UNIVERSITY OF THE WESTERN CAPE

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INTERACTION BETWEEN INTERNATIONAL FREE TRADE AND ENVIRONMENTAL PROTECTION: THE CONTINUED SEARCH FOR BALANCE

(A research paper submitted in partial fulfilment of the requirements for the LLM degree in the Faculty of Law, University of the Western Cape)

Candidate: **Francoise Ongmalik Ikoum**

Student number: 2619889

Supervisor: **Professor T.P. van Reenen**

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RESEARCH KEY WORDS

10 Keys Words:

1- International Free Trade

2- Environmental protection

3- Conflict

4-Balance

5- States

6-International Law

7-World Trade Organization

8- General Agreement on Tariffs and Trade

9- Multilateral Environmental Agreements

10- Sustainable Development

LIST OF ABBREVIATIONS AND ACRONYMS

AB: Appellate Body

CBD: Convention on Biological Diversity

CTE: Committee on Trade and Environment

CITES: Convention on International Trade in Endangered Species

DSB: Dispute Settlement Body

DSU: Dispute Settlement Understanding

GATT: General Agreement on Tariffs and Trade

ISO: International Standards Organization

LDC: Least Developed Countries

MEA: Multilateral Environmental Agreement

MFN: Most Favoured Nation

NAFTA: North American Free Trade Agreement

NT: National Treatment

PIC: Prior Informed Consent

PPM: Products Process Measure

TBT: Agreement on Technical Barriers to Trade

TED: Turtle Excluder Device

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights

SPS: Agreement on the Application of Sanitary and Phytosanitary Convention

WTO: World Trade Organization

CHAPTER I INTRODUCTION

1.1 BACKGROUND TO THE RESEARCH

The promotion and liberalisation of free trade in goods and services have been the objective of international trade law since the General Agreement on Tariffs and Trade (GATT) was first adopted in 1947. [1] Many states have subsequently become parties to what is now a complex system of international trade agreements based on GATT. Since the Marrakesh Agreements of 1994 entered into force they have been administered by the Wold Trade Organization (WTO). The WTO provides the principal forum for negotiations on multilateral trading relations among member states, and for the binding settlement of disputes arising under WTO agreements. [2]

A policy of free trade will inevitably involve some conflict with international environmental agreements or environmental protection requirements in national law which have the effects of restricting trade in certain commodities. [3] Although free trade is important to enhancing economic welfare, environmental protection has also become exceedingly important since the concept of "sustainable development" was stressed at the United Nations Conference on Environment and Development in June 1992. [4]

As time went by, people became more and more concerned with environmental degradation and tried to find out the cause.[5] Some environmentalists condemn free trade as generally bad for the environment because it leads to depletion of natural resources and the pollution of environment, and therefore demand the use of trade measures to avoid that eventuality.[6]

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[1] GATT 1947 as amended in 1994.
[2] Birnie and Boyle, (2002) *International Law and the Environment* 2nd ed. Oxford University Press: 697
[3] *Ibid*
[4] Chang Yang, "Conflict between Free Trade and Environmental Protection: Where we go and what we do tomorrow." Available at: www.lawbrige.net [Accessed on 01/05/2007]
[5] *Ibid*
[6] *Ibid*

The use of trade measures to enforce environmental standards has been the most heated argument. On this point, free traders argue that the use of trade measures would lead to the abuse of environmental standards, as countries will use them to protect their markets by limiting imports from non-complying countries[7]. As such, the practice would constitute an obstacle to trade liberalisation. Besides, they also identify poverty as the primary source of environmental degradation and recognise the need for a new era of economic growth[8]. Some countries use trade measures to protect their environment, but these measures are opposed by other countries. Developing countries have contended that if enforcement of the use of trade measures were permitted, it would be a gateway to protectionist tendencies by developed countries for their markets since rich countries have often misused environmental protection as a protectionist tool to deny market access to developing countries.[9]

International policy does not seek to give free trade priority over environmental protection, but neither does it endorse any general exception for environmental purposes. The linkage between trade and environment has become a major controversial topic in the areas of both international trade law and international environmental law. Recognizing the potential for conflict, what is sought is a balance between the two objectives[10]. Thus the preamble of the 1994 Marrakesh Agreement establishing the WTO acknowledges that expansion of production and trade must allow for:

> 'The optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[11]'

[7] *Ibid*
[8] *Ibid*
[9] Article " Environment/Trade and the Developing Countries: The North-South Debate" Available at http://www.ciesin.columbia.edu/docs/008-067/chpt.3html [Accessed on 01/05/2007]
[10] Birnie and Boyle, (2002) *International law and the Environment* 2ed. Oxford University Press: 698
[11] WTO 1994 Preamble

Similarly, Principle 12 of the Rio Declaration calls for states to co-operate to promote an 'open international economic system that would lead to growth and sustainable development in all countries'. It provides that "Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. Unilateral measures aimed at extra-territorial environmental problems are to be avoided, and 'environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus'. [12]

Since 1994 a number of important decisions of the WTO Appellate Body have helped to clarify how this balance between free trade agreements and environmental protection is to be achieved, but the WTO itself has been less successful in this search for better ways to integrate the two concerns. [13] It has been openly criticized for failing to properly balance environmental and trade issues despite its founding agreement mandating it to use the world's resources in accordance with the objective of sustainable development. [14] Its agenda poses trade liberalization as its highest priority since its aim is to ensure that trade flows smoothly, freely, fairly and predictably. [15] Thus, the WTO aims at the promotion of international trade whereas environmental policies are enforced through ways that are trade-restrictive. [16]

1.2 RESEARCH OBJECTIVES

Generally the study emphasizes the debate surrounding trade and environment issues, with the following specific objectives:

* To examine the interaction between trade (free trade) and environment.

[12] "Environmental Protection" www.lawbridges.net [Accessed on 01/05/2007]
[13] Birnie and Boyle (2002) fn 10 at 698
[14] World Resources Institute "Trade and Environment in conflict?" Available at www.wri.org [Accessed on 01/05/2007]
[15] WTO "The WTO in Brief" available at www.WTO.org [Accessed on 08/05/2007]
[16] C Yeukai, (2005) "Trade Promotion vs. the Environment: Inevitable Conflict?" LLM International Trade and Investment law in Africa, Unpublished Thesis, University of Western Cape, Cape Town

* To analyse the areas of conflict between free trade under the World Trade Organization and environmental protection.

* To critically analyse the different points of view of free traders and those of environmentalists.

* To explore the possibility of harmonizing the conflict between the two regimes and to see whether a trade measure or sanction is the solution for achieving the enforcement.

* To provide suggestions for addressing the conflict to the Committee on Trade and Environment (CTE) whose secondary mandate is to give recommendations on whether to modify WTO provisions in order to ensure that trade relations contribute to the objectives of sustainable development. [17]

1.3 PROBLEM STATEMENT

There is an existing conflict between trade and environmental policies.
There are different opinions and attitudes in the relation between free trade and environmental protection. Free trade regards environmental factors as part of the comparative advantages that one country may have over another. However, many environmentalists are critical about trade liberalization. In their view, free trade is responsible for many aspects of environmental degradation and for the failure of policy makers to adequately protect the environment. [18] In the light of the above statement, I shall investigate whether a balance can be reached between these interests.

[17] Shaw and Schwartz, (2002) "Trade and Environment in the WTO State of Play" *Journal of the World Trade*, Volume 36. *Kluwer Law International*: 129-154.
[18] C. Yang, "Conflict between Free Trade and Environmental Protection: Where we go and what we do tomorrow." Available at: www.lawbrige.net [Accessed on 01/05/2007]

1.4 SCOPE OF THE RESEARCH

The concept of trade liberalization and environment is a very broad concept and the research does not seek to deal extensively with the issues due to the limited nature of the paper. The scope of this paper will thus be limited to the interaction between international free trade and the environmental protection. The question whether trade measures are the best means to achieve the desired end and whether the exclusive purpose of Multilateral Environmental Agreements (MEAs) will be addressed in the paper.

Further development will be given to international free trade under the World Trade Organization that affects environmental concerns and explore whether the Committee on Trade and Environment (CTE) is balancing the conflict. [19]

1.5 SIGNIFICANCE OF RESEARCH

The research will address the conflict between the World Trade Organization rules and the environmental policies. Obviously, trade will prosper in a friendly environment and the reverse is true.[20] The discussion will highlight, most importantly, the need to balance the arguments, since available literature deals with the issue without constructively solving the problem.

1.6 RESEARCH METHODS

Use of the available literature published in books and articles from journals will be made. An overview of the most relevant jurisprudence will be referred to, in order to substantiate some of the arguments made. The Internet will be used to access the

[19] Yeukai, (2005) *Trade Promotion vs. the Environment: Inevitable Conflict?* LLM International Trade and Investment law in Africa, Unpublished Mini-thesis, University of Western Cape, Cape Town
[20] *Ibid*

debates that have been made recently as they will inform the researcher's suggestions and views.

