the globe such that even the sustainability of this growth in trade itself, particularly in developing countries, has come into serious doubt. It has further been argued that growth fuelled by environmental exploitation ultimately harms both the environment and the prospects for further economic growth.⁵¹ More so the absence of the word 'environment' from the GATT text suggests the Agreement's failure to address environmental issues or even strike a balance between trade and the environment. It is also interesting to note that the GATT's focus on 'products' also makes it virtually incapable to encompass the environmental costs and impact of other external matters related to methods of production. This has caused comparative disadvantage for those GATT contracting parties that take steps to protect the environment because they ultimately find it difficult to compete with those that do not. On the other hand the least developed countries often feel they cannot afford to indulge concerns about harm to the environment because they do not consider themselves to be major contributors of such damage anywhere.⁵²

3.3.1 Reciprocal Tariff Reductions

The main feature of the WTO system has been periodic reductions in world tariffs. Even before the inauguration of the WTO, GATT contracting parties met roughly every decade in negotiating rounds that reduced tariffs on goods on a reciprocal basis. These kinds of concessions are regarded as the original reason for negotiating the Agreement. In this sense each party promises in terms of GATT Art II, that it will not impose on a particular product, a customs duty that is higher than the one that is listed on its tariff schedule. This however means on the other hand that if a product is not provided for on a country's schedule, a country may charge any tariff amount that it pleases.⁵³

⁵¹ Matthew Hunter Hurlock 'The GATT, U. S. law and the environment: a proposal to amend the GATT in light of the Tuna/Dolphin decision' (1992) 92 No. 8 (Dec 1992) *Columbia Law Review* 2098 at 2100.

⁵² Ian Sheldon 'Trade and environmental policy: a race to the bottom?' (2006) 57 No. 3 *Journal of Agricultural Economics* 365. However some authors still maintain that economic interdependence has not led to the race towards the bottom See David Vogel Environmental regulations and economic integrations (2000) *Journal of International Economic Law* 265 at 265. For an discussion of some of the problems that are faced by developing countries which are members to the WTO, See Emmanuel Opoku Awalu *International trade and the environment: the impact of the WTO on developing counties ad environmental protection* (2006) 66.

⁵³ See John O. McGinnis and Mark L. Movsesian supra note 35 at 544.

The GATT contracting parties are bound by the tariff levels listed on their schedules, however the Agreement also contains an explicit framework for their renegotiation. Thus for instance, Art XXVIII provides that every three years a GATT party may 'modify or withdraw a concession included in the appropriate Schedule', or if not after three years, if two thirds of the contracting parties so specify. Further, Art XXVIII provides that at any time the contracting parties may authorise renegotiation procedures because of special circumstances besides providing for periodic renegotiations. In either case, the contracting party seeking to invoke the modification or withdrawal is obliged to provide compensatory adjustment to members that are adversely affected by such measures. If the contracting party withdrawing the concession fails to offer adequate compensation which is normally done by granting an equivalent concession to other products, the likely effect is that it will face substantially equivalent withdrawals of concessions by other contracting parties on its exports. This obviously does more in scaring contracting parties and holds key in obliging parties to stick to their GATT obligations rather than be motivated by other external factors, as in this context, environmental protection.⁵⁴

3.3.2 Most-Favoured-Nation Treatment

Article I of the GATT that contains the most favoured nation principle provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

In addition to the specific obligations that arise from tariff concessions, the GATT sets forth various general obligations that apply to trade in all products, not just those listed in the schedules. Most-Favoured-Nation treatment or 'MFN,' which requires members to accord the

⁵⁴See also Lester *et al* supra note 1 at 240 and Schoenbaum supra note 19 at 706.

most favourable tariff and regulatory treatment given to the product of any one member at the time of import or export of 'like products' of all other members, is one of the bedrock principles of the GATT.⁵⁵ This therefore means that no GATT party is to give special trading advantages to another trading partner or to discriminate between trading partners; i.e. if a member country lowers its tariffs for one member, it must extend that concession to all other GATT members. Exceptions to this basic rule are allowed only in certain special circumstances involving, for example, regional trading arrangements and developing countries. Thus, should a WTO member agree in negotiations with another state, which need not be a WTO Member, to reduce the tariff on the certain same product to, for example, three per cent, this same 'tariff rate' must also apply to all other WTO members as well. In other words, if a country gives favourable treatment to one country regarding a particular issue, it must treat all the other members equally regarding the same issue⁵⁶

An important and popular application of this principle was in the *Belgian Family Allowances Case*, which concerned the legality of a 7.5 per cent levy charged under Belgian law on foreign goods purchased by public bodies when the countries of origin did not administer a system of family allowances consistent with that required under Belgian law.⁵⁷ In this case the GATT dispute settlement panel found that since nations with approved family allowances systems were exempted from this levy and, under Art I, the exemption must be granted unconditionally to all GATT members for like products, the consistency with Belgian law of the system of family allowances in a member state's territory is irrelevant to the quantity of the exemption. Thus, Art I requires equal treatment for like imported products without regard to their conditions of manufacture in the exporting nation.⁵⁸

3.3.3 National Treatment

Article III of the GATT contains the 'national treatment obligation,' which imposes a rule of non-discrimination between goods that are domestically produced and those that are imported. Paragraph 2 of Art III prohibits discrimination with respect to internal taxes and charges. It provides that:

⁵⁵ In *Japan - Alcoholic Beverages*, *Japan - Taxes on Alcoholic Beverages* Appellate Body Report (WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/R at para 21 described the concept "likeness" as an "accordion". See *Indonesia - Certain Measures Affecting the Automobile Industry* WTO/DS54, 55, 59, 64/R at para 14.146 for the application of unconditional extension of a favour to a member.

⁵⁶ See also Lester supra note 1 at 322.

⁵⁷ *Belgium - Family allowances* Panel Report (BISD 1S/59) adopted November 1952.

⁵⁸ In *Spain - Tariff Treatment on Unroasted Coffee* Panel Report (BISD 28S/102) at para 4.6 adopted 11 June 1981 the manufacturing and processing methods are insufficient to allow a different tariff treatment.

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

Paragraph 4 requires equal national treatment broadly under all governmental requirements and regulations. It provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The national treatment (GATT Art III) stands alongside MFN treatment as one of the central principles of the WTO Agreement. Under the national treatment rule, Members must not accord discriminatory treatment between imports and 'like' domestic products (with the exception of the imposition of tariffs, which is a border measure). Therefore any measure that applies unequally to like imported and domestic products violates the national treatment obligation.⁵⁹

Whether the imposition of an internal tax on imported products meets the national treatment requirement of Art III (2) depends on whether 'like domestic products' are taxed, directly or indirectly, at the same or a higher rate. A good example of the application of the national treatment principle in the environmental context is in the *United States - Superfund Case* which involved a complaint against the United States Comprehensive Environmental

⁵⁹ See also Lester *et al* supra note 1 at 278. For a broader discussion of the National Treatment principle see Henrik Horn 'National treatment in the GATT' (2006) 96 No.1 (Mar 2006) *The American Economic Review* 394.

Response, Compensation and Liability Act.⁶⁰ The Act imposed a tax on imported oil greater than the charge for domestically produced petroleum products. The United States argued that the resulting discrimination was competitively insignificant and that it was for a benign purpose: to finance pollution control measures such as the cleanup of hazardous waste sites. The dispute settlement panel found, however, that the GATT's national treatment policies are applicable to all taxes regardless of their policy purposes. In that light, the panel concluded therefore that the petroleum tax did not satisfy Art III (2) because it levied a higher charge upon imported petroleum. As for the tax on certain imported chemicals, the panel concluded that the imported and like domestic substances bore equivalent burdens; therefore, the tax met the requirement of Art III (2)⁶¹

3.3.4 Elimination of Quantitative Restrictions

The general prohibition against quantitative restriction is provided for in Art XI (1) of the GATT which prohibits the use of quotas or other quantitative limitations on exported or imported products. Art XI (1) provides that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

However Art XI (2) contains a series of exceptions to this prohibition which includes: export restrictions to relieve critical shortages of foodstuffs or other products "essential" to the exporting contracting party, import or export restrictions necessary to the application of standards for grading or classification of commodities, and import restrictions on 'agricultural or fisheries products' that are necessary to the enforcement of certain governmental policy measures.⁶²

One reason why quotas were so vigorously opposed as a generally accepted device for import restrictions was that it is very difficult to administer quotas without violating the principle of

⁶⁰ *United States- Taxes on Petroleum and Certain Substances* Panel Report (BISD/34S/136) adopted on 17 June 1987.

⁶¹ Schoenbaum *supra* note 19 at 708. *United States- Superfund Case* *ibid* at 162.

⁶² See Andreas F Lowenfeld *International Economic Law* (2002) 36.

non discrimination. Further, quotas based on historical market shares are deemed to disfavour new market entrance. The prohibition against quantitative restrictions, though with certain exceptions, is a further backbone of the general objective of liberalising trade. It minimises the possibility of using non-tariff barriers to deny foreign products the right to access a local market. But Art XI concerns more than just quotas. It also extends to other measures instituted or maintained on the importation or exportation of any product. The word 'measures' in this formulation was interpreted in the *Japan Semi-Conductor case* to refer not only to laws and regulations, but also, more broadly even to 'non-mandatory government involvement'.⁶³ Thus Art XI is comprehensive in scope; it deals with everything other than fiscal matters.

3.4 REMARKS AND CONCLUSION

The GATT sets out the fundamental principles on trade in goods. Its main concern is the facilitation of easy access to markets and equal treatment of trade parties. Its basic rules on non discrimination - the most favoured nation principle and the national treatment principle - call for the equal treatment of all like export or import products. There is no doubt that these rules are stringent enough so as to achieve their purpose if one looks at the way they have been invoked, successfully, in practice. However, these principles have far-reaching consequences especially when it comes to environmental protection. The rules encompassed in the most-favoured nation principle and the national treatment principle, do not have anything that distinguishes between products, indeed, the fact that they are 'like products' is the basis upon which they should be given equal treatment. The same also applies to quantitative restrictions. In the case of prohibition against quantitative restrictions, the effect might even be unbearable when the principle is understood and applied in line with the rules on non discrimination as well. That is, a contracting party will find itself stuck with two problems: first, that it cannot discriminate between two like products where one of them has some environmentally unfriendly issues around it, and second, that the contracting party still has to allow the trade of unlimited quantities of even what it perceives itself to be environmentally damaging products. In the end, with these principles left much to interpretation and possible balancing, the lack of even mere mention in the GATT of the need

⁶³ *Japan - Trade in Semi-Conductors* (BISD 35/116) at paras 106-109 Panel Report adopted on 4 May 1988.

for environmental protection seemingly shows that the principles live in isolation from environmental protection and share uncommon interests.⁶⁴

⁶⁴ However the GATT principles should also be viewed from the general WTO principles. For more on these see Meinhard Hiff 'Power, rules and principles- which orientation for GATT/WTO law?' (2001) *Journal of International Economic Law* 111 at 117.

for environmental protection seemingly shows that the principles live in isolation from environmental protection and share uncommon interests.⁶⁴

⁶⁴ However the GATT principles should also be viewed from the general WTO principles. For more on these see Meinhard Huf 'Power, rules and principles- which orientation for GATT/WTO law?' (2001) *Journal of International Economic Law* 111 at 117.

