

International Trade Regulation and Environmental Governance in the WTO and the NAFTA: Selected Thematic Lessons for SADC in Transition

By



University of Fort Hare
Together in Excellence

A Thesis submitted in Fulfilment of the Requirements for the Degree of Master of Laws in the Nelson R. Mandela School of Law, Faculty of Law, University of Fort Hare

Supervised by:

Professor Patrick C. Osode

Date of Submission:

13 December 2005

Acknowledgments

I would like to thank the Nelson Mandela School of Law for affording me the chance to study and research on this topic. Many thanks go to Professor Patrick Osode, the current Director of the School of Law and supervisor of this research, for his patient guidance and professional directing of the study.

This study would not have been possible without the generous financial assistance from PPS Insurance and Govan Mbeki Research Centre. In this regard, I would like to express my gratitude to Mathew Fourie of PPS Insurance and Professor Andy Gilbert of Govan Mbeki Research Centre. However, opinions expressed herein and conclusions arrived at are those of the author and are not necessarily attributable to PPS Insurance or Govan Mbeki Research Centre.

Of all my colleagues at the Alice Campus, I will only mention Mlungisi, Xolela, Masibonge, Qaqamba, Nombulelo, Amos and Derrick for months of advice, information, constructive criticism and friendship. To the rest of the people who helped me in one way or the other, I wish to express my sincere gratitude.

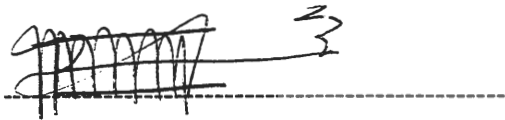
To all the people who helped me to access the relevant information at Law libraries dotted across South Africa, I express my heartfelt gratitude. The law librarians and their assistants at the following campuses do deserve special mention: The University of Fort Hare in Alice and East London, Rhodes University in Grahamstown, Nelson Mandela Metropolitan University in Port Elizabeth, UNISA in Pretoria and The University of Pretoria. This study would not have been possible without the assistance from the Library staff.

Lonias Ndlovu

Alice, 13 December 2005

Declaration

I, Lonias Ndlovu do hereby declare that except for references specifically indicated as such in the text, and any other help as I have acknowledged, this thesis is wholly a product of my own research, analysis and industry and has not been submitted in fulfilment of the requirements for degree purposes at any other University.

A handwritten signature in black ink, appearing to read 'Lonias Ndlovu', is written over a horizontal dashed line.

Alice

13 December 2005



University of Fort Hare
Together in Excellence

Summary

This study focuses on the theme of international trade regulation and environmental governance in the context of the WTO and the NAFTA with a view of extracting possible thematic lessons for SADC in transition. The theme is pursued through an examination of the trade and environment debate in its proper theoretical and historical context together with an examination of the trade and environment jurisprudence in the WTO and the NAFTA. From the case law analysed and critiqued, possible thematic lessons for SADC in transition are extracted.

From the findings of the study, it emerges that the trade and environment debate is alive at both the WTO and the NAFTA and that the SADC can learn a few lessons from both Organisations in terms of avoiding trade and environment disputes. While the WTO has scored partial success in the resolution of trade and environment disputes, the NAFTA experience may be considered an eye opener. The NAFTA does have provisions that are specific to the solution of trade and environment matters. The NAFTA and WTO provisions on the settlement of trade-environment disputes shed light on a future SADC trade and environment regime as discussed in the conclusion of this study.

In terms of the structural outline, this study is divided into eight chapters as follows: Chapter one lays out the background to the study while chapter two focuses on the historical and factual setting for the trade and environment debate. Chapter three outlines the WTO dispute settlement mechanism and its contribution (positive and negative) to the resolution of trade-environment disputes. Chapter four is dedicated to an analysis of the *US-Tuna* (Mexico), *US-Gasoline* and *US-Shrimp* disputes in as far as they have thematic lessons for SADC premised on the conservation of exhaustible natural resources. Chapter five analyses the *EC-Asbestos* dispute and extracts possible lessons for SADC. In chapter six, the Agreement on the Application of Sanitary and Phytosanitary Measures is analysed against a backdrop of the *EC-Hormones* dispute. Chapter seven is dedicated to an analysis of the NAFTA trade-environment provisions on dispute settlement and the case law discussed is thereunder. The overall conclusion of the chapter is that NAFTA provisions are environmentally-friendlier than their

WTO and SADC counterparts hence they should be regarded as a model and adopted. Finally Chapter eight concludes the study by way of a summary, conclusions, recommendations and a tentative agenda for future research.