1.7 LITERATURE REVIEW

Birnie and Boyle hold the opinion that the WTO Committee on Trade and Environment has been clarifying and reconciling the conflicts between environmental protection and the multilateral trading system, but that it still needs to take concrete decisions to deal with the issues mentioned in the Committee's terms of reference. The authors go further by stipulating that the WTO needs to give specific recognition to environmental values.[21]

Sands is of the view that the international community has, on the one hand, furthered its effort to liberalize and deregulate international trade but, on the other hand, it has redoubled efforts to develop international environmental agreements, many of which rely upon trade sanctions to achieve their objectives.[22]

Yeukai argues that the WTO has not yet achieved a balance between trade and environment as the CTE has continued to act mainly as a discussion forum. The author argues that the burden of striking a balance between the two regimes lies on the WTO; and that there is a way for a balance to be reached.[23]

Trade is generally seen as negative for the environment while, it is in fact not. Based on this statement, Duncan Brack thinks that, Free trade can help improve environmental quality, as long as the policies are applied in the right way. The WTO system, currently, however, fails to adequately integrate environmental objectives, which point of view I agree with.[24]

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[21] Birnie and Boyle (2002) fn 10 at 703
[22] Philippe Sands (2005) *Principles of International Environmental Law* 1017
[23] Yeukai (2005) at 56
[24] Duncan Brack, (2000) "Greening the WTO" PDF Available at *Royal Institute of International Affairs* [Accessed on 01/05/2007]

1.8 CHAPTER STRUCTURE

The Research paper is structured in the following chapters.

* Chapter I the introductory chapter, addresses the background for the debate.

* Chapter II examines the interaction between trade free trade and environment protection.

* Chapter III lays down the areas of conflict under World Trade Organization and environmental protection.

*Chapter IV critically analyses recent jurisprudence under the World Trade Organisation.

*Chapter V explores the possibility of harmonizing the conflict between the two regimes to see whether the effectiveness of trade restrictions or sanctions, are the most appropriate instruments for achieving environmental policies enforcement.

* Chapter V provides suggestions for addressing the conflict to the Committee on Trade and Environment (CTE) whose secondary mandate is to give recommendations on whether to modify WTO provisions in order to ensure that trade relations contribute to the objectives of sustainable development. [25]

[25] Shaw and Schwartz, (2002) "Trade and Environment in the WTO State of Play" *Journal of the World Trade*, Volume 36. *Kluwer Law international*: 129-154.

CHAPTER II
INTERACTION BETWEEN FREE TRADE AND ENVIRONMENTAL PROTECTION

2.1 Introduction

The relationship between trade and the environment is complex. It is overburdened with suspicion, and strained by misunderstandings that need to be addressed and clarified.[26] This relationship has been an outstanding issue over the last 12 years, ever since the establishment of the World Trade Organisation (WTO), engaging Member States in debates on changing the rules of the multilateral trading system, as well as gathering intense interest outside the diplomatic circles of Geneva. One of the most challenging tasks of the WTO is to address trade and environment *nexus* (linkages) at the WTO. On the very few occasions in post-war history that global trading members have assembled to start negotiations, they have failed.[27]

The WTO has unfortunately tended to treat the environment as a narrow technical issue, and an opportune one despite the fact that the environment is an important aspect of economic development.[28] Indeed, the environment is simply not an unwelcome add-on to the trade debate. It is central to trade and to the concept of sustainable development which the Marrakesh Agreement recognises as the main objective of the WTO.[29]
As such, environmental issues can not be bracketed out of trade issues, since the two systems can be mutually supportive. In many instance they are. Trade and the environment complement each other, and hence separating the two from each other can be problematic. Besides, sound environmental policies can create new business

[26] Magda Shabin,(2003) *Trade and the Environment: How Real is the Debate?*, ed Gary P. Sampson and W. Bradnee Chambers (eds),*Trade, Environment, and the Millennium* 2 ed, Tokyo: United Nations University Press, 46
[27] *Ibid*
[28] Runnals D "The WTO in the Trade and Environment Debate" (2000) Ed by Konz et al Trade, Environment and Sustainable Development: View from Sub-Saharan Africa and Latin America.62
[29] The 1995Marrakesh Agreement. See WTO the Legal Texts: The Result of the Uruguay Round Multilateral Negotiations.4

opportunities, and these in all likelihood would increase trade. Thus the links between the trade and environment are not only necessary, but could be extremely beneficial.[30]
Under the multilateral trading system, the two possible ways to deal with the links between trade and the environment are through to the recourse of dispute settlement procedures of the WTO, and through negotiations among the Members States resulting in recommendations to the Ministerial Conference. [31]

2.2 Impact and effects of free trade on the environment

Free trade is a catalyst for improving a country's environment as, well as its economy. As wealth increases, so does a good environment.[32]
Contrary to what environmental activists say, countries with open economies have better environmental records and the best way for countries to improve their economies is through free trade and trade promotion.[33]
Kuznet highlights that: "As society becomes richer, its members may intensify their demands for a more healthy and sustainable environment, in which case the government may be called upon to impose more stringent environmental controls."[34]
This could lead to the development of "cleaner" technologies.[35] Together with a structural change towards information intensive industries and services, it could seemingly lead to a gradual decline in environmental degradation. [36]

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[30] Monica Araya et al, "Trade and the Environment at the WTO: the need for a Constructive Dialogue" Available at http://www.sice.oas.org/tunit/pubinfo.asp [Accessed on 29/07/2007]
[31] Chang Yang, "Conflict between Free Trade and Environmental Protection: Where we go and what we do tomorrow." Available at: www.lawbrige.net [Accessed on 01/05/2007]
[32] Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environmental Conflict* (2004) Hart Publishing, Oxford and Oregon UK: 41.
[33] "Free Trade Can Help Protect Environment, Analysts Say" Available at www.heritage.org/Press/Newsreleases/NR100101.cfm [Accessed on 29/07/2007]
[34] J. Franckel and A. Rose, "Is Trade Good or Bad for the Environment? Sorting Out the Causality" (2005) Review *of the Economics and Statistics*. PDF [Accessed on 29/07/2007]
[35] Perez (2004) fn 30 at 41.
[36] *Ibid*

2.3 Environmental Protection

This concept has become an exceedingly important aspect over a long time, since it has occurred to people that natural resources are being increasingly depleted and the environment polluted. The arguments for or against are irrelevant here; what is important, is to strike a balance between the two regimes. It is worth nothing that the environment can actually be protected through trade, the rationale being, that trade is a means to attain sustainable development and that it thus can further protect the environment. The question to be asked in this case is: how could it be feasible? The answer is that greater trade gives rise to greater wealth, and hence the capacity and willingness to devote more resources to the environment will also increase.[37]

The major concern for many WTO members with regards to environmental protection has been import restrictions, a factor that has led to the consideration of environmental protection in the WTO. A Committee on Trade and Environment was therefore created to address the problem. However, despite the renewal of the CTE's mandate at the Singapore Conference, it has long continued to act as a discussion forum, where lack of consensus among the parties on the most relevant issues has so far prevented the adoption of concrete recommendations.[38]

2.4 Areas of conflict between free trade and environmental protection: Specific issues in the debate

The linkages between free trade and measures to protect the environment are undoubtedly clear, let alone the fact that the debate is highly politicised. Delving into the issue is arduous and intricate, with the negotiating fault lines along North-North as much as North-South axes.[39] First, the treaties liberalizing trade can harm the environment, and as a result trade may conflict with the environment.[40]If it is intended that freer trade should

[37] Hoekman et al (2001) 443
[38] *Ibid*
[39] Shaw and Schwartz, (2002) "Trade and the Environment in the WTO State of Play", Volume36 *Journal of the World Trade* Volume 36 No1, *Kluwer Law International*: 131.
[40] Pawelyn J, "Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO" Available at http://www.ejil.oupjournals.org/egi/reprint/15/3/575 [Accessed on 10/08/2007]

lead to economic growth and expand investment flows, the result may well be more pollution and increased consumption of natural resources.

* The economic view is that more trade and economic activity may result in more environmental degradation, whereas environmentalists invoke the pollution havens hypothesis and argue that free trade will increase industrial pollution in developing countries.[41] This will be likely due to the fact that developed countries have stricter environmental regulations.

* The competition brought about by free trade puts pressure on governments to lower environmental standards, called the race to the bottom hypothesis. The rationale behind this hypothesis is that international disparities in environmental standards confer a competitive advantage on low-standard countries.[42] Such an advantage could arguably cause developed countries to relax their environmental standards in other to avoid losing industries to developing countries.[43] In sum, trade liberalization increases the probability that production will locate in poor countries with less stringent environmental standards since liberalization means that goods produced there will face low barriers on their export into "wealthier, greener pastures".[44]

2.4.1 The relationship between Multilateral Environment Agreements (MEAs) and WTO rules

The relationship between the multilateral trading system (MTS) and the Multilateral Environmental Agreements (MEAs) has raised numerous difficulties and controversies. There is an existing conflict between the international legal obligations of the GATT/WTO and those in various treaties dealing with the protection of the environment.[45] These range from issues of hierarchy and compatibility between the two

[41] Perez (2002) 5.
[42] Chang Yang, "Conflict between Free Trade and Environmental Protection: Where we go and what we do tomorrow." Available at: www.lawbrige.net [Accessed on 01/05/2007]
[43] *Ibid*
[44] Richard (2002) 5.
[45] Boysen (1995) 94

entities, to the comprehensive framework of the MEAs, which combine a mixture of incentives and trade measures to deal with environmental externalities.[46]

In the framework of MEAs, positive measures, such as improved market access, capacity building, additional finance, and access to and transfer of technology, were considered to be effective instruments to assist developing countries meet multilaterally agreed upon environmental targets.[47] Leading examples of MEAs include: the Montreal Protocol on Substances that Deplete the Ozone Layer, which adopts trade controls that are more restrictive to non-parties than to 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 Movement of Hazardous Wastes, which prohibits exports and imports of hazardous and other wastes by parties to the Convention and from non-party states.[48]

The scope for trade measures pursuant to MEAs under WTO provisions and their unilateral application in addressing environmental problems lying outside a country's national jurisdiction has led to wide disagreement and has been strongly contested. The need for legal clarification of the WTO-MEA relationship, as well as for stronger dispute settlement systems within the MEAs themselves, have been *ad infinitum* highlighted by the European Communities and Switzerland, which has called for an interpretative understanding to create legal certainty, and to prevent dispute settlement arising in the first place. This proposal has served to bolster the debate in the CTE.