CHAPTER 4

MULTILATERAL ENVIRONMENTAL AGREEMENTS AND TRADE

4.1 INTRODUCTION

In the context of the issues surrounding free trade and environmental protection, one of the most important questions has always been the issue of how the WTO/GATT system accommodates multilateral environmental agreements (MEAs) that employ trade restrictions. This has mostly come to the fore in recent years as scientific evidence emerges that shows that 'the new era of growth is analytically opposed' to what environmentalists expect.⁶⁵ The question is further magnified by the fact that there are now many MEAs and quite a number of them contain trade restrictions. This kind of drive towards the use of multilateral agreements to deal with trade issues in the context of environmental protection has gained momentum since the United Nations Stockholm Conference of 1972, where the global community placed major emphasis on the negotiation and use of MEAs to deal with international environmental problems.⁶⁶ This call truly fell on open ears and it seems the momentum is now growing, with demands to clarify the relationship between these agreements and the GATT in particular. Most notable among these various environmental agreements are: the Montreal Protocol on Substances that Deplete the Ozone Layer which phases out the consumption and production of certain ozone-depleting chemicals and adopts trade controls that are more restrictive as to non-parties than parties; the Convention on International Trade in Endangered Species (CITES) which regulates imports and exports of certain species of animals and plants and allows punitive trade restrictions to be imposed on non-complying parties; and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal which prohibits exports and imports of hazardous and other wastes by parties to the Convention to and from non-party states.⁶⁷

So there are a growing number of environmental agreements that contain provision on trade issues. On the other hand, and in sharp contrast, international trade agreements rarely address

⁶⁵ A case study of India provides some of the relationship between economic growth and environmental issues. See Hartwick and supra Peet note 16.

⁶⁶ See Schoenbaum supra note 7 at 281 and also Duncan Brack 'Balancing trade and the environment' (1995) 71 No. 3 (Jul 1995) *International Affairs* 497

⁶⁷ Schoenbaum supra note 7 at 282.

environmental matters.⁶⁸ One acceptable reason is that, while it seems unnecessary to protect the environment to facilitate trade, it is often manifestly necessary to regulate trade to protect the environment. This is often because the subjects of the MEAs and environmental protection tend to be traded across national boundaries and therefore require regulation. The measures are accordingly used to prevent trade in the targeted products themselves and to make the treaty regime more effective by encouraging governments to join, by discouraging the so-called free riders who would otherwise gain benefits without participating, and by preventing circumvention.⁶⁹ MEAs do not therefore generally employ trade measures as mere sanctions; rather, the trade measures are integral to their purpose, which is either to preserve an environmental benefit or to protect against an environmental harm. In this chapter therefore, a demonstration is made of how environmental protection and the GATT come into conflict. This is shown through contemporary examples of multilateral environmental agreements; more so considering the fact that the relationship between these environmental agreements that limit trade to protect and the GATT is not clear and leaves a lot of unanswered questions as to their ultimate effectiveness.

4.2 IMPORT RESTRICTIONS

Environmental pollution or damage, and especially transboundary pollution, is normally caused by the importation by an affected state of products or equipment from other states. In a bid to stop the spread of environmental pollution or its widespread effect, there is always a quest in the environmental measures to regulate the importation of certain products or processes amongst member states to the various instruments. The measures in most instances include a ban on the importation of certain products or equipment or the prohibition of importation unless some certain requirements are met by the importing state. In most instances these requirements will be mainly focusing on the management or disposal of the equipment in an environmentally sound manner.⁷⁰ There are a few environmental agreements which provide for such measures and some of the most popular amongst these are discussed below.

⁶⁸ A notable exception is the North American Free Trade Agreement (NAFTA) which significant agreements on environmental protection. For a broader discussion of environmental protection in the NAFTA see Annette Baker Fox 'Environment and trade: the NAFTA case' (1995) 110 No. 1 *Political Science Quarterly* 49.

⁶⁹ Schoenbaum *supra* note 7 at 282.

⁷⁰ See also Steven Shrybman 'Trading away the environment' (1992) 9 No 1 (Winter 1991/1992) *World Policy Journal* 93 at 100.

The Montreal Protocol on Substances that Deplete the Ozone Layer provides a comprehensive regime regarding the production, consumption, and trade of certain controlled substances.⁷¹ Parties are required by this Protocol to ban the importation of controlled substances (or products containing them) from non-parties unless those non-parties are determined to be in full compliance with the production and consumption regime of the protocol. This determination is done by a Meeting of the Parties. The main purpose of the import ban on non-parties is clearly to prevent leakage of trade in chlorofluorocarbons (CFCs) and other controlled substances. The import bans also serve the purpose of encouraging countries to join or, if they remain non-parties, to comply with the regime. The trade ban aims also mainly to suppress future production of CFCs.⁷²

The Antarctic Protocol on Environmental Protection establishes a protective regime for the Antarctic environment. Among its provisions is a ban on the importation into Antarctica of live poultry. The purpose of this trade ban was to prevent relocation of certain micro-organisms through trade.

The environmental agreements provide mainly for the restriction on importation of certain products or substances. They further provide for the differential treatment between parties to the agreements and non-parties. This obviously raises questions with the GATT. The difference in treatment between products to and from non-members called upon by the Montreal Protocol may not go unchecked by the non-discrimination principles of the GATT - in particular, the most favoured nation principle. This is because some non-members of this Protocol might be members to the GATT. Worse still, the imposition of conditions on products might also become a quantitative restriction in some way, which in turn causes further problems with the GATT - in particular Art XI on quantitative restrictions.⁷³

4.3 EXPORT RESTRICTIONS

Goods or resources produced, found or stationed in other states (as in the case of non-living natural resources) can find their way out of the state of their origin due to exportation. Besides hazardous chemicals and substances, the most environmentally protected elements that are threatened by exportation are the so-called exhaustible natural resource and endangered species whether living or non-living. Exhaustible natural resources and

⁷¹ Montreal Protocol supra note 13.

⁷² United Nations Conference on Trade and Development 'Trade and environment review 2003' United Nations New York and Geneva April 2004 at 16.

⁷³ Lovenfeld supra 62 at 310.

endangered species by their nature represent some scarce resources and in most instances are found in remote or small parts of the world. Wild animals and birds both reptiles and mammals and things of historical importance normally find their way into this category depending on their value. As a way of controlling the lives and continued existence of these kinds of species, it has always been vital for environmentalists to try and find ways of controlling their free movement. Measures focusing on regulating the movement of these species have mostly included a ban on the exportation of such or a prohibition of doing so without a licence of which the licence sets some standards which should be complied with before it can be obtained.

The Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal provides a broad system for the disposal of, and trade in waste. Among its numerous trade provisions, the Convention provides for the ban on the export of wastes including recyclables to states that are not party to the Convention.⁷⁴ The export ban to non-parties is meant to encourage those non-parties to become parties to the Convention, especially those that desire to engage in reprocessing. Another purpose of this ban is to render the treaty more effective by moving toward a closed system in waste. It should be noted that hazardous waste differs from CFCs in that waste can be more harmful in one country than in another. This normally occurs if the quality of waste treatment or absorptive capacity differs between those countries. These discrepancies might also lead to discrimination in the sense of the GATT.

The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) regulates trade in endangered species.⁷⁵ However as opposed to the Basel Convention, trade with non-parties is permitted, but only when competent authorities in that state issue comparable documentation to that required of parties. The purpose of applying the same trade rules to non-parties was to encourage governments to join CITES. This provision also prevented trade diversion, that is, parties using non-parties as intermediaries. The sole aim of CITES is to protect species of wild animals, including birds, and plants, whose survival is endangered by the commercial trade in them or in products derived from them.⁷⁶ Although discrimination is not manifestly clear in this instance, there is no doubt still that the requirement of comparable documentation may be viewed as a condition in the sense

⁷⁴ The Basel Convention supra note 9 See Agata Fijalkowski & James Cameron (eds) *Trade and the Environment Bridging the Gap* (1998) at 120.

⁷⁵ CITES Supra note 9.

⁷⁶ See Patricia Bimic 'The case of the convention on trade in endangered species. In R Wolfrum (ed) *Enforcing environmental standards: economic mechanisms as viable means?* (1996) 233.

of GATT Art III. Further the regulation of trade poses a threat to the prohibition on quantitative restrictions.

4.4 ECO-LABELLING

Eco-labelling is another method of raising environmental standards. A great variety of eco labelling schemes exist, mainly sponsored by governments, private groups, or a combination of the two. They take several forms which include: mandatory negative content labelling; mandatory content neutral labelling; and voluntary multi criteria labelling.⁷⁷ The theoretical understanding behind eco-labelling is primarily that, if consumers are informed, the market and consumer choice can be relied upon to stimulate the production and consumption of environmentally friendly products.⁷⁸ Eco-labels can show product characteristics and/or process and production methods. They can operate as a seal of approval or objectively impart information. Well known examples of eco-labelling plans include Germany's 'Blue Angels' program and the 'White Swan mark' launched by the Scandinavian countries. In the USA a private organisation operates a Green Seal programme. The European Union has also similarly adopted an eco-labelling scheme which promotes the production and use environmental of environmentally sound products.⁷⁹

Eco-labelling can have discriminatory effects and therefore come into conflict with the fundamental GATT principles on non-discrimination. For instance, it has been observed that eco labelling schemes can discriminate between imported and domestically produced goods if local industry influences the selection of the products on which the eco-label would apply, as well as the selection of criteria of the award of the eco-label. Also, even well designed eco-labelling schemes may discriminate against foreign producers in conformity assessment procedures if the exporter has to seek certification from the certification bodies in an importing country.⁸⁰

⁷⁷ See US Environmental protection Agency, Office of Pollution Prevention and Toxics *Status Report on the use of Environmental labels Worldwide* (1993) Available on <http://www.epa.gov/> [Accessed 20 July 2010]

⁷⁸ See Halina Ward 'Trade and environment issues in voluntary eco-labeling and life cycle analysis (1997) 6 No.2 *RECIEL* 139; and Peter S Menell 'The uneasy case for eco-labeling' (1995) 4 No. 4 *RECIEL* (1995) 304.

⁷⁹ EC Regulation 880/92, art1, 1992, OJ (L 99)1.

⁸⁰ See Committee on Trade and Environment WTO, CTE (*WT/CTE/1*), *Report* (1996) November 1996. International Trade Centre *Eco-labeling and other environmental quality requirements in textiles and clothing: implications for developing countries* (ITC 1996) and also Manoj Joshi, 'Are eco-labels consistent with the World Trade Organisation agreements (2004) 38 No.1 *Journal of World Trade* 69.