The study's recommendations fall under three broad heads namely:

- Recommendations with respect to the resolution of the trade and environment debate in general;
- recommendations pertaining to WTO law reform in trade-environment matters; and
- recommendations specific to improving the emerging SADC dispute settlement mechanism in anticipation of trade-environment disputes in the region.

I have attempted as far as possible to state the law as at December 2005.



University of Fort Hare
Together in Excellence

List of Abbreviations and Acronyms

AB	Appellate Body
AJIL	American Journal of International Law
CFCs	chlorofluorocarbons (CFCs),
CITES	Convention on International Trade in Endangered Species
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
CTE	Committee on Trade and Environment
DDT	Dichlorodiphenyltrichloroethane
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EJIL	European Journal of International Law
EMIT Group	Group on Environmental Measures and International Trade
EPA	The U.S Environmental Protection Agency
EU	European Union
FCTC	Framework Convention on Tobacco Control
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organism
ILM	International Legal Materials
ITO	International Trade Organisation
MEAs	Multilateral Environmental Agreements
MFN	Most Favoured Nation
MMPA	Marine Mammal Protection Act
NAFTA	North American Free Trade Agreement
NGO	Non Governmental Organisation

OECD	Organisation for Economic Cooperation and Development
PCBs	Polychlorinated Biphenyls
PPMs	Process Production Methods
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SPS	Agreement on Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TEDs	Turtle-excluder devices
TRIPS	Trade Related aspects of Intellectual Property Rights
U.S	United States
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
VER	Voluntary Export Restraint
WHO	World Health Organisation
WTO	World Trade Organisation



University of Fort Hare
Together in Excellence

TABLE OF CONTENTS

CONTENTS	PAGE
Acknowledgements	i
Declaration	ii
Summary	iii
List of abbreviations and acronyms	iv
Chapter One: Research Problem, Delimitation and Context	
1. Background	1
1.1 Statement of the Problem	5
1.2 Literature Review	8
1.3 Assumptions Underlying the Research	13
1.4 Aims and Objectives of the Study	13
1.4.1 Aims	13
1.4.2 Objectives	13
1.5 Research Methodology	14
1.6 Justification and Limitations of the Study	16
1.6.1 Preliminary Remarks	16
1.6.2 Justification of the Study	16
1.6.3 Limitations	17
1.7 Structure of Thesis	18
Chapter Two: The Historical and Factual Setting for the Trade and Environment Debate	
2. Introduction	20
2.1 The WTO and the Environment: General	20
2.2 The Core Non-Discrimination Principles	22
2.3 The WTO and the Environment: Specific Provisions	25
2.4 Aims And Objectives Of The WTO	27
2.5 The WTO and the Environment: a Historical Overview	28
2.5.1 Preliminary Remarks	28