Another example of underlying conflict in the WTO is the relationship between environment and Trade-related Intellectual Property Rights (TRIPS) and the Convention on Biological Diversity (CBD). In one of its Annual Report the CTE stated that ***"further***

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[46] Magda Shabin, (2002) Trade and the Environment: How Real is the Debate? in Gary P. Sampson and W. Bradnee Chambers (eds),*Trade, Environment, and the Millennium*, Chapter 2, (2ed) Tokyo: United Nations University Press: 46

[47] *Ibid*

[48] Birnie and Boyle, (2002) *International Law and the Environment* (2 ed) Oxford University Press: 705

work is needed to examine the relationship between…GATS and environmental protection policies in the sector".[49]

This is because the interrelationship between the two has reflected that there are foreseeable problems that could re-occur.[50] The contradiction between TRIPS and the CBD is not merely implicit. There are doubts about the compatibility of the various provisions of the TRIPS Agreement with the clear objectives of the Convention as it relates to the conservation and sustainable use of genetic resources.[51] It is worth noting that the equitable sharing of the benefits arising out of the utilization of the knowledge systems of indigenous communities, and fair trade-offs between access to genetic resources and the transfer of technology, remain the essence of the CBD.[52]

However, the TRIPS Agreement seems to contradict the said objectives in that it does not recognise the rights of the country in which the biological resource or knowledge are located, and here is no provision in the TRIPS requiring the applicant for patents or other intellectual property rights over biological resources to obtain prior informed consent. [53] Whilst the CBD has set up a prior informed consent (pic) system as a check against misappropriation or bio-piracy, TRIPS on the other hand encourages or rather facilitates the possibility of such misappropriation by not recognising the need for, and thus omitting, the pic mechanism.

2.4.2 ECO-LABELLING AND PRODUCTS AND PROCESS STANDARDS

The fundamental rationale for eco-labelling is, to generate political support for improved environmental management and to raise environmental standards through consumer choice.[54]

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[49] As referred by Macmillan (2001) 13
[50] *Ibid*
[51] Magda Shabin fn 43 at 46
[52] Articles 15 and 16 of the CBD
[53] Third World Network "Intellectual Property Rights. TRIPS Agreement and the CBD" Available at http://www.twnside.orgsg/title/benefit.htm [Accessed on 20/08/2007]
[54] FAO "Product Certification and Ecolabelling for Fisheries Sustainability" Available at http://www.fao.org/docrep/005/y2789e/y2789e08.htm [Accessed on 20/08/2007]

The issue of eco-labelling has attracted much attention in the trade and the environment debate in the WTO. The complexity of the issue arises from the fact that eco-labelling schemes are based on life cycle analysis, which involves Process and Product Methods (PPMs).[55] This phenomenon involves the regulation of certain characteristics of the product being offered for sale on the market. It is crucial to note, that even though such standards do not directly regulate interstate trade, they may be used as an instrument of protection, such as to distinguish between domestic products and imported products.[56]

2.4.3 DEVELOPING COUNTRIES CONCERNS

Many developing country governments see the North's environmental concerns as self-serving or paternalistic and even a potential assault on their sovereignty. From their perspective, the North, which has prospered from a development path that has involved extensive environmental degradation, is asking the South to divert resources needed for development to environmental protection.[57]The principal fear of developing countries in dealing with the issue of eco-labelling in the WTO is that an attempt will be made to extend the coverage of such labelling. Through eco-labelling the WTO would become more deeply involved in the realm of domestic policy and intervention from the outside would be allowed to set national priorities. For this reason, more developing countries insist that eco-labelling is inconsistent with, and should not be accommodated within, the WTO system.[58] However, some developing countries, like Namibia supports ecolabelling guidelines, because they see it as an important element for gaining access to new premium green markets and foreign investment.[59] In the future, consumer consciousness of environmental concerns is likely to grow in both the North and South, because both developed and developing countries are working to comply with broad trends in

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[55] Magda Shabin, (2002) Trade and the Environment: How Real is the Debate?, in Gary P. Sampson and W. Bradnee Chambers (eds),*Trade, Environment, and the Millennium*, Chapter 2, (2ed), Tokyo: United Nations University Press, 46

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

[57] "Trade and Environment: Conflicts and Opportunities" 1992 Report 94 Available at http://www.ciesin.org [Accessed on 28/08/2007]

[58] Magda Shabin (2002) fn51at 46

[59] FAO "Product Certification and Ecolabelling for Fisheries Sustainability" Available at http://www.fao.org/docrep/005/y2789e/y2789e08.htm [Accessed on 20/08/2007]

environmental standards, such as ISO 14 000, in order to become more competitive in international markets.[60]

[60] *Ibid*

CHAPTER III
INSTRUMENTS DEALING WITH FREE TRADE AND ENVIRONMENTAL PROTECTION

3.1 NORMS RELEVANT UNDER THE GATT / WTO

In terms of its relation to environmental management and protection, the GATT law needs to be applied in a two stage manner. First, there are some specific rules, most notably on discrimination between domestic and imported products, and on quantitative restrictions on imports and exports. Then, there are exceptions to the rules which establish the rights of Members State to deviate from those rules for certain reasons, including environmental protection[61].

3.1.1Article I: The Most Favoured Nation Principle

At the core of the GATT/WTO system are two non-discrimination principles: the Most-Favoured Nation Principle (MFN) and the National Treatment Principle (NT). These non-discriminatory mandates are essential for the full implementation of the schedules of concessions – lowered tariffs which are binding obligations under the GATT Article II[62]. **Article I** establishes the MFN rule which requires parties to ensure that if special treatment is given to the goods of one country, it must be given to all WTO members. This provision originated because states had different tariff levels for different countries, and it was designed to reduce or eliminate those differences. This Principle has now also been extended to other potential barriers to trade[63].
This rule has two major exceptions. The first one applies to regional trade agreements. Where these have been adopted, preferential tariffs may be established between the parties to the agreement. The second exception is for developing countries, and especially

[61] UNEP, (2005) "Environment and Trade: A Handbook, (2ed) International Institute of Sustainable Development". Pdf [Accessed on 23/07/2007]
[62] Bernie and Boyle, (2002) *International Law and the Environment*, (2ed). Oxford University Press: 699
[63] UNEP, (2005) Environment and Trade: A Handbook, (2ed) International Institute of Sustainable Development. Pdf [Accessed on 23/07/2007]

for the least developed countries (LDCs). GATT allows members to use preferential tariffs rates, or zero tariffs rates, to products originating from these countries[64]. The aim of this exception is to help promote economic development where it is most needed.[65]

3.1.2 Article III: The National Treatment Principle

Article III establishes National Treatment, which requires that the products of other countries be treated "no less favourably" than "like products" manufactured in the importing country. The basic purpose of the NT is to ensure that products manufactured abroad have the same opportunity to compete in domestic markets. That is, domestic laws, regulations and policies should not impact on the competitive opportunity of imported products[66].

3.1.3 Article XI: Quantitative Restrictions

Article XI of the GATT imposes another type of limit on measures that a member can take to restrict trade. It prevents members from restricting imports from, or exports to, the territory of another WTO member through the use of quotas, import or export licenses or other measures intended to have the same effect. Indeed, these norms aim at ensuring that trade becomes freer and fairer, with the ultimate goal of furthering economic growth through the expansion of international trade[67].The prohibitions are, however, subject to a narrow range of exceptions.

3.2 GATT ENVIRONMENTAL EXCEPTIONS: ARTICLE XX

A government challenging an environmental measure must argue a breach of Articles I, III and XI. However, even where a national law is found to be inconsistent with one of these Articles, it will not violate the GATT 1994 if the state invoking the measure can

[64] UNEP, (2005) Environment and Trade: A Handbook, (2ed) International Institute of Sustainable Development. Pdf [Accessed on 23/07/2007]
[65] *Ibid*
[66] *Ibid*
[67] Trebilcock and Howse, (2000) "The Regulation of International Trade, Routledge Press: 397.

successfully prove that it falls under the provisions of GATT Article XX (General Exceptions), which allows for certain specific exceptions to the rules[68]. According to this provision, the burden imposed on unilateral measures taken by a contracting party with the aim of protecting one of the interests listed therein, can be held to be compatible with the GATT rules, provided that ***"such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".***[69]

Among the classes of measures listed are two types of exceptions, which are particularly relevant to the environment related measures, namely, Article XX (b) and Article XX (g).