4.5 PROCESS AND PRODUCTION METHODS

In addition to placing environmental trade measures on products, measures may also concern themselves with how a product is produced, manufactured or obtained, commonly referred to as process and production methods (PPMs). Some process and production methods are directly related to the characteristics of the product concerned. For example, pesticides used on food crops produce residues on food products, cattle raised on growth hormones produce meat with hormone residues and unsanitary conditions in slaughter houses result in meat that may be contaminated with disease - causing organisms.⁸¹ The United Nations Agreement on Conservation and Management of Straddling Fish Stocks provides new methods of intergovernmental cooperation to respond to dwindling fish stocks.⁸² In terms of the treaty, parties may adopt regulations to prohibit the landing or transshipment of fish where it has been established that the catch has been taken in a manner which undermines the effectiveness of sub regional, regional or global conservation and management measures on the high seas. The purpose of this import ban was also to prevent free riders from undermining the treaty.

The process and production methods have, in most instances, become more relevant to the GATT discrimination principle when it is considered in the context of the concept of "likeness". The question has always been whether, under the current WTO law, the process and production methods by which goods are produced is relevant in determining whether products are "like" if the process and production methods do not affect the physical characteristics of the products. This response is normally that it is not relevant which consequently mean that products produced in an way that damages the environment can thus not be treated differently from those that are produced in an environmentally sound manner on the sole basis of the difference in the process and production methods.⁸³

4.6 RECYCLING AND PACKAGING

Several countries have taken bold steps to introduce mandatory recycling of products and packaging to reduce the generation of waste and the resulting pollution and the need for landfills. These laws are part of an increasing trend in many industrialised countries to consider the environmental impact of products throughout their life cycles to the point of

⁸¹ Patricia Birnie et al *International Law and the environment* 3ed (2009) 788.

⁸² (1995)34 *ILM* 1542.

⁸³ See Robert House *The WTO system: law, politics and legitimacy* (2007) 77.

their ultimate disposal.⁸⁴ Germany has led the way, passing the 'verpackungsverordnung (Packaging Ordinance)' in 1991, which regulates the packaging of products and sets mandatory recycling requirements for packing waste. The Packaging Ordinance requires the manufacturers of products to take back packaging wastes and to arrange for their recycling. They fulfil this duty by participating in a private waste collection system, which, for a fee, will handle this obligation by collecting waste from consumers. Participating manufacturers may mark their products with a green dot. The Packaging Ordinance applies to all products distributed within Germany. The European Union has also, in 1994, adopted a Packaging Directive to the same effect, which applies to the packaging of all products sold in the European Union, including imports.⁸⁵ The purpose of these laws is to weaken this impact by minimising packaging waste, prohibiting the use of toxic and hazardous materials and packaging, and creating incentives or requirements for recycling, re-use, or proper disposal of both the packaging and the products themselves.

Such laws have the potential to disrupt the free flow of international trade. Manufacturing groups, especially, are concerned that the spread of such life cycle or producer responsibility laws will have a protectionist effect, isolating national markets. Developing countries are especially concerned that their exporters will be unable to comply with these laws. The discriminatory and restrictive effect will thus definitely be felt particularly by the developing countries that will fail to meet these requirements due to the costs involved.⁸⁶

4.7 ENVIRONMENTAL TAXES

Governments and public authorities have often been called upon to use market based economic incentives rather than directive and control regulations to improve environmental quality. As a result, taxes are often used and are likely to be used more frequently in the future, both to raise revenue and to achieve environmental goals. Environmental taxes are based on the principle that many resources are under priced and therefore, overused. Environmental taxes, in effect, raise the price of the use of these resources. They can have three purposes: to discourage the consumption of goods and services that create

⁸⁴ Although developing states lag behind in this area, this can be attributed to the little resources at their disposal. These environmental standards can have even devastating consequences for free trade especially through blocking market access products from least developed countries. See Samir R Gandhi 'Regulating the use of voluntary environmental standards within the World Trade Organisation legal regime: making a case for developing countries' (2005) 39 No.5 *Journal of World Trade* 855.

⁸⁵ EC Directive 94/62 par 2 (1). On packaging and labelling see Chris Hilson 'Information disclosure and the regulation of traded product risks' (2005) 17 No 3 *Journal of Environmental Law* 305.

⁸⁶ Gandhi supra note 84.

environmental costs, to encourage producers to develop alternative production methods and products that are less harmful to the environment and to implement the polluter-pays principle, which holds that the polluter should bear the expenses imposed upon society of ensuring that the environment is in an acceptable state.⁸⁷

The *United States Superfund Case* is a suitable example of issues arising in the use of legislation to control the use of certain products in the United States by levying a tax on oil products.⁸⁸ These measures might be very responsive to the necessary purpose of promoting human health. However the problem comes if the taxes are applied differently between local and imported like products. Although this might be necessitated by genuine differences in the ingredients, content or production methods of the taxed products, the discrimination that might ensue from such different tax thresholds might clash with GATT principles. Thus, although taxation is increasingly getting the nod in relation to the control of environmentally unfriendly products or substances, its effectiveness is seriously threatened by the possible conflict that might arise in its application and the general principles of the GATT.

4.8 REMARKS AND CONCLUSIONS

Environmental protection is often achieved by the prohibition or limitation of the production and consumption of certain products or substances that are either environmentally harmful or are susceptible to harm themselves or anything relating to them - be it living or non-living. The measures employed as methods to further these prohibitions or limitations normally take the form of import and export restrictions, labelling, process and production standard requirements, and environmental taxes. These measures are often provided for in a number of the various emerging environmental agreements. It is not only probable but certain that these measures, if employed to the best result of their purpose, will definitely come into conflict with the fundamental principles of the GATT on non-discrimination and quantitative restrictions. More so the fact that the relationship between these multilateral environmental agreements that often provide for these measures and the general obligations of the GATT is not clear leaves the measures for environmental protection at the mercy of the GATT principles. It is clear that without a resolution of this debate, the standoff between trade principles and environmental protection will always present a problem because as is apparent

⁸⁷ For a critical view on this strategy see Daniel C. Esty 'Bridging the trade-environment divide' (2001) 15 No. 3 (Summer 2001) *The Journal of Economic Perspectives* 113 at 120.

⁸⁸ *United States- Superfund Case* supra note 60. See also Gerd Winter 'The GATT and environmental protection: the problems of construction' (2003) 15 No. 2 *Journal of Environmental Law* 113 at 133.

the purpose of most of these environmental agreements is to limit or ban trade that is environmentally sensitive. Therefore this is where the problem begins.⁸⁹

⁸⁹ See generally Fijalkowski and Cameron *supra* note 74 at 97 for a discussion on the role of environmental agreements and their relationship with GATT/WTO law.

CHAPTER 5

THE GATT ARTICLE XX (b) AND (g) EXCEPTIONS

5.1 INTRODUCTION

The general exceptions to the provisions of the GATT provided for in Art XX are at most meant to excuse state parties from their obligations under the agreement. The exceptions have been described as recognition by the GATT of other non-trade externalities that should be given precedence within the context of trade issues. Amongst the numerous exception paragraphs in Art XX, most relevant to this discussion are paragraphs (b) and (g). These provisions allow derogation from the GATT obligations for the sake of protecting human, animal and plant life or health, or for the conservation of exhaustible resources. To a larger extent, the contents of these provisions encompass much of what is environmental protection, directly or indirectly. The aim of this chapter is to show that these exceptions are a welcome realisation by the GATT of how threatening to the environment trade can be if not regulated. But besides this realisation, the formulation of the exceptions makes it simply a case of giving with one hand and taking with the other. This becomes the case when one considers the analysis of the conditions and requirements set out in the exceptions for them to be successfully invoked by state parties.⁹⁰

5.2 GATT ARTICLE XX EXCEPTIONS

Although the word *environment* is not used, the general exceptions provision of the GATT - Art XX - constitutes conditional exceptions to the GATT obligations, including those in Art I, III and XI. Thus, just as practice has shown, Art XX maybe applied to justify certain environmentally inspired rules that affect trade.⁹¹ The provisions of Art XX (b) and (g) read as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

⁹⁰ Nathalie Bernasconi-Osterwelder et al *Environment and trade: a guide to WTO jurisprudence* (2006) 77 and Bimie supra note 81 at 759 provides an analysis of the application of the GATT Article XX (b) and (g) exceptions.

⁹¹ Bimie supra note 81 at 759.

international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The party asserting these exceptions as a defence has the burden of proving that they are applicable.⁹² Whereas this is a somewhat common procedural requirement, its application in this context practically subjects environmental protection to free trade. This becomes the case especially considering the fact that this burden has not been often successfully discharged largely because of the strictness with which the provisions are interpreted and more so apparently in favour of the general rules than the exceptions themselves. A closer and careful analysis of these provisions shows that the provisions are so carefully constructed which leaves very little room for any interpretation in favour of a successful invocation of the exception by an asserting contracting party.

5.2.1 Article XX (b)

Article XX (b) relates to the protection of human, animal, plant life or health. The interpretation of this exception is commonly done in a three stage process. That is: does the measure in question protect human, animal plant health or life? And if so, is the measure for which the exceptions are being invoked necessary for its purpose? And lastly, is the measure applied consistently with the chapeau, i.e. avoiding arbitrary or unjustifiable discrimination and/or a disguised restriction on international trade?⁹³

Seriatim:

Does the measure in question protect human, animal, or plant life or health?

In practice the first stage of enquiry under Art XX (b) is normally relatively easy to apply and has not given rise to many interpretation difficulties. Basically the party asserting this exception as a defence has to show that the measures that are being implemented are designed to protect human, animal or plant life or health. The policies under Art XX (b) are

⁹² Lester *et al* supra note 1 at 382.

⁹³ Birnie supra note 81 at 760.

broad enough to include health policies as well as environmental protection policies. For example, it has been accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Art XX (b).⁹⁴

Is the measure applied necessary to fulfil the policy objectives?

This second element in the test under Art XX (b) has been more problematic in practice. It is this requirement that makes it impossible to invoke this exception to protect the environment. The determination of what measures are 'necessary' has proved to be something that parties trying to invoke the exception have failed to judge accurately. At the same time the interpretation of the exception itself has not been consistent enough to create certainty. Measures have been deemed to be 'necessary' within the meaning of Art XX (b) only when there existed no alternative measure that is GATT-consistent or less inconsistent which a member can be reasonably expected employ to achieve the environmental objective pursued.⁹⁵ The meaning of this requirement has been clarified in the *EU-Asbestos Case* in three important respects. First, in determining the level of protection for health or the environment they consider appropriate, other members cannot challenge the level of protection chosen but can only argue that the measure at issue is not necessary to achieve that level of protection. Second, that there is no alternative to the measure at issue that the member could reasonably be expected to employ, the Appellate Body stated that in determining whether a suggested alternative measure is reasonably available, several factors must be taken into account alongside the difficulty of interpretation. Thus in deciding whether a measure is necessary the Appellate Body therefore also considers the importance of the societal value pursued by the measure at issue as well as the extent to which the alternative measure will contribute to the protection or promotion of that value.⁹⁶ In the third respect, the Appellate Body shifted from the requirement in the *Thailand-Cigarettes Case* that the alternative measure needs to be GATT-consistent or less inconsistent by putting

⁹⁴Van den Bossche supra note 21 at 604 and *Thailand- Restrictions on importation of and internal taxes on cigarettes* Panel Report (BISD 37S/200) adopted 7 November 1990.