University of Fort Hare
Together in Excellence

2.5.2 The Early Years: Emerging Trade and Environment Debate in the WTO	28
2.5.3 The 1971 GATT Study	30
2.5.4 Emit-GATT Group on Environmental Measures and International Trade	30
2.5.5 New Developments, 1971-1991	31
2.5.6 Further Developments: The 1992 Rio Summit and Beyond	32
2.5.7 1994: The Marrakesh Agreement and the Decision	33
2.5.8 The 1994 Ministerial Decision	34
2.5.9 Recent Developments	35
2.5.9.1 WTO Symposium: Challenges Ahead on the Road to Cancun	36
2.5.10 Multilateral Environmental Agreements and the WTO	37
2.5.10.1 Some MEAs with a Bearing on International Trade Law	38
2.5.10.1.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna	38
2.5.10.1.2 The Convention on the Regulation of Whaling	39
2.5.10.1.3 The Montreal Protocol on Substances That Deplete the Ozone Layer	39
2.5.10.1.4. The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal	40
2.5.10.1.5. The Helsinki Rules on the Uses of the Waters of International Rivers (1966)	40
2.5.10.2 Kinds of Conflict That Could Arise Between WTO Rules and MEAs	41
2.5.10.3 Should WTO Rules be Changed to Accommodate Trade Measures In MEAs?	43
Conclusion	44
Chapter Three: Dispute Settlement under the WTO	
3. Introduction	45
3.1 Substantive issues in Dispute Settlement	45
3.1.1 Nullification or Impairment	48
3.1.2 Attainment of objectives being impeded	49
3.1.3 Violation and Non-Violation Cases	49
3.2 Procedural Aspects of the WTO Dispute Settlement Process	52
3.2.1 Background	52
3.2.2 The various stages in the dispute settlement process	54
3.2.2.1 Consultation	54

3.2.2.2 Other Interested Members	54
3.2.2.3 The Panel Process	55
3.2.2.4 Panel Procedure	55
3.2.2.5 Appeals and Related Procedure	56
3.2.2.6 Possible Steps after the Dispute Has Been Decided	57
3.3 Notable Criticisms against WTO Dispute Settlement Procedures	58
Conclusion	60

Chapter Four: Trade and Environment Jurisprudence: The conservation of Exhaustible Natural Resources

4. Introduction	61
4.1 The Applicable provisions of Article XX of GATT 1994	62
4.1.2. General requirements under Article XX	64
4.1.3 Requirements under Article XX (g)	65
4.1.4 Article XX Chapeau	65
4.1.4.1 Arbitrary or unjustifiable Discrimination	65
4.1.4.2 A Disguised Restriction on International Trade	66
4.2 The Tuna-Dolphin Dispute	67
4.2.1 Background	67
4.2.2 Establishment of the Panel: The Parties' Contentions	68
4.2.3 The Panel's Findings	69
4.2.4 Commentary/Analysis	71
4.3 The Gasoline Dispute	73
4.3.1 Background	73
4.3.2 Establishment of the Panel: The Parties' Contentions	74
4.3.3 The Panel's Findings	75
4.4.4 Issues Raised on Appeal	76
4.4.5 The Appellate Body's Decision	76
4.4.6 Commentary/Analysis	79
4.5 The Shrimp-Turtle Dispute	85
4.5.1 Background	85
4.5.2 Establishment of the Panel: The Parties' Contentions	87
4.5.3 The Panel Findings	87

4.5.4 Issues Raised on Appeal	89
4.5.5 The Appellate Body Findings	90
4.5.6 Commentary/Analysis	94
Conclusion	96

Chapter Five: Trade and Environment Jurisprudence: The Protection of Human Health

5. Introduction	104
5.1 Requirements under article XX (b): The Necessity Test	105
5.2 The Agreement on Technical Barriers to Trade	106
5.3 The Asbestos Dispute	109
5.3.1 The Factual Background	109
5.3.2 Establishment of the Panel: The parties' Contentions	110
5.3.3 Summary of the Panel's Findings	110
5.3.4 Matters Raised on Appeal	114
5.3.5 Highlights of the Appellate Body's Findings	115
5.3.6 Summary of Appellate Body Findings	115
5.3.7 Commentary/ Analysis	121
Conclusion	123



University of Fort Hare
Together in Excellence

Chapter Six: Trade and Environment Jurisprudence: The Agreement on the Application of Sanitary and Phytosanitary Measures

6. Introduction	127
6.1 The Agreement on Sanitary and Phytosanitary Measures	128
6.1.1 A Brief Overview of the SPS Agreement	129
6.2 The relevant WTO Jurisprudence: The EC – Hormones Dispute	135
6.2.1 The Legal and Factual Background to EC-Hormones	136
6.2.2 Establishment of the Panel: The Parties' Contentions	137
6.2.3 Summary of the Panel Findings	139
6.2.4 Matters Raised on Appeal	139
6.2.5 Summary of the Appellate Body Findings	140
6.3 Analysis and Conclusions	143