1. Article XX (b) deals with the national measures ***"necessary to protect human, animal or plant life or health";***

2. Article XX (g) provides for measure ***"relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".***

A country wanting to use the environmental exceptions in Article XX, must, first of all, establish a *provisional justification* for using Article XX by showing that sub-paragraph (b) or (g) applies. Then it must establish a *final justification* by showing that the measure in question does not contravene the lead paragraph or chapeau, quoted above. [70]
The provisions of Article XX lessen the effects of the measures relating to NT and MFN". These require governments that take measures which arguably qualify as falling within exceptions of Article XX, to do so in a way that minimizes the impacts that could possibly occur. This has led some Panels to interpret Article XX to require nations to use the "least restrictive alternative", which in term, has given rise to interpretative problems resulting in the environmental-trade related liberalization clash.[71]

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[68] Magda Shabin (2002) fn at 46
[69] *Ibid*
[70] *Ibid*
[71] Magda Shabin, (2002) Trade and the Environment: How Real is the Debate?, in Gary P. Sampson and W. Bradnee Chambers (eds),*Trade, Environment, and the Millennium*, Chapter 2, (2ed), Tokyo: United Nations University Press, 46

Two questions, in particular, stand out, namely, the interpretation of the word "necessary" and the question of whose health, or which exhaustible natural resource, can be the object of an acceptable governmental regulation[72]. A restriction on the export of endangered species of plants and animals falls within the scope of Article XX (b) if it can be shown to be "necessary". A measure is not necessary if the same level of protection could be achieved by a measure less disruptive of international trade. What this implies is that a proportionality test should be invoked to balance the regulation's objectives against its effects on trade.[73] Equilibrium will be achieved only if a Dispute Panel interprets "unnecessary" in an environmentally sensitive way. More important is the fact that the word "environment" is not explicitly mentioned in the provision. According to Montini Article XX justifies unilateral adoption of measures aimed at protecting the environment since there is no explicit reference to the environment in the GATT.[74] The problem that arises is the extent to which this exemption permits countries to restrict imports with the aim of promoting the environment.[75] This question has unfortunately not been answered by the GATT.

3.2.1 Application of Article XX

The *chapeau* which forms part of the Article has been interpreted by the Appellate Body[76] as embodying ***"the recognition on the part of the need to maintain a balance of rights and obligations between the right of the member to invoke one or another of the exceptions of the Article XX, specified in paragraphs (a) to (j), on the other hand and the substantive rights of the other members under GATT 1994, on the other hand".***[77] The measure must therefore be necessary and must not be arbitrary, discriminatory or unjustifiable as between countries where the same conditions prevail.

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[72] Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict?" Available at http://www.worldtradelaw.net/articles/jacksontradeenvironment .PDF [Accessed on 01/05/2007]
[73] C. Yeukai, (2005) fn 19
[74] Montini M, (2003) *The Necessity Principle as an Instrument of Balance* in Francioni F ed *Environment, Human Rights and International Trade* Hart Publishing, 151.
[75] Mc Donald, (1999) "Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order" 23 *Environmental Law* 397.
[76] Hereinafter referred to as AB
[77] As referred by Charnovitz S, (2000) "Exploring the Environmental Exception in Article XX" (1991) *Journal of World Trade* 5.

3.3 Multilateral Environmental Agreements

Nearly 200 Multilateral Environment Agreements (MEAs) currently exist, with membership varying from a relatively small group to about 170 countries, but only 20 of these incorporate trade measures, that is restraints on the trade in particular substances or products, either between parties to the treaty and/or between parties and non-parties.[78] However, it should be noted that no trade disputes have arisen in the WTO over the use of MEAs, because of the understanding created through information sessions in the CTE where the secretariats of environmental agreements have been invited to present relevant information with respect of their agreements.[79]

The approach taken by the North American Free Trade Agreement (NAFTA) provides that, in the event of conflict between itself and CITES, the Montreal Protocol or the Basel Convention or other MEAs where all NAFTA parties agree, the provision of the MEA should take precedence over the WTO. However, it also urges parties to use the means least inconsistent with the NAFTA in implementing the MEAs.[80]

In the CTE, the EU has proposed a new sub-paragraph to Article XX, covering measures 'taken pursuant to specific provision of an MEA complying with he "Understanding on the relationship between measures taken pursuant to MEAs and the WTO rules'''.
The proposal included a simple definition of an MEA and stated that measures taken pursuant to the specific provisions of an MEA should be presumed to be 'necessary' for the achievement of its environmental objectives, though they still remained subject to the requirements of the *chapeau* to Article XX.[81]

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[78] Duncan Brack, (2005). *Multilateral Environmental Agreements: An overview* in *The WTO, Trade and the Environment.* (5ed). An Elgar Publishing
[79] Gary Sampson, (2005) Effective *Multilateral Agreements and Why the WTO Needs Them* in *The WTO, Trade and the Environment.* 5 ed. An Elgar Publishing
[80] *Ibid*
[81] Duncan Brack (2000) fn 78

3.4 WTO dealing with MEAs

The Committee on Trade and Environment in its agenda addresses the relationship between the provisions of the multilateral trading system and trade measures for environmental purpose; in particular, the relationship between WTO rules and compliances procedures, and those of the MEAs. In other words, its mandate embraces the need to determine if the WTO should change its rules to accommodate those in MEAs.[82]

3.5 Critics Regarding WTO Rules

The WTO lacks clarification in some MEAs such as the Bio-safety Protocol which could well impact on trade. The WTO aims to eliminate what traders are calling non-tariff trade barriers. Because its agenda is over-burdened, it is imperative to redirect its mandate with an emphasis on sustainable development.[83]

[82] Gary Sampson (2005) fn 70
[83] Activists to WTO Available at www.cnn.com [Accessed on 15/08/2007]

CHAPTER IV
REGULATION AND HARMONIZATION OF FREE TRADE AND ENVIRONMENTAL PROTECTION

The problem of reconciling competing socio-economic values has been addressed through two WTO Institutions: the CTE and the DSB. In this chapter, I shall examine on the one hand, the challenges facing by the CTE, and on the other hand present what strategies the DSB uses to resolve trade-environment disputes.

4.1 THE COMMITTEE ON TRADE AND ENVIRONMENT (CTE)

The terms of reference given to the CTE at Marrakesh were partly "To identify the relationship between trade measures and environmental measures, in order to promote sustainable development.
To make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system…"[84]

However, the Committee narrowed this broad mandate down to a ten-item agenda for work and used this agenda to its framework for discussion until its role was fundamentally changed by the 2001 Doha Declaration. At Doha, the members charged the Committee with focusing primarily on three issues:

1 The relationship between the WTO and MEAs;

2 Procedures for information exchange between MEAs secretariats and WTO, and criteria for granting MEAs observer status in WTO meetings; and

3 Reducing or eliminating barriers to trade in environmental goods and services[85].

For these issues the CTE was to serve as a negotiating forum, contributing to the Doha agenda results- a role completely different from the discussion forum it had been up to

[84] UNEP, (2005) Environment and Trade: A Handbook, (2ed) International Institute of Sustainable Development. Pdf [Accessed on 23/07/2007]
[85] *Ibid*

that time, and for which it convenes in special negotiating sessions. The Committee was also instructed, in pursuing its work on the ten-point agenda, to give particular attention to three issues (though not in the form of negotiations):

- The effect of environmental measures on market access, and the environmental benefits of removing trade distortions;
- The relevant provisions of the TRIPS Agreement; and
- Labeling requirements for environmental purposes.[86]

4.2 WTO/GATT DISPUTE SETTLEMENT

The WTO Dispute Settlement Mechanism, with its ability to provide binding decisions, is one of the central elements of the Uruguay Round Agreements. The Dispute Settlement Understanding (DSU) introduced a more structured dispute settlement process, with more clearly defined stages, than that which existed under the GATT since 1947. A fundamental difference between the two is that under the GATT a positive consensus was needed to adopt reports, so that any party could prevent the formal adoption of a decision.[87] Under the DSU, dispute settlement reports are automatically adopted, unless there is a consensus to the contrary. This is known as a "reverse consensus" and makes a decision very difficult to reject. However, the DSU did add a mechanism for appealing rulings to a standing Appellate Body (AB).

A dispute is brought before the WTO when a member believes that a fellow member is infringing its rights under one of the agreements governed by the WTO. This usually occurs when a company brings an alleged violation to the attention of its government, and the government decides that the action before the WTO is warranted.[88] The two parties to a dispute then follow a pre-defined set of procedures, via consultations, the Panel, appeals, and the surveillance of implementation.

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[86] *Ibid*
[87] UNEP, (2005) Environment and Trade: A Handbook, (2ed) International Institute of Sustainable Development. Pdf [Accessed on 23/07/2007]
[88] *Ibid*

The Dispute Settlement Mechanism cannot force a state to change its laws, even if these are found to contravene WTO rules. States intent on keeping such laws can either negotiate compensation for the complainant (for example, increasing access to markets in another area), or, failing that, be subjected to retaliatory trade sanctions.[89] Third parties having a substantial interest in a matter before a Panel are entitled to participate in Panel proceedings.[90] Most significantly, a Panel report becomes binding unless one of the parties to the dispute decides to appeal or the DSB decides by consensus not to adopt the report.[91]

4.3 CASE STUDY

Prior to the entry into force of the DSU in January 1995, six GATT panels had been established for disputes relating – directly or indirectly- to international environment issues, and many other Panel decisions provided guidance on the interpretation of relevant provisions of the GATT.[92] The most important of these decisions were two panel reports issued in 1991 and 1994[93] concerning the dispute between Mexico and the United States over the latter's ban on imports of Yellow-fin Tuna from Mexico and 'intermediary nations' which had been caught in a manner which harmed dolphins. The dispute was controversial and, unlike previous GATT Panel decisions, subject to intense public scrutiny. This study will consider only the *Tuna/Dolphin I* Case of 1991and three other cases.