⁹⁵ Van den Bossche supra note 21 at 605; and *Thailand - Cigarettes Case* ibid paras 77- 78. For a broader discussion of the necessity requirement see also Lester *et al* supra note 1 at 148.

⁹⁶*European Communities - Measures affecting asbestos and products containing asbestos* Appellate Body Report (WT/DS135/AB/R at para 172 adopted 5 April 2001, *United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services* Appellate Body Report (WT/DS285/AB/R) para 306 adopted 29 April 2005 and also *Korea- Measures Affecting imports of Fresh, Chilled and Frozen Beef* Appellate Body Report (WT/DS161/AB/R and WT/DS169/AB/R) adopted 10 January 2001. See also Steve Chamovitz 'The WTO's environmental progress' (2007) 10 No. 3 *Journal of International Economic Law* 685 at 691.

forward another requirement that the alternative measure must be 'less trade restrictive' than the measure at issue.⁹⁷ In short, the new test then became, whether there is an alternative measure that would achieve the same end and that is 'less restrictive' of trade than a prohibition.

In reality these twists and turns and protracted interpretations of the test in practice make the standard required uncertain. Further, the use of the words, necessary and reasonably available do not give any assistance and hope but simply casts further doubt on the potential of state parties actually passing the test with ease. These stringent and ambiguous requirements therefore make it practically impossible to use this exception to further environmentally sound policies that are *prima facie* GATT inconsistent, but for the exception, without even considering the provisions of the chapeau which are considered below.

5.2.2 Article XX (g)

This paragraph is designed to allow WTO members to take actions to conserve exhaustible natural resources. The exception contains a four stage enquiry, thus a party asserting this exception as a defence must show: that the measures for which the provision is invoked concern exhaustible natural resources; that those measures are related to the conservation of those exhaustible natural resources; that these measures are made effective in conjunction with restrictions on domestic production or consumption; and lastly, that the measures are applied in conformity with the requirements of the chapeau of Art XX. Let us examine the wording of the article more closely:

Natural resources

The first issue that has to be addressed under Art XX (g) is whether the trade measure concerns the conservation of exhaustible natural resources. The Appellate body has taken a generous view of the matter, adopting an 'evolutive approach' to the interpretation of the term 'natural resources' by stating that it does not have a static content and must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.⁹⁸ A resource maybe living or non-living and does not need to be rare or endangered to be potentially exhaustible. Under this expansive

⁹⁷ Ibid. See also Alan O. Sykes 'The least restrictive means' (2003) 70 No. 1 (Winter 2003) *The University of Chicago Law Review* 403 who argues that 'necessary' in this context is the same as less restrictive.

⁹⁸ See *United States- Import prohibition of Shrimp and Shrimp products* Appellate Body Report (WT/DS58/R/AB) at paras 127, 129- 130 adopted 6 November 1998.

interpretation, virtually any living or non-living resource particularly those addressed by multilateral environmental agreements could qualify.⁹⁹

Relating to conservation

This requirement that measures should be relating to the conservation of exhaustible natural resources has thrown big spanners in the way of any invocation of the Art XX (g) exception in the protection of the environment in trade related issues. The term 'relating to', in particular has proved very problematic to interpret and maintain a consistent definition. Although a trade measure does not need to be necessary as in Art XX (b) to natural resources conservation, the GATT/WTO panels have interpreted 'relating to', to mean that it must be 'primarily aimed at' conservation.¹⁰⁰ In this way the requirement has thus proven to be a difficult obstacle. The question arises whether the 'primarily aimed' interpretation of the term 'relating to' is in fact correct because certainly the phrases themselves are not synonymous and therefore the primarily aimed at interpretation might actually be an unwarranted and unprocedural amendment of the provisions of the GATT Art XX.¹⁰¹ As the Appellate Body in the *US-Gasoline Standards Case* pointed out, the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for Art XX.¹⁰² In the *US-Shrimp/Turtle Case* the Appellate Body took a more nuanced approach to the 'relating to' element, examining the structure of the measure in question and the conservation objectives sought to be achieved and concluded that the US import ban on Shrimp was reasonably related to the turtle conservation measures sought to be achieved.

The measures are made effective in conjunction with restrictions on domestic production or consumption

A third requirement of Art XX (g) is that the measure in question must be made effective in conjunction with restrictions on domestic production or consumption. A definitive interpretation of this phrase was given by the Appellate Body in the *US-Gasoline Standards Case*:

⁹⁹ Birnie supra note 81 at 772.

¹⁰⁰ Ibid. See *Canada – Measures affecting exports of unprocessed Herring and Salmon Panel Report* (BISD 35S/98) at para 4, 6 adopted 22 March 1988 and see *United States- Standards for reformulated and conventional gasoline Appellate Body Report* (WT/DS2/AB/R) and Panel Report as modified by Appellate Body Report (WT/DS2/R) at 16 adopted 20 May 1996.

¹⁰¹ The fact that the terms are not synonyms simply shows that they do not have the same meaning, and thus are not substitutes; therefore employing another phrase which does not have the same meaning might mean the introduction of a new clause that was not even envisaged by the drafters.

¹⁰² See *United States- Standards for reformulated and conventional gasoline* supra note 100 at 19.

The basic international law rule of treaty interpretation... that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here. The ordinary or natural meaning of made effective when used in connection with a measure- a governmental act or regulation- may be seen to refer to such measure being operative as in force or having come into effect. Similarly the phrase, in conjunction with may be read quite plainly as together with or jointly with. Taken together, the second clause of Article XX (g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. We believe that the clause, if such measures are made effective in conjunction with restrictions on domestic production or consumption is appropriately read as a requirement that measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline.¹⁰³

The Appellate Body further pointed out however, that the 'in conjunction with' element requires a certain amount of even-handedness, but not identity of treatment, and restrictions on either domestic production or consumption will be satisfactory.

A similar approach was used in the *US-Shrimp/Turtle Case* and the Appellate Body found that the import ban on shrimp was reasonably related to the purpose of protecting sea turtles just as the Appellate Body in the *US-Gasoline Standards Case* found that there was a reasonable relationship between the baseline establishment rules and the clean air. In addition this requirement was satisfied because the United States required all shrimp trawlers to use turtle excluder devices in areas and times where there is a likelihood of intercepting sea turtles, thus becoming comparable restrictions on the domestic harvesting of shrimp.

The approach to Art XX (g) now mandated by the Appellate Body is substantially different from the restrictive and somewhat illogical interpretations of GATT panels particularly in the *Tuna/Dolphin* decisions.¹⁰⁴ In fact the US restrictions on the harvesting of tuna would now pass Art XX (g) with ease. Dolphins are clearly an exhaustible natural resource, the import ban on tuna that was harvested using methods that kill dolphins is clearly related to the purpose of cutting dolphin mortality; and the requirements protecting dolphins also apply to United States vessels and fisherman. Also important, the Appellate Body in the *US-*

¹⁰³ See *United States- Gasoline Standards* case supra note 100 at 20- 21.

¹⁰⁴ *Birnie* supra note 81 at 773.

Shrimp/Turtle Case gives clear extraterritorial scope to Art XX (g); it applies without distinction to exhaustible resources beyond areas of national jurisdiction as well as to domestic measures.¹⁰⁵ However these fall far short of certainty and the standards required for effective environmental protection because although these interpretations are welcome and a sign of progress, they have not had an opportunity to be applied consistently so far and besides, they do not bind future interpretations of the same provisions.

5.2.3 The Chapeau

The whole list of exceptions under Art XX is qualified by the introductory clause commonly termed *the chapeau*. Therefore, even if the measure otherwise falls within one of the exceptions in Art XX, it would be illegal under the chapeau if it constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or if it is a disguised restriction on international trade.¹⁰⁶

The object and purpose of the chapeau of Art XX should be to avoid the possibility that the application of proportionality justified measures would constitute a misuse or abuse of the exceptions of Art XX. The interpretation and application of the chapeau in a particular case is a search for the appropriate line of equilibrium between the right of members to adopt and maintain trade restrictive legislation and measures that pursue certain legitimate societal values or interests and the right of other Members to trade.¹⁰⁷ The search for this line of equilibrium is guided by the requirements set out in the chapeau that the application of the trade restrictive measures may not constitute either arbitrary or unjustifiable discrimination between countries where the same conditions prevail or constitute a disguised restriction on international trade.¹⁰⁸

Arbitrary or unjustified discrimination between countries where the same conditions prevail

For a measure to be justified under Art XX, the application of that measure, pursuant to the chapeau of Art XX, should not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. The discrimination referred to in this instance has been deemed to be of a different standard than the discrimination referred to in the other

¹⁰⁵ Ibid.

¹⁰⁶ The significance of the chapeau was strongly emphasised by the WTO Appellate Body in the *United States Gasoline Standards Case* supra note 100 at 22.

¹⁰⁷ However, it is the interpretation of the chapeau that in most instances has stood in the way of environmental protection. See Sanford Gaines 'The WTO's reading of the GATT article XX chapeau: a disguised restriction on environmental measures (2001) 22 *Winter U. Pa. J. Int'l Econ. L.* 739.

¹⁰⁸ Van den Bossche supra note 21 at 616-617.

provisions of the GATT 1994 such as Art I and III. Further, discrimination between countries where the same conditions prevail was deemed to refer not only to exporting countries where the same conditions prevail but also to importing countries where the same conditions prevail. Unjustifiable discrimination was in some instances found to prevail where the discrimination from the measure at issue must have been foreseen. The discrimination thus was unjustifiable because it was not merely inadvertent or unavoidable. The Appellate Body also decided that discrimination may also result when the same measure is applied to countries where different conditions prevail. Also when a measure is applied without any regard for the difference in condition between the countries and this measure is applied in a rigid and inflexible manner, the discrimination may constitute arbitrary discrimination within the meaning of the chapeau of Art XX.