Chapter Seven: Trade, Environment and Dispute Resolution under the North American Free Trade Agreement

7. An overview	150
7.1 The NAFTA, Dispute Settlement and Environment	154
7.2 A cursory Note on Procedural Aspects	156
7.3 Examples from Case Law	157
7.4 Pope and Talbot v Canada	158
7.3.2 S.D Myers Inc v Canada	159
7.3.3 Metalclad v United Mexican States	161
7.4 Documented Positive Aspects of NAFTA	166
7.5 General Criticism of the NAFTA Dispute Settlement Regime	169
Conclusion	173



Chapter Eight: Summary, Conclusions and Recommendations

8. Introduction	178
8.1 A brief Overview of the Research aims and objectives	179
8.2 Chapter Summaries and Principal Findings	182
8.2.1 Historical and Theoretical foundations	181
8.2.2 Dispute Settlement Issues	182
8.2.3 The Conservation of exhaustible Natural Resources	183
8.2.4 Human Health Issues	185
8.2.5 Sanitary and Phytosanitary Measures	186
8.2.6 The NAFTA and the Trade and Environment Debate	187
8.2.7 Matters Arising	188
8.3 Overall Conclusion of the Study	188
8.4 Recommendations	191
8.4.1 The Trade and environment debate in General	191
8.4.1.2 The Establishment of a World Environment Organisation	195
8.4.1.3 The Ugly Face of Unilateralism	197

8.4.1.4 Government Anger v Consumer Anger	198
8.4.2 Proposals for WTO Law Reform	199
8.4.2.2 Making the WTO More Transparent	200
8.4.2.3 The Case for the Provision of Legal Assistance to Developing WTO Members	201
8.4.2.4 The Case of Ineffectual WTO Remedies	203
8.4.2.5 The case for the renegotiation of Article XX	204
8.4.3 Towards a Positive Transformation of the SADC	205
8.5 Agenda for Future Research	208
8.6 Chapter Summary	209
Bibliography of Works Cited	211
Table of Cases	228
GATT and WTO Case Law	229
NAFTA Case Law	232
Table of Statutes	234
Statutes: Southern Africa	233
Statutes: United States	233
List of Conventions and International Instruments	234



University of Fort Hare
Together in Excellence

CHAPTER ONE

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible be used on an international consensus.¹

Research Problem, Delimitation and Context

1. Background

Countries of the world have been involved in international trade since time immemorial.² There are obvious benefits from trade with other countries such as improved quality of life, competition, widened consumer choices, economic integration, friendship, increased employment and so on.³

However coupled to these gains from trade are inherent problems emanating from trade liberalization. One of the dominating complaints today is that the countries' obsession with trade liberalization has resulted in environmental degradation.⁴ This has resulted in a conflicting relationship between trade and environmental issues; the

¹ Principle 12 of the Rio Declaration on Environment and Development, adopted 4 June 1992, United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1, reprinted in 31 ILM 874, 878 (1992), available at <http://www.earthsummit2002.org/toolkits/women/un-doku/un-conf/earth%20rio%20decl.htm>.

² Douglas A. Irwin, "A Brief History of International Trade Policy" at <http://www.econlib.org/library/Columns/Irwintrade.html> [13 November 2005], citing prominent authorities such as Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1952), Frederic Bastiat, *Economic Sophisms* (1996) and Bhagwati Jagdish, *Free Trade Today* (2002), traces the history of international trade from the ancient Greeks to the present, through mercantilism to present day theoretical challenges to free trade against a backdrop of the existence of institutional infrastructures such as the WTO.

³ See generally, Samuelson's theory of gains from trade and Adam Smith's theory of comparative advantage discussed in detail in Lipsey and Harbury, *First Principles Of Economics* (1992) at 340-359 and Smith et al *Economics: A South African Perspective* (1996) at 124-139.