***Tuna / Dolphin* Case[94]**

4.3.1 Facts

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[89] *Ibid*
[90] DSU, para.10
[91] *Ibid*
[92] Philippe Sands, (2005) *Principles of International Environment Law*, (2ed) Cambridge: University Press: 953
[93] *Tuna/Dolphin* I (30 ILM 1594 (1991); Tuna/Dolphin II (33 ILM 839 (1994)
[94] *Tuna/Dolphin* I Available at http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm [Accessed on 13/09/2007]

The US imposed a ban on tuna products in cases where the tuna has not been caught in compliance with its environmental standards, one of which was a requirement of the 1972 US Marine Mammal Protection Act (MMPA) compelling fishermen to use certain fishing techniques, rather than purse seine nets.[95] The US also set the allowable catch of dolphins in the eastern tropical Pacific Ocean at 20 500 per annum. Pursuant to the MMPA, the US authorities could ban the importation of fish caught commercially in violation of the Act. The rationale of the MMPA was to avoid incidental injury to ocean mammals during the harvesting of fish in the eastern tropical Pacific.

As part of the implementation of the MMPA, a requirement had been introduced that in respect of all Yellow fin Tuna products wishing to enter the US market, it had to be shown to the satisfaction of the US authorities that the overall regulatory regime of the country of origin was comparable to that of the US.[96]

4.3.2 The Issue in Dispute

Mexico failed to satisfy the US authorities that its tuna has been caught in a manner comparable to that set out in the MMPA and this resulted in the ban on tuna and tuna products that originated from Mexico. Mexico alleged that the ban violated Article XI[97] of the GATT as it prohibited imports. In response the US argued that because the restriction applied to American tuna as well, the ban was an integral part of its internal regulations, which did not violate Article III[98]. The Panel first had to decide whether Article III or XI of the GATT was applicable.

4.3.1.3 The Panel Decision

The panel reasoning was as follows;

[95] Trebilcock and Howse (2000) fn 60 at 406
[96] WTO, "GATT Jurisprudence", Available at http://www.wto.org [Accessed on 13/09/2007]
[97] Article XI proscribes members from restricting imports from or exports to the territory of another WTO member through the use of quotas, import or export licenses or other measures intended to have the same effect.
[98] Article III requires that nations when applying domestic taxes and regulations treat imports no less favourably than their domestically produced goods.

- Article III allows countries to imposes and subject foreign products to internal regulations provided that such regulations do not violate Articles I and III.
- Article XI of the GATT contains a general prohibition on quantitative restrictions on imports and exports, subject to a narrow range of exceptions, e.g. if the restriction is based on Article XX of the GATT.

The Panel thus ruled that what the US had sought to regulate via the MMPA was not actual imported products but the manner in which those products had been produced in an exporting country, and that Article III concerned measures that applied to and affected the nature of the products themselves.[99] It was accordingly found that the US ban constituted a quantitative restriction within the meaning of GATT Article XI. The next question was then whether the ban could be justified in terms of Article XX of the GATT. The Panel considered GATT Articles XX (b) and XX (g) which allow measures aimed at the preservation of exhaustible natural resources, provided the same are taken in conjunction with restrictions on domestic production or consumption.

4.3.1.5 Argument Presented

The United States' ban was aimed at enforcing the MMPA, which protected dolphins from incidental killings and therefore fell within GATT Article XX (b). The US argued that there was no alternative reasonable measure to achieve this.
Mexico on the other hand argued that GATT Article XX (b) was not applicable *in casu as* the US had sought to regulate production outside its borders, and that the measure was not necessary as there were alternatives to protect the dolphin's health or lives. Mexico accordingly pointed out that co-operation between the two countries concerned was the appropriate solution.[100]

4.3.1.6 Panel Ruling

[99] Trebilcock and Howse (2000) fn 84 at406
[100] WTO " GATT Jurisprudence" Available at http://www.wto.org/english/tratop_e_/envir_e/edisoOOe.htm [Accessed on 13/09/2007]

The Panel considered the drafting history of GATT Article XX (b) and found that extending the operation of GATT Article XX (b) beyond the borders of the country would be encouraging states to unilaterally adopt environmental policies. The GATT Panel accepted Mexico's argument that multilateral cooperation between states was the only acceptable way of addressing environmental concerns where they affected the rights and/ or duties of two or more countries.
Concerning GATT Article XX (g), the Panel emphasized the importance of the proviso "in conjunction with restrictions on domestic production or consumption". This was interpreted to suggest that measures taken should be primarily aimed at conservation of exhaustible natural resources within the jurisdiction of the member states. The Panel thus ruled that Article XX (g) could not have been intended to apply beyond national boundaries, for the same reasons advanced by the Panel in relation to GATT Article XX (b).

In conclusion, the *Tuna/Dolphin I* ruling is not a precedent as the decision was never adopted. Mexico and the United States of America mutually agreed to settle the case by diplomatic negotiation, that is to say, in terms of a regional trade agreement, the America NAFTA.

4.3.1.6 Lessons Arising from the *Tuna/Dolphin* Case

The Panel's decision, according to Chang,[101] creates a large degree of ambiguity.
First, a country is not entitled under the GATT to force other countries to adopt its own domestic policies, environmental or otherwise. The Panel concluded that a country could only control the production or consumption of a natural resource if the production or consumption is within its own jurisdiction. Although many environmental problems are transboundary in nature, this ruling interprets the WTO as being able to cope with national issues only.[102]

[101] Chang HF, (1995) "An Economic of Trade Measures to Protect the Global Environment"
[102] *Ibid*

Secondly, the ruling suggests that countries can take action on problems outside their jurisdiction but that these must be "necessary", a term which creates controversy as to what the "necessity test" entails. The Panel in the *Tuna/Dolphin* case claimed that it meant that the US would have to show that it had exhausted all options "less restrictive of trade before resorting to import restrictions".[103] The Panel noted that the possibility of international co-operation with respect to dolphin conservation was an option that the US had not exhausted. With this interpretation the Panel narrowed the Article's scope, resulting in less protection being afforded to the environment.

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

The Panel referred to the basic principles of the GATT in concluding that a "Contracting party may not restrict imports of a product merely because its origin in a country with environmental policies different from its own".[104]

The fundamental problem that arises at this point is the dividing line that the Panel chose between environmental policies for the sake of protecting one's environment, and the policies that somehow dictate to another Contracting Party how it should protect its own environment. The Panel thus adopted an extra-territorial approach even though the US was not encroaching upon any of Mexico's laws or policies. This issue of extra-jurisdictional standards is therefore a moot point.[105] Whilst trade restriction can be regarded as an important tool, it can still be viewed as the imposition of one country's values on another, known as "eco-imperialism". This might just result in a "slippery slope" of unilateral trade measures being imposed to achieve a variety of domestic policy goals resulting in the distortion of international trade. [106]

[103] Trebilcock and Howse (2000) fn 88 at 406
[104] I*bid*
[105] Chang HF, (1995) fn 94
[106] Citizens Guide to Trade, Environment and Sustainability "Trade Case Study: Tuna/Dolphin Dispute" Available at http://www.foei.org/trade/activistguide/tunaban.htm [Accessed on 13/09/2007]

4.3.1.7 Reactions to the Decision

Needless to say, the *Tuna/Dolphin* decision attracted enormous criticism, with environmentalists shunning it whilst the GATT Secretariat and free traders vigorously defended it.[107] One of the criticisms is that there seems to be a "mischaracterization" of the problem, in that the Panel sees the dividing line only between environmental policies meant to protect the environment and policies that dictate to another how to protect the environment.[108]

From the onset, it should be realized that the US was not aiming, paternalistically as it were, to dictate to Mexico how it should regulate its purely domestic environmental problem. The measure was aimed at preserving dolphins as a global common.[109] There was no jurisdiction, be it Mexican or any other, which was being disturbed or encroached upon. At the same time, the American legislation was not interfering with any specific obligations or rights assigned to Mexican fisherman under Mexican law. Also, the lifting of the ban on tuna was not conditional upon the Mexican government adopting legislation identical to the American dolphin protection legislation, but rather on compliance with the process standards. As long as Mexican fishermen used nets that could not harm dolphins, their products were free to enter the US.

What was also questionable was the Panel's view of the extent to which a country can invoke GATT Article XX (b) and (g) to protect global commons. In this connection, the Panel held that Article XX of the GATT could not be relied on, thus limiting its application to protection of a country's domestic environment. Again, the Panel restricted countries to their own jurisdictions in as far as production and consumption measures are concerned. Indeed, the decision puts the environment in an uncertain position, with trade prevailing over environmental measures. Environmentalists reject the decision as an undue restriction of the potential role of the GATT in addressing global concerns.

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[107] Trebilcock and Howse (2000) fn 92 at 408

[108] *Ibid*

[109] A global common is something that falls outside the jurisdiction of all countries, but which should be protected for the benefit of all, for example, the Antarctica and the high seas.

Some commentators have gone to the extent of calling upon the GATT Council to reverse the decision,[110] a suggestion which shows how unwelcome the decision was to environmentalists. A number of other cases, discussed below, highlight the developments that have been taken place so far under the WTO DSU, especially the in which way the AB has interpreted the GATT Article XX provision.

Reformulated Gasoline Case[111]

4.3.2 Background

The *Reformulated Gasoline* case[112]provided the new WTO Appellate Body with its first case, and its first opportunity to consider trade measures purporting to pursue environmental goals. The dispute arose out of a complaint brought by Brazil and Venezuela against regulations promulgated under the US Clean Air Act (CAA) dealing with the standards for reformulated and conventional gasoline.[113] The function of the regulations, known as 'the Gasoline Rule', was to establish 'cleanliness' standards for gasoline sold throughout the US, set in terms of 1990 baseline emissions. This baseline was determined either on a refinery-specific, individual basis, or on the basis of average 1990 US gasoline quality.[114]

Domestic entities were permitted to established individual baselines, but no provision was made, however, to allow foreign refiners to establish individual baselines. Instead all of them were required to use statutorily determined baselines as a basis for determining whether their gasoline met the requirements of the Gasoline Rule.[115]

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[110] Weiss E.D, (1992) "Environment and Trade as Patterns in Sustainable Development – A Commentary" 86 *American Journal of International law*, 728 at 731.
[111] *Reformulated Gasoline*. Available at www.wto.org/english /tratop_e/envir_edis07-e.htm [Accessed on 24/09/2007]
[112] Philippe Sands, (2005) *Principles of International Environment Law* (2ed) Cambridge: University Press: 958
[113] Philippe Sands (2005) fn 100 at 961
[114] WTO Case Number 2 and 4: Ruling adopted on 20 May 1996. See WTO/ Environment-dispute 7, Available at www.wto.org/english /tratop_e/envir_edis07-e.htm [Accessed on 24/09/2007]
[115] Philippe Sands (2005) fn 100 at 962.