Disguised restrictions on international trade

The chapeau requires that the application of the measure at issue should not constitute a disguised restriction on international trade. In summary a measure which is provisionally justified under Art XX, will be considered to constitute a disguised restriction on international trade if the design, architecture, or structure of the measure at issue reveals that the measure does not pursue the legitimate policy objectives on which the provisional justification was based, but in fact, pursues trade restrictive i.e. protectionist objectives. Such a measure can thus not be justified under Art XX.¹⁰⁹

5.3 CONCLUDING REMARKS ON ARTICLE XX

Art XX sets out the general exceptions to the obligations under the GATT enshrined in the principles on non-discrimination and prohibition against quantitative restrictions. These exceptions are meant to safeguard other interests external to the promotion of free trade, with paragraphs (b) and (g) of this article notably tipped to protect the environment, notwithstanding that the word environment itself is not mentioned therein. However the way the exceptions are carefully crafted simply raises too many barriers against the achievement of this purported objective. The exceptions set out very stringent requirements to be satisfied by the party asserting these exceptions as a defence which has often led to ultimate failure to

¹⁰⁹ *Ibid*, *United States- Shrimp/Turtle Case* supra note 98 at paras 5,138-5,144. The line of difference between permissible measures and impermissible measures under this test can be best understood through the difference between environmental protection and environmental protectionism. See generally J Owen Saunders 'Trade and environment: the line between environmental protection and environmental protectionism' (1992) 47 No. 4 (Autumn 1992) *International Journal* 723.

discharge this burden. Further, for any of the paragraphs in Art XX, the asserting party would have to prove at least that the measures in question satisfy at least five cumulative tests from the paragraph itself and from the chapeau. The tests are so ambiguous that there is no certainty in their interpretation and application more so coupled by the fact that they all need to be satisfied, such that even if the asserting party establishes the satisfaction of a greater portion of the requirements, one requirement can easily render its side of the story worthless. It can strongly be argued therefore that the only conclusion that can be drawn from this is that the exceptions in Art XX (b) and (g) are misleading. They purport to protect the environment yet in reality there is very little possibility of achieving that especially having due regard to the formulation and terminology of the provisions that even subjects environmental and other interests to the main GATT interest of liberalising trade. This possibly is the reason why others think that the WTO simply 'interferes with legitimate efforts by the United States and other countries to block imports that harm the environments' and is therefore also the 'single most destructive organisation ever formed'.¹¹⁰

¹¹⁰Michael M. Weinstein and Steve Charovitz 'The greening of the WTO' (2001) 80 No. 6 (Nov- Dec 2001) *Foreign Affairs* 147 at 150.

CHAPTER 6

THE WTO DISPUTE SETTLEMENT JURISPRUDENCE

6.1 INTRODUCTION

Often disputes have arisen in the context of the GATT when one party decides to derogate from its obligation under the GATT while relying on the exceptions under Art XX (b) and (g). These disputes have found themselves in the dispute settlement mechanisms provided for in WTO. In reality these disputes have more often been won by the party contesting the trade restricting measures rather than the party asserting the Art XX defences. In this chapter, it is important to see the mechanisms and issues around this WTO dispute settlement system that cause or contribute to this kind of unfortunate eventuality that trade always trumps environmental interests. Further it is important to look at the jurisprudence of the dispute settlement system to see if there is light in the future that environmental interests will evenly be catered for in the same procedure.

6.2 THE WTO DISPUTE SETTLEMENT SYSTEM

Disputes in the WTO are settled by the dispute settlement body in terms of the rules provided in the Dispute Settlement Understanding (DSU). In brief, the dispute settlement system is set in motion when member governments bring conflicts over trade, in most instances, different interpretations of the provisions of the GATT/WTO Agreements. Should consultation not result in a settlement, the WTO's Dispute Settlement Understanding requires the establishment of an investigative panel, normally consisting of three persons of 'appropriate background and experience' proposed by the WTO Secretariat or the director-general, from countries not party to the dispute. Panel reports are adopted by the DSB unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal. Appeals are handled by a WTO appellate board made up of three of the seven members of the WTO Appellate Body. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. The resulting report is then adopted by the DSB and has to be unconditionally accepted by the disputing parties unless the DSB decides by consensus against its adoption. Once the panel or Appellate Body report is adopted, the government found against is supposed to notify the WTO of its intentions for implementing the adopted recommendations. The DSB keeps the implementation under regular monitoring until the issue is resolved, with rules being set for compensation or the

suspension of trade concessions in the event of failure of implementation thereof.¹¹¹ The current system has established a speedy, effective and compulsory way of resolving disputes. The process for resolving disputes provide for a comprehensive mechanism of resolving disputes and also ensuring that the decisions taken are enforced within a reasonable period of time.¹¹² However some of these perceived strengths are in fact barriers to environmental protection. The elements of the DSB relevant to this trade and environment discussion are highlighted below.

One of the great strengths of the WTO is the system of compulsory binding dispute settlement created by the Understanding on the Rules and Procedures Governing the Settlement of Disputes which was adopted in 1994. The striking issue in this context is that the adjudication of disputes is done on disputes arising from the covered WTO Agreements. This in principle means that other non WTO agreements cannot be brought for adjudication under this system. However, it is important to note the influence of customary international law on the interpretation of treaties, in particular Art 31(3) of the Vienna Convention on the Law of Treaties which requires that relevant rules of international law applicable be taken into account in dispute settlement. More so, Art 3(2) of the WTO DSU expressly provides that the existing provisions of the covered agreement are to be clarified in accordance with the customary rules of interpretation of public international law. This had a notable impact in the *EC- Biotech Case*,¹¹³ where the Panel accepted that non-WTO measures could be used as evidence of the ordinary meaning of terms in the WTO.¹¹⁴

Other striking issues of relevance to this discussion are the qualifications required of the adjudicators of the dispute settlement panels. The adjudicating panellists are not required by the Understanding on the Rules and Procedures Governing the Settlement of Disputes to have expertise in environmental law as for example the panels adjudicating prudential issues and

¹¹¹Hartwick and Peet supra note 16.

¹¹² For an analysis and background to the WTO Dispute resolution see G Richard Shell 'Trade legalism and international relations theory: an analysis of the World Trade Organization' (1995) 44 No. 5 (Mar 1995) *Duke Law Journal* 829 at 848.

¹¹³Panel Report WT/DS291/, 292,293R.

¹¹⁴ The case concerned complaints against the European Communities by the United States, Canada and Argentina, over measures taken by the European Community and six of its member states to regulate the importation of genetically modified organisms. See James Cameron and Kevin R. Gray 'Principles of international law in the WTO Dispute Settlement Body' (2001) 50 No. 2 (Apr 2001) *The International and Comparative Law Quarterly* 248, Natalie McNelis EU Communication on the precautionary principle (2000) *Journal of International Economic Law* 545 and also, Joost Pauwelyn 'How to win a World Trade Organisation dispute using non- World Trade Organisation law? Questions of jurisdiction and merits' (2003) 37 No.6 *Journal of World Trade* 997- 1030, and also J Pauwelyn 'The role of public international law in the WTO: how far can we go?' (2001) 95 *American Journal of International Law* 535 at 535- 552.

other financial matters under GATS are required have the necessary financial services expertise.¹¹⁵ Further, the WTO procedures provide for appeals from panel decisions to the 'Appellate Body.' The Appellate Body is a permanent, seven-member trade court that oversees the work of all dispute resolution panels, regardless of the treaty or code that is the subject of the dispute. Judges will be appointed by the DSB to serve four-year terms, and the court will sit in three-judge panels. Each judge may be reappointed once. Appellate Body judges are to be people 'of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.'¹¹⁶ There is no formal requirement that these judges should be lawyers or that they occupy their Appellate Body positions on a full-time basis, and still there is also no requirement that the judges have an expertise in environmental issues *per se*.¹¹⁷

6.3 THE GATT CASES

6.3.1 *United States – Prohibition of Tuna and Tuna products from Canada*¹¹⁸

An import prohibition was introduced by the United States after Canada seized nineteen fishing vessels and arrested U.S. fishermen fishing for albacore tuna, without authorisation from the Canadian government, in waters considered by Canada to be under its jurisdiction. The United States did not recognize this jurisdiction and introduced an import prohibition as retaliation under the Fishery Conservation and Management Act. Canada complained about the United States prohibition on the import of all types of tuna and tuna products from Canada. The panel ruled that the ban was discriminatory and in contravention of Art XI of GATT, and that it could not be justified under Art XX (g) since it was adopted for retaliatory purposes.

6.3.2 *Canada- Measure Affecting Exports of Unprocessed herring and Salmon*¹¹⁹

Under the 1976 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The United States

¹¹⁵ Some have even called for the use of experts to supplement for this gap. See generally Joost Pauwelyn 'The use of experts in WTO dispute settlement' (2002) 51 No. 2 (Apr 2002) *The International and Comparative Law Quarterly* 325.

¹¹⁶ DSU Article 17.3.

¹¹⁷ See also Peter Godlagher *Guide to dispute settlement* (2002) for a detailed explanation of the dispute settlement procedural rules.

¹¹⁸ Panel Report (BISD 29S/91) adopted on 22 February 1982

¹¹⁹ Panel Report (BISD 35S/98) adopted 22 March 1988.

complained that this was inconsistent with Art XI and Canada argued that the export restrictions were part of a system of fishery resource management aimed at preserving fish stocks and were therefore justified under art XX (g). The Panel upheld the United States' complaint and rejected Canada's argument. It ruled that the measures were inconsistent with GATT Art XI and further unjustifiable under Art XX (g) since they were not 'primarily aimed at' the conservation of exhaustible natural resources. In this case the measures could not satisfy the requirement that they should be 'relating to' the 'conservation of natural resources'.¹²⁰

*6.3.3 Thailand- Restrictions on the Importation of and Internal Taxes on Cigarettes*¹²¹

Thailand prohibited the import of cigarettes and tobacco products by the 1966 Tobacco Act, but permitted the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax, a business tax, and a municipal tax. The United States complained that this was contrary to Art XI and also requested the panel to find that the internal taxes were inconsistent with GATT Art III: 2. Thailand argued, inter alia, that the import restrictions were justified under Art XX(b) because the government had adopted measures that could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in U.S. cigarettes might make them more harmful to human health than Thai cigarettes. The panel upheld the United States complaint, ruling that Art XX was not satisfied because the measure was not 'necessary' to protect human health.¹²²

*6.3.4 United States- Restriction on Imports of Tuna (Tuna Dolphin I Case)*¹²³

The United States prohibited the import of yellow fin tuna and tuna products from Mexico under the 1972 Marine Mammal Protection Act and the 1990 Dolphin Protection Consumer Information Act which required a general prohibition of 'taking' and importation into the United States of marine mammals, except with explicit authorization. It governed in particular the taking of marine mammals' incidental to harvesting yellow fin tuna in the Eastern Tropical Pacific Ocean, an area where dolphins are known to swim above schools of tuna. Under the Marine Mammal Protection Act, the importation of commercial fish or products from fish caught with commercial fishing technology that results in the incidental killing or incidental serious injury of ocean mammals in excess of United States standards

¹²⁰ Hartwick and Peet supra note 16.

¹²¹ Panel Report (BISD 37S/200) adopted 7 November 1990.

¹²² Elaine Hartwick and Richard Peet supra note 16.

¹²³ (1991) 30 *ILM* 1598.

was prohibited. In particular, the importation of yellow fin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean was prohibited unless United States authorities were satisfied by the harvesting standards. The legislation also required exporting and intermediary countries to prove that they met the United States dolphin protection standards. Mexico complained that the ban was a quantitative restriction under Art XI. The panel reported that the United States was not entitled to impose an import embargo simply because it objected to the way tuna was produced but could only do so on the basis of the quality or content of the tuna i.e. product not process. Secondly, it could not use Art XX (b) or (g) to enforce its domestic laws in another country, even if the purpose is to protect animal health or exhaustible natural resources i.e. extra-territoriality.¹²⁴ Mexico and United States settled out of court but the panel decision itself is criticised for weakening environmental protection.¹²⁵ The case is obviously criticised by environmentalists because it set the tone for the irrelevance of process and production methods in determining likeness of products. The apparent conflict is that goods produced by environmentally unsound means and those that are not, remain 'like products' and subject to the non-discrimination principle. Furthermore it prohibited states from taking environmental measures that had extraterritorial application.