⁴ Fredrickson (ed) *Trade, Global policy and the environment, World Bank discussion paper no.402* (1999) at 15.

chief adversaries being environmentalists on the one hand and free trade advocates on the other. There definitely is a growing concern about potential adverse environmental impacts from increasing trade.⁵ With the demise of communism, the free trade ideology is apparently triumphant; yet at its moment of triumph, fundamental problems, such as the adverse environmental effects of free trade are emerging.⁶

Confronted by the above conflict, one cannot help but ask the following pertinent questions:

- 1) How can it be ensured that countries engage freely in international trade and offer their populations improved economic conditions without causing environmental effects that are irreversible?
- 2) How does trade liberalization affect the environment and how does environmental policy influence trade flows?
- 3) Does increased economic integration induce policymakers to seek to improve the ability of domestic industry to compete with their foreign rivals through the dilution of environmental regulations?
- 4) What are the possible ways to reduce any negative environmental effects from freer trade?
- 5) How do trade measures influence a country's decision to participate in global environmental discussions?
- 6) What are the environmental impacts of the various regional, bilateral and multilateral trade liberalization programmes undertaken by subject countries?
- 7) Do specific GATT⁷ and WTO⁸ rules on trade in goods enhance or compromise environmental standards?

⁵ See generally, Werner Scholtz, "The Relationship Between the Environment and Trade in the WTO: Prolonging the Conflict Between North and South?" (2004) 18 *Speculum Juris* 250-265 for a discussion of the trade and environment debate from a North – South perspective.

⁶ Tim Lang and Colin Hines, *The New Protectionism: Protecting the Future Against Free Trade* (1993).

⁷ The General Agreement on Tariffs and Trade (1947 and 1994) hereinafter the GATT. GATT 1947 means the original GATT of 1947 along with all its amendments till 31 December 1994. The main text of the GATT 1947 is given at the end of the of the WTO publication, *The results of the Uruguay round of multilateral Trade negotiations: The Legal Texts*. GATT 1994 means GATT 1947 plus the decisions taken under it until 31 December 1994, plus the Uruguay round understandings in six areas namely: other duties and charges, state trading enterprises, balance of payment provisions, customs unions and

- 8) What measures has the SADC, in its metamorphosis into a free trade area, put in place in anticipation of the impact of trade liberalization on the environment?

In a bid to address these and other pertinent questions, this research seeks to increase the level and scope of our knowledge about the nexus between trade liberalization and global and local environmental quality. The research does not offer a final solution to the above issues but provides new perspectives and thinking on the questions interrogated. The research should go a long way towards helping policymakers

free trade areas, waivers of obligations and tariff modifications. It also includes the new protocol on tariff concessions adopted in Marrakesh in 1994. [Bhagirath Lal Das, *The World Trade Organisation: A guide to the framework for international trade* (1999) at 9-10]

⁸ Established on January 1 1995, the World Trade Organisation provides a forum for implementing the multilateral trading system, negotiating new trade agreements and resolving trade disputes. The concept of a WTO dates back to 1919 when United States president Woodrow Wilson proposed a 'World Trade Board' as part of the Covenant of the League of Nations. The 'Board' dropped out in a later draft, but the idea did not die. An international Trade Organisation (ITO) was approved by a united Nations Conference in 1948 but the organization never eventuated due to opposition in the U.S Congress. The agreement establishing the World Trade Organization, which was signed in Marrakesh, Morocco in 1994, incorporates the original GATT which continues to apply to issues not covered by the more specific agreements negotiated during the Uruguay round. The trade rules of this organization are constantly negotiated and broadened to cover a number of issues that were not included or anticipated during the signing of the initial agreement. Each negotiation, which focuses on specific aspects of international trade such as tariffs or subsidies is called a round and usually assumes its name from the place in which it is negotiated. Examples are Geneva (1947); Annecy (1948); Torquay (1950); Geneva (1956); Dillon (1960-1961); Kennedy (1964-1967); Tokyo (1973-1979) and Uruguay (1994-1994) rounds. The last significant meeting of the WTO was in the city of Cancun in Mexico in 2003 where the talks broke down due to serious disagreements between the developed and developing nations over negotiations on the 'Singapore issues'. The issues emerging from the Singapore conference in December 1996 relate to investment, competition, government procurement and trade facilitation. For a further note on the Cancun debacle and related issues, see Ramesh Jaura, " 'Mixed Feelings' about the Debacle" at <http://www.globalpolicy.org/socecon/bwi-wto/wto/2003/0915mixedfeelings.htm> [30 Nov 2005] and Global Policy Forum, "The WTO's Fifth Ministerial Conference, Cancun, Mexico, September 10 to 14, 2003" at <http://www.globalpolicy.org/socecon/bwi-wto/idxcancun.htm> [30 Nov 2005]. The next WTO Ministerial Conference, the sixth one since the WTO was founded will be held in Hong Kong, China, from the 13th to the 18th of December 2005. See http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm [30 Nov 2005] for further details pertaining to the objectives of the conference, its background and preparations thus far.