4.3.2.1 The Issue in Dispute

Venezuela and Brazil filed a claim against the US on the basis of the differential treatment imposed by the Gasoline Rule, alleging that it was inconsistent with and constituted a violation of, the NT Principle in Article III.4 of GATT.[116] Venezuela also argued that the Gasoline Rule was not covered by Article XX which provided for general exceptions to the WTO rules. The US argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in GATT Article XX, paragraphs (b), (g) and (d).[117]

4.3.2.2 The Panel's Ruling

After examining the arguments, the Panel considered the US measure as a "means of arbitrary and unjustifiable discrimination between countries"[118]. It therefore found that the Gasoline Rule was inconsistent with Article III and could not be justified under paragraphs (b), (d) or (g).The US was consequently found to be in violation of WTO rules because it discriminated against the gasoline imports. The US appealed against the decision of the Panel.

4.3.2.3 Final Decision

On appeal against the Panel's findings on Article XX(g), the AB found that the baseline established rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the "chapeau" (introductory paragraph) of Article XX.[119] The AB reached the same conclusion as the Panel in that the US measure was discriminatory, but made certain changes to the Panel's legal interpretation.[120] The

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[116] The National Treatment Principle obliges WTO members to treat domestic and imported products equally.
[117] WTO Case Number 2 and 4: Ruling adopted on 20 May 1996. See WTO/ Environment-dispute 7, Available at www.wto.org/english /tratop_e/envir_edis07-e.htm [Accessed on24/09/2007]
[118] WTO Appellate Body Report: United States-Import Prohibition of Certain Shrimp and Shrimp Products Available at http: // www.ejil.org/journal /Vol10/No1/sr4.rtf [Accessed on 24/09/2007]
[119] WTO Case Number 2 and 4: Ruling adopted on 20 May 1996. See WTO/ Environment-dispute 7, Available at www.wto.org/english /tratop_e/envir_edis07-e.htm [Accessed on24/09/2007]
[120] WTO Appellate Body Report: United States-Import Prohibition of Certain Shrimp and Shrimp Products Available at http: // www.ejil.org/journal /Vol10/No1/sr4.rtf [Accessed on 24/09/2007]

AB rejected the adoption of a "less-restrictive means" test when reading Article XX (g), finding that the Panel had failed to interpret the provision in line with the Vienna Convention on the Law of Treaties. The expressions "necessary to" and "relating to" did not imply the "same kind or degree of connection between the measure under appraisal and the state interest or policy to be promoted". The AB found that the measure in question was indeed, primarily aimed at conservation of exhaustible natural resources.[121]

The most significant finding related to the *"chapeau"* of Article XX regarding whether or not the measure was illegal or justified under Article XX. A two step approach was adopted:

1. Provisional characterization of the measure as falling within one or more of the exceptions in Article XX (a-j);
2. "Further appraisal of the same measure under the criteria of the chapeau".

The AB interpreted the "chapeau" as aimed at preventing the protectionist "abuse" of the exception in Article XX. It was held that the US's non-pursuit of co-operation, showed that the discrimination was "unjustified"; and its willingness to alleviate certain costs of domestic, but not foreign, entities, pointed to a "disguised restriction on international trade".[122]

4.3.2.4 Comments

The AB's ruling in this case is a stride towards the development of a principled jurisprudence in the environment trade debate. The AB adopted a mechanism ensuring that the exceptions in Article XX (b) and (g) do not lead to protectionist abuse and therewith pose threats to the integrity of the trading system. It thus identified at least one way in which this latter goal could be furthered without the results-based manipulation involved in the *Tuna/Dolphin* case, where the Panel did not have a textual basis for its

[121] WTO Case Number 2 and 4: Ruling adopted on 20 May 1996. See WTO/ Environment-dispute 7, Available at www.wto.org/english /tratop_e/envir_edis07-e.htm [Accessed on24/09/2007]
[122] *Ibid*

decision, resulting in the removal of all measures from possible justification under Article XX.[123]

Shrimp-Turtle Case[124]

4.3.3.1 Background

Thousands of sea turtles drown every year when they are caught in shrimp nets. The US requires domestic shrimpers to use protective technology called Turtle Excluder Devices (TED), which are a kind of trap door by which turtles can escape from shrimp nets. In 1989 the US Congress effectively banned the importation of shrimp caught by foreign shrimpers who did not use TED, in terms of the US Endangered Species Act, requiring US registered shrimp trawlers and other shrimp vessels in US waters to use TED "when fishing where there is a likelihood of encountering sea turtles''.[125]

4.3.3.2 How the WTO got Involved

India, Malaysia, Pakistan and Thailand lodged a complaint against the United States embargo in 1996, claiming that the U.S. Turtle Shrimp Law violated international trade law by barring the importation of their shrimp and shrimp products into the US.

4.3.3.3 The US Argument

The US argued that it is trade measure satisfied GATT Article XX (g), which allows trade restrictions needed to conserve exhaustible natural resources. This argument was rejected by the **Panel** on the basis of the interpretation of Article XX "*chapeau*". It then

[123] Trebilcock and Howse (2000) fn at 415.
[124] November 23, 1999. See WTO "India etc versus Us: Shrimp Turtle" Available at http://www.wto.or/englih/tratop_e/envir_e/edis08_e/htm [Accessed on 01/10/2007]
[125] R.Read, (2004) "Like Products, Health & Environmental Exceptions: Interpretation of PPMs in Recent WTO Trade Dispute Cases" *The Estey Centre Journal of International Law and Trade Policy*. Vol.5 No2: 123-146 [Accessed on 10/10/2007]

found that the US measures indeed constituted an unjustifiable discrimination between countries where the same conditions prevail. The US appealed against the decision of the Panel

4.3.3.4 WTO Final Decision

The WTO AB report of 1998 reversed the original Article XX (g) decision, finding that endangered sea turtles are an "exhaustible resource" and therefore environmental and conservation objectives are a legitimate trade measure.[126]
The AB found, however, that the US protective measures were "arbitrarily" discriminatory; thus they were inconsistent with the *"Chapeau"* to Article XX and therefore illegal under Article XI.[127]
The WTO ruled in 1998 against the United States. One of its findings was that US had acted in a discriminating manner by giving Asian countries only four months to comply with the Turtle Shrimp Law, but giving Caribbean Basin nations three years. The US revised its guidelines on the importation of shrimp, changing both the method and the schedule by which it evaluates how well foreign shrimpers are doing at protecting sea turtles from drowning. The first beneficiary was Australia, which was allowed, under the revised guidelines, to export shrimp to the US.[128]

4.3.3.5 Comments

Although the WTO *Shrimp-Turtle* case was lost by the US, the grounds on which it was lost were that the US measures were discriminatory, not that the US had sought to protect the environment[129]. This case, according to Jackson, is a landmark decision in the WTO

[126] WTO Appellate Body Report: United States-Import Prohibition of Certain Shrimp and Products. Available at http://www.ejil.org/journaal/Vol 10/No1/sr4.rtf [Accessed on 01/10/2007]
[127] R.Read, (2004) "Like Products, Health & Environmental Exceptions: Interpretation of PPMs in Recent WTO Trade Dispute Cases" *The Estey Centre Journal of International Law and Trade Policy*. Vol.5 No2: 123-146 [Accessed on 10/10/2007]
[128] WTO Case File: The shrimp-turtle case. Available at http://seattlepi.nwsource.com/business/case l.shtml [Accessed on 01/10/2007]
[129] Environment: Disputes 4, Mexico etc, versus US: Shrimp-turtle case. Available at http://www.wto.org/english/tratop_e/idis08_e.htm. [Accessed on 01/10/2007]

case law' [130]because the AB recognized the validity of the US Endangered Species Act. Environmentalists say that the US weakened its law protecting shrimp turtles, and created a loophole which is already being exploited by Australia and Brazil. The Sea Turtle Restoration Project, an environmental group, blames the WTO ruling for the death of 13,000 sea turtles in India last year.

Asbestos Case[131]

4.3.4.1 Background

This matter involved France and Canada over the ban imposed by France on the use of asbestos and cement containing asbestos fibres. The Panel found that chrysotile-fibre products and fibro-cement products were like products within the meaning of Article III: 4. It further found that the provisions of the Decree prohibiting the marketing of chrysotile fibres and chrysotile-cement products violated Article III: 4. Nevertheless, the Panel decided that the violation of Article III: 4 was justified under Article XX (b) as being "necessary" to protect human health, on the grounds that the carcinogenic properties of all forms of asbestos have been proven scientifically[132] and that the measure did not conflict with the chapeau of Article XX.[133] Canada appealed.