6.3.5 *United States- Restriction on Imports of Tuna (Tuna Dolphin II Case)*¹²⁶

In 1992 the European Community repeated the complaint against the United States that both the primary and the intermediary nation embargoes enforced pursuant to the Marine Mammal Protection Act, did not fall under Art III, were inconsistent with Art XI:1 and were not covered by any exceptions under Art XX. The United States argued that embargo was consistent with GATT since it was covered by Art XX, paragraphs (b), (d) and (g) that the primary nation embargo did not nullify or impair any benefits accruing to the European Communities or the Netherlands since it did not apply to these countries. Although the Panel upheld the earlier view that controls over process and production methods cannot be imposed extraterritorially and therefore neither the primary nor the intermediary nation embargo was covered under Art III, that both were contrary to Art XI: 1 and not covered by the exceptions in Art XX (b), (g), or (d) of GATT, it saw no reason for the same restrictions on the enforcement of Art XX (b) and (g). However it confirmed such extra territorial measures on

¹²⁴ Joel P. Trachtman 'United States--Restrictions on imports of Tuna. No. DS21/R, 30 *ILM* 1594 (1991)' (1992) 86, No. 1 (Jan., 1992) *The American Journal of International Law* 142.

¹²⁵ Eric Christensen and Samantha Geffin 'GATT sets its net on environmental regulation: The GATT panel ruling on Mexican Yellowfin Tuna imports and the need for reform of the international trading system' (1992) 23, No. 2 (Winter 1991/1992) *The University of Miami Inter-American Law Review* 569.

¹²⁶ (1994) 33 *ILM* 839.

the nationals and vessels of the importing State only. This of course scarcely alters the earlier position.

*6.3.6 United States- Taxes on Automobiles*¹²⁷

The Environmental Export Council complained that these measures imposed by the United States: the luxury tax on automobiles, the 'gas guzzler tax' on automobiles, and the Corporate Average Fuel Economy regulation (CAFE) were inconsistent with GATT Art III and could not be justified under Art XX(g) or (d). The luxury tax which applied to cars sold for more than \$30,000-and the gas guzzler tax which applied to the sale of automobiles attaining less than 22.5 miles per gallon were argued to be consistent with Art III: 2 of GATT. The panel found the CAFE regulation which required the average fuel economy for passenger cars manufactured in the United States or sold by any importer not to fall below 27.5 miles per gallon and also companies that are both importers and domestic manufacturers to calculate average fuel economy separately for imported passenger automobiles from those manufactured domestically to be inconsistent with GATT Art III: 4. The panel held that the separate foreign fleet accounting discriminated against foreign cars because the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers rather than on the basis of factors directly related to the products as such. The panel further ruled that the discrimination was not justifiable under Art XX (b).¹²⁸

6.4 WTO CASES

*6.4.1 United States- Standards for Reformulated Conventional Gasoline (US Standards Gasoline Case)*¹²⁹

Following a 1990 amendment to the Clean Air Act, the United States Environmental Protection Agency promulgated the Gasoline Rule on the composition and emissions effects of gasoline to reduce air pollution in the United States. From 1 January 1995, the Gasoline Rule permitted only gasoline of a specified cleanliness (reformulated gasoline) to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 (conventional gasoline) could be sold.

¹²⁷ Panel Report (DS31/R) circulated 11 October 1994 (not adopted).

¹²⁸ Hartwick and Peet *supra* note 16. See also Eric Philips 'World trade and the environment: the CAFE case' (1996) 17 (Spring 1996) *Michigan Journal of International Law* 827 for an analysis of this case and a discussion on the legal issues involved.

¹²⁹ (1996) 35 *ILM* 274.

The Gasoline Rule applied to all United States refiners, blenders, and importers of gasoline. It required any domestic refiner in operation for at least six months in 1990 to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. The Environmental Protection Agency also established a statutory baseline intended to reflect average United States 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990 and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

Venezuela and Brazil claimed that the Gasoline Rule was inconsistent, *inter alia*, with GATT Art III and was not covered by Art XX. The United States argued that the Gasoline Rule was consistent with Art III and, in any event, was justified under the exceptions contained in GATT Art XX, paragraphs (b), (d), and (g). The panel found that the Gasoline Rule was inconsistent with Article III and could not be justified under Art XX, paragraphs (b), (d), or (g). On appeal of the panel's findings on Art XX (g), the Appellate Body found that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Art XX (g) but failed to meet the requirements of the chapeau of Art XX.¹³⁰

6.4.2 United States- Import Prohibition on Shrimp and Certain Shrimp Products (Shrimp/Turtle Case)¹³¹

Seven species of sea turtles are currently recognized. Living in subtropical and tropical areas, they migrate between 'foraging and nesting grounds'. Sea turtles have been adversely affected by human activity, directly or indirectly. The United States Endangered Species Act of 1973 lists as endangered or threatened five species of sea turtles living in United States waters and prohibits their take within the United States, within the United States territorial sea, and in the high seas. Pursuant to the Endangered Species Act, the United States requires that United States shrimp trawlers use turtle excluder devices in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of public law 101-102, enacted in 1989 by the United States, provides, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States unless the harvesting nation is certified to have a regulatory program and an

¹³⁰ See Maury D Shenk 'United States--Standards for Reformulated and Conventional Gasoline' (1996) 90 No. 4 (Oct 1996) *The American Journal of International Law* 669.

¹³¹ *Supra* note 98; (1999) 38 *I L M* 118.

incidental take rate comparable to that of the United States or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles.

India, Malaysia, Pakistan, and Thailand complained that the prohibition imposed by the United States on the importation of certain shrimp and shrimp products was contrary to Articles I, III, and XI of (GATT). In April 1998, the panel found that the U.S. measure at stake was inconsistent with GATT Art XI and could not be justified under GATT Art XX because it constituted 'unjustifiable discrimination between countries where the same conditions prevailed.' The United States had maintained that section 609 fell within the exception under Art XX (g). On appeal the Appellate Body found that the measure at stake qualified for provisional justification under Art XX (g) but failed to meet the requirements of the chapeau and therefore was not justified under Art XX of GATT. However, the Appellate Body added that GATT and all other WTO agreements must be read in light of the preamble to the WTO Agreement, which endorses 'sustainable development' and 'environmental protection'.¹³²

6.4.3 European Communities- Measures Affecting Asbestos and Asbestos Containing Products (Asbestos Case)¹³³

Both the Panel and the Appellate Body rejected a challenge by Canada to an import ban imposed by France on asbestos and products containing it. The Appellate Body held that, where there is a scientifically proven risk to human health, Art XX (b) enables States to determine the appropriate level of protection they consider 'necessary', based on either the acceptability or likelihood of danger.¹³⁴ This case at least raised some hopes that indeed Art XX can be successfully used to protect the environment. It is at least one case where the DSB stretched its often folded arms. Whether this has any meaning for the future is very doubtful considering the fact that this arguably was just one easy case that had nothing much of what could be considered to be serious conflict, especially as this related directly to some clearly and commonly agreed dangers to human health.

¹³²Gregory Shaffer 'United States-import prohibition of certain Shrimp and Shrimp products. WTO Doc. WT/DS58/AB/R' (1999) 93, No. 2 (Apr 1999) *The American Journal of International Law* 507.

¹³³ *European Communities- Measures affecting asbestos and products containing asbestos* Appellate Body Report (WT/DS135/AB/R) adopted 5 April 2001.

¹³⁴ David A. Wirth 'European Communities-measures affecting asbestos and asbestos-containing products' 96 No. 2 (Apr 2002) *The American Journal of International Law*. 435.

*6.4.4 United States-Import Prohibition of Certain Shrimp and Shrimp Products- Recourse to Article 21.5 of the DSU by Malaysia.*¹³⁵

In November 1998, the United States announced that it would comply with the Appellate Body report of the Shrimp/turtle case in a manner consistent with its firm commitment to the protection of endangered sea turtles. On 27 January 2000, the United States stated that it had implemented the DSB's rulings and recommendations. The United States noted that it had issued revised guidelines implementing its Shrimp/Turtle law, which were intended to introduce greater flexibility in considering the comparability of foreign programs and the United States program; and it had made an elaborate timetable and procedures for certification decisions. It also noted that it had undertaken and continued to undertake efforts to initiate negotiations with the governments of the Indian Ocean region on the protection of sea turtles in that region. Finally, the United States stated that it offered and continued to offer technical training in the design, construction, installation, and operation of turtle excluder devices to any government that requested this training.

On 12 October 2000, Malaysia requested the re-establishment of the original panel to examine whether the United States had in fact complied with the Appellate Body findings, arguing that, by not lifting the import prohibition and not taking the necessary measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner, the United States had failed to comply with the recommendations and rulings of the DSB. The original panel met again to consider these issues. The United States argued that the Appellate Body had earlier confirmed that its effective import prohibition was provisionally justified under GATT Art XX(g) as a measure 'relating to' the conservation of an exhaustible natural resource but that the Appellate Body report also found that certain specifically identified aspects of the application of the United States measure amounted to 'unjustifiable or arbitrary discrimination' under the chapeau of Art XX. The United States claimed that the steps it had taken to comply in applying section 609 included revised guidelines that provide more flexibility in decision making, enhanced due process protections for exporting countries, efforts to negotiate a sea turtle conservation agreement in the Indian Ocean region, and enhanced offers of technical assistance. Malaysia argued that the import prohibition contained in section 609, although provisionally justified under GATT Art XX (g), was not justified under Art XX because it fails to meet the requirements of the chapeau and that it

¹³⁵ (2001) 41 I L M 149.

should be removed for the United States to bring the measure into conformity with its obligations under that agreement.