develop improved local and global environmental trade policies. The importance of these issues can only be felt in the future hence the specific reference to the yet-to be established SADC free trade area. This is more so because the world is increasingly becoming an integrated place in which trade flows if handled well, may generate substantial benefits for the world's poor.

When the GATT rules were agreed upon more than 50 years ago, interest in environmental matters was minimal.⁹ The position however has changed with the advent of the WTO and a proliferation of multilateral environmental and trade agreements.¹⁰

Citizens throughout the global community have now come to see trade liberalization as the core of a profound and proliferating process of globalisation that has reached into their daily lives, which can cause, and has already caused widespread environmental costs through processes that they can neither fully comprehend nor control.¹¹ This has provoked opposition to trade liberalization from civil society and the general citizenry resulting in protests,¹² some assuming violent proportions.

⁹ That could partly be the reason why there is no GATT provision that specifically deals with trade and environment matters. Article XX of the GATT, widely relied upon by many writers and commentators as containing provisions on GATT and the environment does not specifically refer to the environment. It alludes to environmental matters in articles XX (b) and XX (g). For a full discussion of the relevant provisions of article XX, see Chapters Three to six below. On the issue of whether the WTO exceptions should be renegotiated to specifically make for a provision that explicitly refers to the environment, see the recommendations in chapter eight below.

¹⁰ Examples are: The principles adopted at the earth summit in Rio De Janeiro in 1992, Convention on international trade in endangered species of wild flora and fauna (CITES), The Montreal protocol on substances that deplete the ozone layer, The Basel convention on the control of transboundary movements of hazardous waste and their disposal, Kyoto protocol on climate change and The convention on persistent organic pollutants of 2001 among other multilateral agreements. See also the brief discussion of Multilateral Environmental Agreements (MEAs) in chapter two below.

¹¹ John J. Kirton and Virginia W. McLaren, "Forging the trade-environment-social cohesion link: Global challenges NAFTA experiences" in John J. Kirton and Virginia W. McLaren (eds) *Linking Trade, Environment and Social Cohesion* (2002) at 1 (hereafter Kirton and McLaren).

¹² Large and violent protests were witnessed at the Seattle WTO ministerial Conference in 1999, at the United Nations conference on trade and development (UNCTAD) in Bangkok, Thailand and the international monetary fund in Washington and Prague in 2000. The WTO Ministerial held in the City

It is also interesting to point out that when viewed through the eyes of the developed and developing worlds, the trade and environment debate has tinctures of irony. Developed countries are concerned about loss of comparative advantage in certain industries due to more stringent domestic environmental regulations while developing countries on the other hand are worried that trade liberalization will promote liberalization in less environmentally friendly industries thus aggravating environmental damage.¹³ It is however submitted that the conflictual relationship runs much deeper than the superficial extent proposed by Judith M. Dean.¹⁴