4.3.4.2 Final Decision

The AB reversed the Panel ruling on the non-applicability of the SPS and TBT Agreements and GATT Article XI. It also reversed the view that health risks may not be taken into account in judging likeliness.[134]

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[130] Jackson, J. H Comments on Shrimp/turtle and the product/process distinction. (2000) Vol.11No2 *European Journal of International Law* 3.03-7
[131] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.
[132] R.Read (2004) fn at 123-146
[133] *EC – Asbestos*, Panel Report, Para. 8.191.
[134]Trade Dispute Cases", (2004) *The Estey Centre Journal of International Law and Trade Policy*. Vol.5 No2: 123-146 [Accessed on 10/10/2007]

Nonetheless, the AB upheld the panel ruling that the French Decree on asbestos imports was justified under GATT Article XX (g) as a measure necessary to protect human life or health.[135] It disagreed with Canada's contention that the Panel had erred in holding chrysotile fibres and their carcinogenic effects created a health risk. Moreover, it ruled that it was unable to conclude a complete "like-product' analysis as Canada, any evidence to consumer tastes and habits,[136] due to the lack of proof by Canada. It then concluded that the asbestos ban by France was consistent with Article III: 4 of the GATT.

4.3.4.3 Comment

The ruling in the *Asbestos* case is noteworthy for many reasons. First, there is an analysis of "like Product" in Article III: 4 of the GATT. The like-product decision in the asbestos case has important and potentially far-reaching implications for the PPMs relating to health and safety, because it establishes the need for the Panel to consider all aspects of the relevant criteria rather than focus on just a subset thereof. Besides, this case demonstrates that the WTO rules support nationally determined environmental, and health and safety, provisions rather than the lowest common international denominator. It also highlights the potentially critical role that can be played by the GATT Article II: 4 'like product' with respect to establishing grounds for distinguishing between harmful products and less harmful substitutes. [137]

4.3.4.4 Comments on rulings

The gasoline Case brought out the two-tiered approach to analyzing Article XX which has been adopted in the following cases.
Asbestos Case changed the analysis of "like products"
The Shrimp-turtle decision has arguably brought the WTO a step closer to reality as the decision could be interpreted as allowing members to take unilateral actions based on the

[135] *EC – Asbestos*, Appellate Body Report, Para. 172
[136] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.
[137]Trade Dispute Cases", (2004) *The Estey26 Centre Journal of International Law and Trade Policy*. Vol.5 No2 123-146 [Accessed 10/10/2007]

way in which products are produced and that these actions are justified under Article XX of the GATT as long as they are not implemented in an arbitrary or discriminatory manner.[138]

[138] Shaw and Schwartz, (2000) "Trade and Environment in the WTO: State of Play" Vol. 36 No 1. *Journal of the World Trade:* 150

CHAPTER V
RECOMMENDATIONS

5.1 Greening the GATT: Amendment of GATT Article XX

The greening of GATT can be possible trough the amendment of GATT Article XX. This article is not sufficient to cover environmental problems that arise, and there is a need to amend its provisions. An amendment to the exceptions provisions of GATT Article XX could accommodate measures taken pursuant to an MEA that might otherwise be inconsistent with WTO rules.[139]

5.2 Exemption of MEAs

The WTO agreement explicitly allows parties to waive GATT obligations in exceptional circumstances. So it is worth considering exempting multilateral environmental agreements from GATT rules. Of course, such waiver should be approved by a three-fourths majority of the GATT parties. It is not impossible in some circumstances. Although some argue that this approach appears to rank the GATT/WTO and trade liberalization above multilateral environmental protection, it would prove to be useful in the interim. [140]

5.3 Change of procedure to DSB under GATT/WTO

Since trade policy cannot avoid interacting with environmental policy, there are ways to make future WTO tribunals more conducive to fair and informed decision-making. However, the system must be more open to seeking and accepting environmental expertise from scientists, NGOs and industry.[141] For example, in the selection of

[139] Gary Sampson Trade, "Environment and the WTO: A Framework for Moving Forward. Bridges Comment".
[140] Chang, "Conflict Between Free Trade and Environmental Protection". Available at www.lawbridges.net [Accessed on 01/05/2007]
[141] Duncan Brack, (2000) "Greening the WTO" *The Royal Institute of International Affairs and Trade Policy*.

panellists. The objective of panellists is to create a sufficiently diverse background and a wide spectrum of experience. So one can argue that, the WTO tribunals should include experts in the realm of environmental protection. The panel members should be recognized and accepted by both trade and environmental concerns. Maybe things will be different in that case.

5.4 Incorporation of MEAs into the WTO

MEAs do not have any self-standing value before a WTO panel. Put differently, this means that when countries conclude an MEA, this MEA, and the implementing measures it calls for, must still pass the GATT Article XX test or be explicitly incorporated in the WTO treaty, even for the relation between WTO Members that are parties also to the MEAs.[142] MEAs must include, therefore, provisions which clarify new regulations, specify how conflicts over trade-related issues will be treated, and provide a forum through which it conducts dialogue with other parties to the treaty. Fortification of MEAs in this way would significantly enhance the ability of the trade and environmental regimes to avoid debilitating conflicts.[143]

5.5 Enforcement through sanctions

Trade sanctions which include import bans appear to be a very good and a potentially useful means of providing enforcement measures for international cooperation requirements regarding environmental standards. This does not mean that free trade is given priority over environmental protection, but instead that it recognizes trade sanctions to be more efficient than environmental ones which are less strict. According to Cameron**,** environmental regimes lack the power of the WTO dispute settlement mechanism which "offer rewards for use". Moreover, he thinks that many of the

[142] Joost Pauwelyn, (2004) "Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO**"** *European Journal of International Law***:** Vol. 15 No.3 588
[143] Shaw and Schwartz, (2000) "Trade and Environment in the WTO: State of Play" *Journal of the World Trade*: Vol. 36 No 1. 150

obligations in MEAs are not subject to judicial application; and that they are simply too general, leaving too much discretion to parties on how they choose to implement them.[144]

5.6 Agreements on PPMs

The WTO treatment of trade restrictions based on environmental regulations applying to processes that is, Process-based regulation for example, the taxation of emissions from energy use, or ecolabelling based on life-cycle analyses of impact is becoming increasingly important in strategies for environmental sustainability; and it is not unreasonable for countries who want to apply similar restrictions to imports as they do to their own producers.[145] This may not, however, be allowable under the GATT prohibition on discrimination between 'like products'. Originally incorporated into the GATT in order to prevent discrimination on the grounds of national origin, the term has usually been interpreted more broadly to prevent discrimination in cases where process methods, rather than product characteristics, have been the justification for trade measures. The 1998 *Shrimp-Turtle* case (involving US restrictions on imports of shrimp fished with methods which killed sea turtles) may mark a change of approach, but considerable uncertainty remains.

5.7 Creation of a World Environmental Organization

A centralized and well-financed WEO capable of dealing with a broad range of environmental problems through rule-making and enforcement should be the ultimate goal.[146] Macmillan advocates the creation of a new World Environment Organization that "unites and transcends the WTO system and the public international environmental system". Similarly, Runge argues that a Global Environmental Organization (GEO) offers the trading system the opportunity to disentangle trade from environmental matters, allowing the WTO to focus where it should; on expansion of market access and

[144] Gary Sampson and J.Whalley, (2005) *Seeing Red Over Green* in *The WTO, Trade andEnvironment* 2ed Elgar Publishing.
[145] Duncan Brack, (2000) "Greening the WTO" (2000).The Royal Institute of International Affairs.
[146] Shaw and Schwartz "Trade and Environment in the WTO: State of Play" *Journal of the World Trade*: Vol. 36 No 1. 150

reduction in trade protectionism, saving attention for environmental measures only in cases of obvious trade distortions. [147] Besides, according to Runge, a GEO could be of considerable assistance to the WTO in clarifying where environmental exceptions to the GATT articles are justified under Article XX and providing guidelines for minimally trade- distorting MEAs. It could also help fill the institutional gap in dispute resolution and coordination surrounding many MEAS and institutions now responsible for global environmental issues.[148]

There seems to be a consensus that responsibility for addressing the problems of global environmental policy should not be transferred to the multilateral trading system. In fact, some analysts have argued that there is a case for a GEO that would complement and counterbalance the WTO. Although this is clearly a long-term goal, several international leaders seem to be increasingly supporting it.[149] Charnovitz argues that a WEO is currently not feasible due to lack of willing governments, competing domestic and international interests, extreme poverty, and resource distribution. He then expresses that current global environmental mechanisms need to be improved and funding to them increased in order to facilitate data collection, policy creation and communications. He then notes that, despite these shortcomings, environmental governance has exhibited a "can-do" attitude, solving a number of problems through innovation and flexibility.[150]

5.8 Moving ahead with the Doha

Environmental issues have made slow but steady progress on the WTO agenda. It was not until the fourth Ministerial Conference in Doha that the environment explicitly became a negotiating issue. That Conference adopted the Doha Ministerial Declaration. This is a Development Round extremely important, and equally important is its content. The

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[147] Runge, (2001) "A Global Environmental Organization and the World Trading System" *Journal of the World Trade*: Vol. 35 No4 *Kluwer Law International*. 423

[148] Gary Sampson and J.Whalley, (2005) "*Seeing Red Over Green*" in The WTO, Trade andEnvironment 2ed Elgar Publishing. Introduction

[149] Monica Araya, (2000 "Trade and environment at the World Trade Organization: The need for a constructive dialogue" . 157

[150] Jessica Green and Norichika Kanie, "Reforming International Environmental Governance". Available at http://www.ony.uni/edu/Seminars/2004/reforminggovernance/Summary.doc [Accessed on 26/10/2007]

content has to demonstrate new opportunities for developing countries, primarily market access of developing countries into markets of developed countries.