The panel considered that the prohibition fell within the 'prohibitions or restrictions, other than duties, taxes or other charges' maintained by a member on the importation of a product from another member and violated Art XI:1 of the GATT 1994 but that section 609 of public law 101-162, as implemented by the Revised Guidelines of 8 July 1999, and as applied so far by the United States authorities, was justified under Art XX of the GATT 1994 as long as conditions, such as ongoing serious good faith efforts to reach a multilateral agreement, remained satisfied. The panel concluded that the United States had made a *prima facie* case that Section 609 is now applied in a manner that no longer constitutes a means of 'unjustifiable and arbitrary discrimination', as noted by the Appellate Body.¹³⁶

6.4.5 Brazil- Measures Affecting Imports of Retreaded Tyres.¹³⁷

The Brazil-Retreaded Tyres 1 dispute involved a number of trade measures introduced by Brazil relating to the importation of retreaded tires. Brazil had imposed an import ban on retreaded tires and had introduced a corresponding measure that prohibited the marketing, transportation, storage, or keeping in deposit or warehouses of imported tires. None of these measures applied to domestic retreaded tires. The Appellate Body of the WTO held that Brazil's trade measures violated Art XX of the GATT. Before both a WTO panel and the Appellate Body, Brazil argued that its measures were 'necessary' to prevent the risks to human, animal, and plant life and health arising in Brazil from the accumulation of waste tires

The panel held that Brazil's ban on the importation of retreaded tires violated the prohibition on quantitative restrictions in GATT Art XI: 1. The panel also determined that the ban could not be justified under the exceptions found in GATT Art XX. The European Communities appealed the panel decision, directing its arguments toward certain elements of the panel's reasoning in support of its findings under Art XX. The Appellate Body upheld the panel's finding that the import ban was provisionally justified under Art XX (b), being necessary to

¹³⁶ WTO Secretariat Overview of the State-of-play of WTO Disputes Available at <http://docsonline.wto.org/gen> Accessed on 14 June 2010 and Jayati Srivastava and Rajeev Ahuja 'Shrimp-Turtle decision in WTO: economic and systemic implication for developing countries' (2002)37 No. 33 (Aug. 17-23 2002) *Economic and Political Weekly* 3445 and also Louise de la Fayette United States-import prohibition of certain Shrimp and Shrimp products-recourse to Article 21.5 of the DSU by Malaysia (2002) 96 No. 3 (Jul 2002) *The American Journal of International Law* 685.

¹³⁷ Appellate Body Report WT/DS332/AB/R adopted 17 December 2007.

protect the health and life of humans, animals, and plants. The Appellate Body found, however, that because of the 'Mercosur exemption' and the court injunctions,¹³⁸ Brazil had applied the import ban in a manner that was inconsistent with the chapeau. In particular, the panel had erred in considering the scale of the measure's discriminatory effects when examining whether the application of the measure under Art XX was consistent with the requirements under the chapeau.¹³⁹

6.5 CONCLUDING REMARKS RE CASES

The cases that have been decided so far do not show a good picture for the effective protection of environmental interests in the multilateral trading system. After the Shrimp/Turtle and the Biotech Cases there has been some revived hope that the WTO dispute system is now opening up for a more considerable inclusive approach that will benefit both trade and environmental protection in the sense of sustainable development. However, it seems that this hope is misplaced. The reluctance of the dispute settlement panels and the Appellate Body to decide in favour of environmental protection is arguably not a matter of attitude but a limitation of their mandate. This mandate is informed by the strong wording of the GATT Art XX exceptions that in themselves are difficult to satisfy such that even when the party asserting this Article as a defence manages to satisfy much of the Art XX requirements, non-compliance is invariably still very simple to establish. Further, given the nature of the exception, the panellists, who are not required to have any special knowledge in environmental law, therefore find it a more simplified to read in some pro-trade sentiments in their decisions. Therefore, the hope that the attitude of the dispute settlement bodies of the WTO is shifting should be looked at from a more principle-based perspective as it cannot simply be judged from the very strongly worded and cautious decisions like the Shrimp/Turtle decision.

¹³⁸ Treaty of Asuncion (1991) 30 ILM 1041; supplemented by Protocol of Ouro Preto Regarding the Institutional Structure of Mercosur (1995) 34 ILM 1244; Protocol of Brasilia for the Solution of Controversies in Mercosur (1997) 36 ILM 69; Olivos Protocol for the Settlement of Disputes (2002) 42 ILM 2 collectively known as the Mercosur Agreement which required that parties not introduce new restrictions on commerce against each other

¹³⁹ Kevin R. Gray 'Brazil - measures affecting imports of retreaded tyres' (2008) 102 No. 3 (Jul 2008) *The American Journal of International Law* 610 at 610-611.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 INTRODUCTION

The dangers posed by unregulated trade to the environment cannot be understated. The fact that a solution is also needed to bridge the gap between free trade and environmental protection can also hardly be denied.¹⁴⁰ In this discussion, it can be noted that there is a strong weakness in the reliance on the GATT Art XX as a source of regulating trade to protect the environment. This weakness, however, does not only stem from the wording of this article but from many other factors around the multilateral trading system as driven by the World Trade Organisation. Some of these other factors, as already highlighted, include the historical background to the formation of the WTO and the issues surrounding the Dispute Settlement Body, in particular the qualifications of its panellists. However, there is no reason why energy should not be exerted in transforming the GATT itself which as it remains the pillar of trade liberalisation even though it does not say so in clear terms.

In this Chapter, some of the conclusions drawn from the previous chapters are collated to make a critical appraisal of their background and impact. The most important thing here is to outline the challenges that present themselves in using the GATT Art XX to protect the environment as discussed in the preceding chapters. After outlining these challenges, steps are taken to try and propose some solutions to deal with the situation. It is important however to highlight here that these challenges are not only about the wording of Art XX itself. Having strong consideration of the way this multilateral trading system is intertwined and intact in its failure to protect the environment, a combination of these factors is looked at and dealt with to provide solutions to the extent to which each factor affects the current status of the GATT Art XX and its ability to effectively protect the environment.

7.2 THE WTO

The WTO's history and background clearly shows its founding values and principles. From the GATT 1947, it is apparent that the system was driven by economic gains and trade interests. There is nothing in the evolution of the GATT 1947 to the WTO which suggests that the multilateral trading system was formed with environmental protection in mind. In

¹⁴⁰ Michael B Smith 'GATT, trade and the environment' (1993) 23 *Environmental Law* 533 also makes the same observation.

fact what is clear is the fact that the system was bound on working on the liberalisation for trade through concessions aimed at the reduction of tariffs. As if that is not enough, work even turned towards removing the non-tariff barriers to trade that in most respects could be used as border controls against unwanted imports. In the end, there is little reason to expect much from such a system that is built on the philosophy of freer trade and faster movement of goods. In fact some economists tend to look at environmental protection as another barrier to trade instead of looking at it in terms of its independence and importance which makes it require indispensable protection from freer trade.¹⁴¹ Although the GATT 1994 itself does not mention liberalisation of trade as its main aim, its principles inevitably result in free trade.

It can be understandably argued that environmental issues had not come to the fore during the beginning of this trade regime as far back as 1947. Of course this could have had an impact in the decision and policy making of the time. At that time it could have been unreasonable to worry about anything else except expansive growth considering that this was just after the Second World War. The Stockholm Conference which is seen by many as the real turning point in appreciating the need for environmental protection only came in about 1972. There is no doubt that free trade was gaining momentum by then, and the rounds for negotiating tariff concessions were at their peak and gaining acceptance from many GATT contracting parties. In fact many states were party to the GATT such that the value of the system could not be understated. In coming to the WTO in 1994, it could be expected that the GATT could be transformed in light of the Stockholm Conference but all that was done is to note the need for sustainable development in the preamble, which in effect does not have any meaningful legal force.

Although the WTO and the GATT 1994 maintained the stance of keeping environmental protection out of their trade business, this cannot be sustained any longer. The momentum and the realisation of the importance of environmental protection seem to have grown further now than before. There is no doubt that action needs to be taken. Of course contracting parties to the GATT and the new members of the WTO can be forgiven for the time they have been ignorant of the dangers posed by free trade and their resultant failure to cater for this adequately in the GATT and the WTO system. However, their wisdom should be credited to them in terms of their enactment of Art XXV which allows joint action by parties to 'waive obligations imposed on a party in exceptional circumstances' not elsewhere

¹⁴¹Josh Ederington and Jenny Minier 'Is environmental policy a secondary trade barrier? An empirical analysis' (2003) 36 No. 1 (Feb 2003) *The Canadian Journal of Economics / Revue canadienne d'Economie*, 137.

provided in the GATT and also Art XXVIII which provides for the authorisation of renegotiation procedures by the parties. Arguably, the increasing damage of the 'environment' by free trade was unforeseen, thus therefore not provided for in the GATT and now calls for solutions. This should be treated as special circumstances are not catered for in the GATT since the GATT itself provides nothing specific about environmental protection. The scientific certainty that now grips the movement towards the need for more environmental protection could not have been more compelling then than it is now. Therefore parties are called to waive and renegotiate obligations that hinder environmental protection, and to negotiate measures that can limit the production, consumption and movement of goods that are endangered themselves or pose a serious danger to either the local or global environment. Thus, there is no reason why members should not call a fresh 'round' to negotiate ways of protecting the environment.

7.3 MULTILATERAL ENVIRONMENTAL AGREEMENTS

Multilateral environmental agreements are concluded by states in an effort to cooperate towards an integrated approach to environmental protection. As highlighted in Chapter 4, the number of these agreements is growing apace. Some amongst these agreements go a step further in actually not only protecting the environment as it were, but in limiting trade in any form that could endanger the environment. The value of these agreements in this day can never be understated. They have become the real acceptable way of dealing with transboundary or global environmental concerns. Understandably also, even within the WTO dispute settlement system, members have been called upon to cooperate rather than to utilise unilateral measures when it comes to environmental protection.¹⁴² This has further heightened the value of multilateral environmental agreements amongst even the WTO members as well.

The biggest challenge that is facing this ever growing body of environmental agreements that protect the environment through the limitation of trade is their likelihood to be effective in the current WTO legal framework. These so called MEAs have no definite place in the current trading system. The danger that is posed by this defect is that even though they aim to limit trade in certain goods, this cannot happen in as much as it might result in the violation, by whichever WTO member that will be adhering to the principles of that environmental agreement, of its obligations under the GATT. The obligations that come with

¹⁴² See Asif H Qureshi and Malcolm D. Evans 'Extraterritorial Shrimps, NGOs and the WTO appellate body' *International and Comparative Law Quarterly* (1999) 48 No. 1 (Jan 1999) 199 at 205 commenting on the Appellate Body report of the *United States-Shrimp/Turtle Case*.

the GATT package and the sanctions that come with the failure to fulfil those obligations, in particular the withdrawal of concessions, can be of such devastating effect to the economy that it will be difficult in the near future to find a member that chooses to adhere to the weak obligations under many MEAs to the expense of its trade interests - not unless the position of these MEAs, their status and their relationship with the GATT is clearly resolved and stated in a way that allows cooperation between the two.

The issue of multilateral environmental agreements and their relationship with the GATT invariably needs to be addressed to cover up for the overlap and some notable inconsistencies between the two. There are various ways of doing this, but the most notably commented and commendable are through the amendment of the GATT Art XX.¹⁴³ The amendment of the GATT Art XX will allow for the insertion of an extra Art XX (k) that will provide for the recognition of obligations under environmental agreements as a further ground of exception to the general GATT obligation on non-discrimination and prohibition against quantitative restrictions. This will of course allow members to the WTO to assert Art XX (k) as a defence when they have allegedly violated their GATT obligations in pursuance of an obligation under the concerned multilateral trade agreement. Alternatively, a special exception can be introduced to the GATT which provides for the recognition of multilateral environmental agreements for the same reasons as those stated above.¹⁴⁴

7.4 ARTICLE XX (b) AND (g)

The protection of the environment through invoking the Art XX (b) and (g) exceptions has clearly proved to be a difficult task. It is not easy to argue that states are reluctant to comply with the requirements of the exceptions. The simple conclusion is that the exceptions in Art XX (b) and (g) are difficult to invoke where a member has violated its GATT obligations. For each paragraph, either (b) or (g), there is a stringent test that the Member asserting the paragraph as a defence should be able to satisfy. For paragraph (b), it has not been easy to satisfy the 'necessary' requirement i.e. that measures invoked are necessary to protect human, animal plant life or health. This test employs the 'least restrictive measures' criterion which has proved to be very strict and difficult to meet. The same goes for the 'relating to' element in the paragraph (g) exception, without even mentioning the extra spanners that are thrown in the way by the introductory paragraph commonly termed the chapeau. A combination of

¹⁴³ See Hurlock *supra* note 51 at 2148.