1.1 Statement of the Problem

The nature of the trade and environment conflict can be briefly stated as follows. The use of trade measures such as restrictions and sanctions as tools for environmental protection at the international level is the most opposed and controversial. Proponents for free trade argue that the use of the above measures is tantamount to the abuse of environmental standards for protectionist ends. This is particularly so if the imposition of the standard amounts to a unilateral act which blocks the entry of a specified product into the market of another member state for reasons other than environmental protection.¹⁵ It should be remembered that concern for the environment, real or imaginary, could become an additional weapon in the protectionist lobby's armory.¹⁶

of Cancun, Mexico in 2003 was also preceded by violent demonstrations. According to SABC News, "WTO Under Pressure to Include Fair Trade Deal" at <http://www.sabcnews.com/world/asia/pacific/0.2172.117899.00.html> [12 December 2005], thousands of people took to the streets in Hong Kong ahead of the WTO Ministerial to be held on 13-18 December 2005. Almost all meetings of the G8 that this writer can recall have always been characterized by violent protests and demonstrations.

¹³ Judith M. Dean "Testing the impact of trade liberalization on the environment: Theory and evidence" in Fredriksson op cit note 4 at 55.

¹⁴ Judith M. Dean, Ibid.

¹⁵ The argument that free trade should now take environmental effects into serious account has obvious tinctures of irony if viewed from the perspective of developing countries' attempts at penetrating world markets. Developed countries and donors that hitherto encouraged export promotion as a package to improve macroeconomic performance now encourage the conservation of natural resources. There is more than a hint of hypocrisy in these pronouncements [S. Mansoob Murshed, "The Environment and the North-South interaction" in S. Mansoob Murshed and Kunnibert Raffer, *Trade, transfers and Development: Problems and Prospects for the Twenty-First Century* (1993) at 46-47]

¹⁶ S. Mansoob Murshed op cit note 15 at 47.

The argument generally hovers between 'free traders', the 'centrists' and environmentalists who are the most vocal. Environmentalists passionately and convincingly argue that unrestricted free trade will lead to self-destruction and, therefore, demand the use of trade measures to obviate that eventuality.¹⁷

As previously stated,¹⁸ the GATT is not very helpful when it comes to the resolution of the trade and environment conflict.¹⁹ This is more so, since at the most rudimentary level, the GATT aims at the liberalization of trade whereas environmental policies are enforced through the instrumentality of trade-restrictive devices such as product standards, licenses, quotas etc. Article XX of the GATT exempts some national measures from compliance with some GATT fundamental provisions²⁰ as long as they do not constitute a means of arbitrary or unjustified discrimination between contracting parties.²¹ However it has to be pointed out that there is no specific reference to the environment in article XX.²² This then begs the question: Should articles XX (b) and XX (g) be interpreted broadly to include measures aimed at environmental protection? Further, would this not open the floodgates to protectionist tendencies on a global scale?

University of Fort Hare

The trade and environment conflict cannot be allowed to hover nebulously in global skies above our regional heads as if we, as a region do not have our own share of

¹⁷ See Werner Scholtz, "The relationship Between the environment and Trade in the WTO: Prolonging the Conflict between North and South" (2004) 2 *Speculum Juris* 250.

¹⁸ See note 9 above.

¹⁹ For a complete overview of GATT/WTO law and environmental protection, see Robert Howse and Michael J. Trebilcock, "The Free Trade – Fair Trade Debate: Trade, Labour and the Environment" in Jagdeep S. Bhandari and Alan O. Sykes, *Economic Dimensions in International Law* (1997) at 186-187; Thomas J. Schoenbaum, "Free International Trade and Protection of the Environment: Irreconcilable Conflict?" (1992) 86 *American Journal of International Law* 700-727 and Ernest – Ulrich Petersmann, *WTO (1995) Guide to GATT Law and Practice* at 22-52.

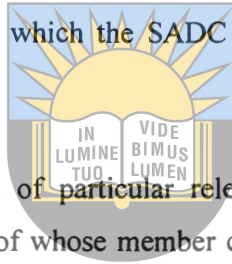
²⁰ Such as the prohibition against discrimination by calling for equal treatment of imports and exports for tax purposes and the national treatment principle among other pertinent provisions.

²¹ Furthermore, article XX (b) permits use of measures necessary for the protection of human and animal health while article XX (g) permits the employment of measures necessary for the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic consumption or production.