Paragraph 31 of the Doha Declaration lists three issues for environmental negotiation. Many observed termed the environmental negotiations objectives in the Doha Declaration as being limited in scope and only covering the relationship between WTO rules and specific trade obligations set out in MEAs, procedures for regular information exchange between MEA Secretariats and relevant WTO committees, and the criteria for granting observer status to MEAs, the reduction or elimination of trade barriers to environmental goods and services.[151] Paragraph 32 of the Doha Declaration instructs the Committee on Trade and Environment to give particular attention to the effect of environmental measures on market access, especially in relation to developing countries.[152]

The failure of the Doha Round has been evident since 2001. The history of the Doha round has been filled with double-talk, with rich countries often demanding that poor countries concede ground in unfair ways, with poor countries occasionally taking a strong stance against these demands, and the EU and US in particular driving for more open markets in poorer countries, sometimes even blaming the poorer countries for failed talks, or calling deals criticized as bad for the poor, as good for the poor.[153]

5.9 The Collapse of WTO Doha Trade Round

The "Development" round of trade talks, the almost five year-long Doha Round, collapsed at the end of July, 2006. The US found itself on the defensive as around the world blame was directed at the US, in particular by the EU. However, the EU has also been part of the reason for failure throughout the five years.[154] Technically, the US was

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[151] UNEP, (2005) Environment and Trade: A Handbook, (2ed) International Institute of Sustainable Development. Pdf [Accessed on 23/07/2007]
[152] WTO Doha 4th Ministerial - Ministerial declaration.mht Available at http://www.wto.org [accessed on 01/11/2007]
[153] Anup Shah, "Trade and Economic Issues: Free Trade and Globalization" Available at http://www.globalissues.org/TradeRelated/FreeTrade/dohacollapse.asp WTO Doha "Development" Trade Round Collapses, 2006 - Global Issues.mht [accessed on 01/11/2007]
[154] *Ibid*

blamed for causing the collapse in July 2006, because it felt that developing countries would not open their markets in the same way that it was being asked to open its and so it saw no point in continuing the talks. It wanted what would seem like a fair deal: rich countries open their market, and poor countries do the same in return. Without understanding context or history, this sounds just and equal.[155] However, global trade has always been unequal, in favor of, dominated by, and influenced by, the rich countries. The Doha "Development" Round, as it is known, was nicknamed that way to show that this round of trade negotiations was to favour poor countries' ability to develop and prosper from global trade, while acknowledging the unequal nature of global trade, dominated by industrialized countries, at the direct expense of the developing world.[156]

[155] Anup Shah Trade and Economic Issues: Free Trade and Globalization Available at http://www.globalissues.org/TradeRelated/FreeTrade/dohacollapse.asp WTO Doha "Development" Trade Round Collapses, 2006 - Global Issues.mht [accessed on 01/11/2007]
[156] *Ibid*

CHAPTER VI
CONCLUDING REMARKS

Environmental policymaking and the pursuit of more liberal global trade are both important policy objectives. Although the "trade versus environment'' debate has become extremely heated in the past years, a number of perceived conflict areas do not appear to represent inherent tradeoffs between policy objectives. In some cases, policies which are generally perceived to be environmentally motivated are in fact motivated for other reasons and may have negative environmental consequences (eg, natural resource export restrictions). In such cases, trade liberalization and environmental protection are compatible, rather than conflicting, policy aims.[157]

On the one hand, the international community has furthered its efforts to liberalize and deregulate international trade; on the other, it has redoubled efforts to develop environmental agreements, which rely upon trade sanctions to achieve their objectives. While it could be argued that the GATT/WTO rules do not give adequate weight to the environment, the jurisprudence, in particular the new WTO AB has significantly expanded the potential for 'environmental exceptions' available under Article XX of the GATT.[158] This development reflects the fact that legitimate environmental measures can, when certain conditions are met, lawfully restrict international trade.
In the view of Sands, it may no longer be necessary to reconsider and modernise Article XX of the GATT, with regards to the approach taken by AB, inspired by rules of international law arising outside the WTO.[159]

The WTO has become a venue for dispute settlement even when the topic of dispute is not primarily trade-related. It is also highly likely that the pre-eminent nature of the WTO settlement process affects the drafting of MEAs. Strengthening the dispute settlement

[157]Krutilla, (1993) "The GATT and Environmental Policy: An Analysis of Potential Conflicts and Policy Reforms" *Policy Studies Reviews***.** PDF[Accessed on 25/10/2007]
[158] Philippe Sands, (2005) *Principles of International Environmental Law* (2ed) Cambridge University Press. 1018
[159] *Ibid*

mechanisms within individual MEAs seems an appropriate step, but apparently a lack of political will has precluded this development. Members would rather take their case before a body with a proven record of quick and decisive rulings. [160]

The split between members and non-members of an MEA usually falls along the North-South divide. Developing countries rightly argue that poverty is of more immediate and significant concern than protecting the environment. This rationale can then be used to challenge the environmental policy of states that have the luxury of worrying about the global commons.[161]

Like Runge, Esty proposes the creation of a World Environmental Organisation capable of dealing with serious environmental Problems. Since the political will does not currently exist to create such an organization, non-state actors should work in concert with states to promote the norm of managing our global commons responsibly.
Daniel Esty argues that, there is a need to strengthen global environmental institutions. The WTO can only help address environmental problems through trade, but clearly the international environmental agenda is much broader. Lamy emphasizes "I am glad that we no longer find ourselves before a choice of Greening the GATTs, or GATTing the greens; the choice that Esty posed. The GATTs have already been relatively greened, and if we accomplish the Doha Round, we would green them some more."[162]

The surest way to promote sustainable environmental policies around the world is to increase economic growth and the standard of living in poor countries. Economic growth is achieved through greater economic liberalization, including free trade. Therefore, those truly concerned with protecting the environment should support a trade promotion authority that effectively advances free trade.[163]

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[160] Shaw and Schwartz, (2000) "Trade and Environment in the WTO: State of Play" Vol. 36 No 1. *Journal of the World Trade:*150
[161] *Ibid*
[162] WTO-News: speeches DG P Lamy the "Greening" of the WTO has started. Available at http://www.wto.org/english/news_e/sppl_e/sppl79_e.htm [Accessed on 28/10/2007]
[163] Eiras Journal Article *Trade: The Best Way to Protect the Environment.* (2001). Available at http://www.heritgafoundation.org [Accessed on 28/10/2007]

The World Trade Organization (WTO) has recognized, for the first time, which trade liberalization reinforces the need for environmental protection since there are some areas where environmental degradation can occur as the result of trade expansion not complemented by good environmental policy.[164]

At root of the research and analysis over dispute settlement in trade and environment is the need to balance tensions between the political and judicial processes. This is particularly challenging when the political reality is such that the political process is unable to set the necessary direction on fundamental issues, as is the case with trade and environment. So far the WTO Dispute Settlement Body has proven to be a central actor in defining the trade and environment debate. However, there are deficiencies, which need to be addressed in other to improve the WTO.[165]

The fundamental roles that MEAs and the WTO each play in global governance are widely accepted. Unfortunately, so is the potential for conflict between them. Despite a fair amount of negotiation and a large number of proposals on how to clarify the relationship between the two regimes during the last decade, no solution has been found or is even in sight yet. The Cancún Ministerial meeting also failed to provide sufficient further insight on how to reconcile both regimes. While a case in front of the WTO dispute settlement body would certainly shed more light on the relationship, greater clarity about MEAs could also assist to reconcile the relationship between the two regimes.[166]

The Doha Development Round and its limited mandate will certainly not resolve the complex relationship between MEAs and WTO rules; however, the ongoing negotiation process may contribute to the clarification, which in turn could help to generate consensus about how a mutually supportive relationship might be achieved.

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[164] Monica Araya, (2005) "Trade and Environment Lessons from NAFTA for the Free Trade Area of the Americas".
[165] Chatham House Report on Trade, "Environment and the WTO Dispute Settlement Mechanism". Available at http://www.cat-e.org [Accessed on 26/10/2007]
[166] Duncan Brack, (2003) "Trade and Multilateral Environmental Agreements" Draft Report. Available at http://www.cat-e.org [Accessed on 26/10/2007]

Sampson argues that the WTO can promote a healthy environment and sustainable development. Not only is the conflict between environmental protection and the WTO inevitable, but the two can play mutually supportive roles.

Developing countries should participate in this debate, not only to strengthen the WTO but also to ensure that their concerns are heard and addressed in the process.
It is then more likely that they will play a constructive role in the WTO context by contributing to the support of new trade rules that promote both free trade and environmental protection.[167]

Given the vast North–South divide, one effective way to encourage the participation of developing countries could be a northern commitment to avoid domestic pressures that favour unilateralism as well as protectionism. Additionally, northern countries that are pushing for "greener" WTO rules should also create a momentum of their own for initiatives rewarding southern efforts to address trade and environment issues proactively.

To sum up, international free trade can have a positive impact on environmental protection. This is can be done by improving the efficient allocation of resources, promoting economic growth, and generating revenues that can be utilized for environmental improvement. However, in the absence of effective environmental policies and regulations, using trade sanctions as a remedy, the conflict will remain between the two regimes. Thus, in order to avoid WTO superseding environmental policies, the former will have to accommodate environmental measures in its agenda so that they complement each other.

[167] Monica Araya et al, "Trade and the Environment at the WTO: the need for a Constructive Dialogue" Available at http://www.sice.oas.org/tunit/pubinfo.asp [Accessed on 29/07/2007]

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