¹⁴⁴ Schultz *supra* note 40 at 433.

these tests has seen members who strive to satisfy the specific paragraph (b) and (g) tests being caught by the chapeau's further far reaching requirements.

The effectiveness of protecting the environment using Art XX (b) and (g) exceptions is not only undermined by the strictness of the test employed in those provisions. The Art XX (b) and (g) exceptions allow members to derogate from their GATT obligations if they are employing 'measures necessary to protect human, animal and plant life or health' or 'relating to the conservation of exhaustible natural resources'. Whereas these provisions are both used and understood to be a way of bridging the gap between trade and environmental protection in the GATT, the wording itself is questionable on its sincerity to the global movement towards a more serious agenda of environmental protection. Thus the fact that the GATT and its exception provisions use other words apart from the word 'environment' itself is questionable. There is no reason why the GATT should not provide in its exceptions for a clear criterion based on the need to protect the environment rather than proliferating and listing the facets of the environment when the term itself exists.

The GATT Art XX (b) and (g) should therefore be amended to remove the strict requirements that are set out in those provisions, in particular the 'necessary' requirement in Art XX (b) that has had some far reaching effects on efforts by members to protect the environment. This can be done in various ways including substituting the 'necessary' requirement by the term 'reasonable' measures.¹⁴⁵ The difference is that whereas the necessary requirement uses the least restrictive measures approach, the reasonableness criterion employs an objective approach that will be less lenient as it looks at the relationship between the measure and its purpose rather than the availability of other measures apart from those chosen by the member. Further, the exceptions can provide for derogation from the obligations under the GATT for the purpose of protecting the 'environment'.¹⁴⁶ This will depart from the current situation where the exceptions to protect human, animal and plant life or health and the conservation of exhaustible natural resources are seen as equivalent to the environment. The difference is that the word environment and the things that benefits from environmental protection are far more that those stated in the Art XX (b) and (g) exceptions.

¹⁴⁵ Bimie supra note 81 at 807.

¹⁴⁶ Jennifer Schultz 'Environmental reform of the GATT/WTO international trading system' (1994) 77 *Law and Economics Review* 80 at 97- 98. However others have only proposed a different interpretation of the same provisions. See Eric Philips 'World trade and the environment: the CAFE case' (1996) 17 (Spring 1996) *Michigan Journal of International Law* 827 at 859.

7.5 THE WTO DISPUTE SETTLEMENT BODY

One of the key elements of the multilateral trading system administered by the World Trade Organisation is the compulsory dispute settlement body established under it. It is a very remarkable system in as far as one looks at its adjudication and enforcement mechanisms. However, when it comes to environmental protection the dispute settlement mechanisms are not only of limited help but a major step backwards. As highlighted above, most environmental issues that find themselves in this dispute settlement body are decided in favour of trade and against environmental protection. It is also questionable whether this is because of the stringent requirements set out in the provisions of Art XX (b) and (g) only, or that there are other factors that come into play as well. This is more important considering the fact that the reluctance of the WTO dispute settlement body to decide in favour of environmental protection can be attributed to other factors rather than just the perceived failure of the WTO members to meet the strict requirements of Art XX.

As noted earlier, there is some room to believe that the composition and qualification of the adjudicators in the dispute settlement panel and the appellate body has some impact in the outcome of the cases involving trade and environmental protection that come before the DSB. The fact that the panellists are required to have special knowledge about the WTO agreements they adjudicate on, without any such similar requirements for special knowledge on environmental issues is a big cause for concern. It can be argued that lack of such a requirement ensures panellists who do not have knowledge of environmental law at all and are obviously prone to be more biased in favour of trade interests.¹⁴⁷ Besides the question of bias, there is little possibility that such panellists will also treat environmental issues with as much concern and vigour as they would do to the trade issues covered in the GATT. This becomes more questionable and worrisome if one further considers that there is not even an environmental court that has compulsory jurisdiction to deal with environmental issues as is the case with the dispute settlement system of the World Trade Organisation, for at least, its availability would give room for review or the possibility of forum choice.

There is no doubt that the nature of the qualifications of the WTO dispute settlement panellists has an impact on the outcome of the disputes they adjudicate. If the members are serious about protecting the environment, there is no reason why the panellists should not be

¹⁴⁷For a similar view see Ken Conca 'The WTO and the undermining of global environmental governance' (2000) 7 No. 3 (Autumn 2000) *Review of International Political Economy* 484 at 485.

required to have such special knowledge in environmental issues as these are often coming before them. The DSU therefore needs to be amended to add special knowledge in environmental law as a requirement for people who are chosen to be adjudicators either on the panels or on the Appellate Body. Further, there is no fundamental reason why environmental issues should always find themselves subjected to trade interests as is the case in the WTO DSB. Calls for a compulsory environmental court that will deal with all issues relating to environmental agreements are therefore justified in that light.¹⁴⁸ This will allow a separate system that is endowed with the need and agenda of protecting the environment to regulate the policy issues on the global environment without unnecessarily being subject to trade. This will stop the practice that environmental issues find themselves adjudicated in a trade dispute settlement system as is the case at the present moment.¹⁴⁹

7.6 OTHER ISSUES

The above discussion was mainly concerned with the effect of Art XX (b) and (g) on the environment. However, there is no harm in highlighting some of the improvements that can be made within the framework of the WTO to strengthen the entire current system when it comes to environmental protection. Amongst these, the call for the use of the general principles of international law such as the precautionary principle in the WTO dispute settlement system is one of the key elements.¹⁵⁰ This allows for a broader analysis of the rules of the multilateral trading system in the context of all other issues of concern rather than in isolation. The use of experts in the dispute resolution system is another issue that needs stronger emphasis. This becomes particularly important considering that the adjudicators are not required to be experts in issues of international law. Experts will be of paramount importance in assisting the panellists to make decisions that are within the broader framework of the common goal of sustainable development.¹⁵¹ Also, the participation of non-governmental organisations in the processes of the WTO and its dispute settlement body cannot be left out. The role of these non-governmental organisations in lobbying and

¹⁴⁸ See Amedeo Postiglione *Global environmental governance: the need for an international environmental agency and an international court of the environment* (2010) for a comprehensive discussion on the need for an environmental court.

¹⁴⁹ See generally Charles W Schmidt 'Caught in the middle: should the World Trade Organization settle environmental disputes?' (1999) 107 No. 11 (Nov 1999) *Environmental Health Perspectives* A562. However some argue that the WTO is the best forum to deal with environmental regulation, see Andrew L Strauss 'The case for utilising the World Trade Organisation as the forum for global environmental regulation' (1998) 3 *Widener Law Symposium Journal* 309.

¹⁵⁰ See also Ilona Cheyne 'Gateways to the precautionary principle in WTO law' (2007) 19 No 2 *Journal of Environmental Law* 155 on the importance of the precautionary principle in this context.

¹⁵¹ See generally Schmidt supra note 149 at A563.

agitating for transparency and accountability cannot be underestimated.¹⁵² This should force the members and the structures of the WTO to make decisions that are responsive to the 'balanced' needs of economic development and environmental protection.¹⁵³

7.7 CONCLUSION

It has been argued in this paper that the current GATT provisions in Articles XX (b) and (g) do not represent the best way to ensure the protection of the environment from the harmful trade practices that emanate from the general principles in the GATT. To start with, the formation of the WTO and the evolution of the multilateral trade regime, as highlighted in the second chapter of this paper, do not show any sign that the parties had any specific intention to promote environmental protection within the trading context, even though the WTO Treaty mentions the word 'environment' in its preamble. The current trading regime is about trade liberalisation and there is nothing that shows that the members strongly envisaged limiting that primary aim to protect the environment. The general principles of the GATT on reciprocal tariff negotiations, non-discrimination and prohibition against quantitative restrictions seek to foster this goal of more liberalisation often described as 'freer trade'. The problems of these principles are that they do not only go as far in promoting fairness. Instead they go a step further in frustrating the genuine efforts of members who conclude agreements, in particular multilateral environmental agreements, with a genuine intention to protect the environment through some trade restrictive means. This danger will continue to persist as long as the relationship between the GATT and these so called MEAs is not clarified in one way or the other. Worse still the hope of some of these MEAs could have been in the inclusion of Art XX (b) and (g) which in the ordinary sense should have been affording the environment some adequate protection. However the stringent requirements set out in these provisions has made it practically impossible to invoke them when a Member has derogated from the GATT obligations to protect the environment. The cases that involve a standoff between trade and environment that have come before the dispute settlement system of WTO the bear witness to the nature of these provisions. In fact, an analysis of these cases simply convinces someone that either the provisions in GATT Art XX (b) (g) do not protect the environment at all, or the dispute settlement body is under mandate not to use them to protect

¹⁵²Schultz supra note 144 at 433.

¹⁵³ See Douglas J Caldwell and David A Wirth 'Trade and the environment: equilibrium or balance?' (1996) 17 (Spring 1996) *Michigan Journal for International Law* 563 at 584 who observe that some authors have advocated for a balancing of trade and environmental interests.

the environment. The point is these provisions have not shown that they can be effectively used to protect the environment against harmful trade practices.¹⁵⁴

In the final analysis there is every reason to argue that there is need for reforming the GATT provisions and the entire multilateral trading system to allow for better environmental protection within it. Although in some remote instances it has seemed to be possible to invoke the Art XX exceptions to protect the environment, that kind of optimism is blurred by practice. The expectations that have emerged from the possible use of international law in the WTO dispute settlement process and the outcome of the *US-Shrimp/Turtle recourse to Art 21.5 Malaysia Case* are also not backed by reality. The reality is that the entire system of the WTO from its own formation, the GATT principles and their relationship with MEAs, the GATT Art XX (b) and (g) exceptions and the dispute settlement body represent a very strong and well connected force that runs through from the beginning to the end in blocking environmental protection. To argue that these GATT exceptions can protect the environment against harmful trade with the whole system still as it is can only be described as unimaginable. Even continuing to pursue the invocation of these provisions when trade and environmental conflicting issues arise is characteristically futile because it is highly unachievable in the current system. It is therefore best described as chasing one's own shadow.¹⁵⁵

¹⁵⁴ See also Steven Shrybman 'Trading away the environment' (1991) 9 No. 1 (Winter 1991/1992) *World Policy Journal* 93 at 96.

¹⁵⁵ See also John Borgadus 'The GATT and the environment: irreconcilable differences?' (1996) 5 *Dalhousie Journal of Legal Studies* 237.

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