²² As previously pointed out above at note 9.

trade and environment problems. The conflict has to be reduced to the regional context of a metamorphosing SADC. As the SADC transforms itself into a regional trade grouping, namely a free trade area,²³ there is a compelling need to look at the trade and environment debate in the context of the region and reflect meaningfully on the implications. This will help the region develop a watertight regional trade and environment policy for possible export to the developed world. Such a home-grown policy would ensure a harmonious co-existence between free trade and sustainable environmental exploitation.

In pursuit of the regional trade-environment model, this research will explore whether or not the North American Free Trade Area,²⁴ a regional trade grouping located in a totally different environment to the SADC, provides a good model for advancing regional sustainable development which the SADC can adopt *holus bolus* or with some modifications.



The trade-environment debate is of particular relevance to developing countries especially the SADC, a majority of whose member countries are bedevilled by high unemployment, low or negative economic growth, lack of modern technology and other economic ills. This is a region in desperate need of the benefits of trade liberalization while at the same time struggling to preserve its fast degrading

²³ A free trade area is formed when a group of states have reduced or eliminated trade barriers between themselves, but maintain their own individual tariffs in their trade with other states which are not members of the free trade area. The North American Free Trade Area (NAFTA) is a good example of a free trade area, initially formed between the United States, Canada and Mexico. The GATT makes provision for the formation of free trade areas in Article XXIV. The Southern African Development Community (hereafter SADC or the SADC) formed in 1992 takes over from the Southern African Development Coordination Conference (SADCC) of 1980. The SADC adopted a trade Protocol in 1996 and this Protocol has made provision for the phased elimination of tariff and non-tariff barriers to trade with guidelines given as to how the process is to be pursued. This will eventually result in a free trade area being formed. The preamble, articles 4(principles), 5 (objectives) 6 (undertakings) 16 (the tribunal) 21 (areas of co-operation) 23 (NGOs) 32 (settlement of disputes) and 33 (sanctions) of The Declaration and Treaty of the SADC on < www.ucnrosa.org.zw/elisa/SADC-protocols/declaration%20-treaty.html> (Visited on 22 Feb 2004) are very pertinent to this research and are dealt with in Chapter eight below.

²⁴ Hereafter, the NAFTA.

liberalization at the expense of the environment and environmental protection at the expense of free trade, economic prosperity and development.

*How can we speak to those who live in villages and in slums about keeping the Oceans, the rivers and the air clean when their own lives are contaminated? Are not poverty and need the greatest polluters?*²⁴

It is submitted that it is not only poverty but also development activities undertaken without due regard to their adverse environmental impact that contaminate natural amenities. Even the economic development which some developing countries simplistically believe takes precedence over environmental matters can still be achieved if concerted efforts are made to do it in a sustainable manner.²⁵

1.2 Literature Review

The theoretical debate about the relationship between international trade and the environment remains unresolved. There are two principal schools of thought on this issue. There are those, such as Bhagwati and others,²⁶ who regard environmental concerns as separate and distinct from the regulation of international trade. Environmental issues should instead therefore be dealt with through the appropriate MEAs.²⁷ Others argue that it is essential to consider environmental issues within trade agreements such as the WTO rather than treat them in isolation.²⁸ Given that the Committee on Trade and Environment²⁹ has been charged with bringing the WTO and

²⁴ Indira Gandhi, the late Prime Minister of India, quoted in A.M Sonjela "Developing countries' perceptions of environmental protection and economic development (1984) 24 *Indian Journal of International law* 489 at 493.

²⁵ Patrick. D.Okonmah "The right to a clean environment: The case for the people of oil-producing communities in the Nigerian delta" (1997) 41 *Journal of African Law* 43 at 60.

²⁶ J.N Bhagwati, *Free Trade Today* (2002) at 78.

²⁷ Bhagwati, *ibid*.

²⁸ See C.L Deere, and D.C Esty, (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (2002) at 113.

²⁹ The Ministerial decision on trade and the environment, adopted in Marrakesh on 15 April 1994, called for the establishment of a Committee on Trade and the Environment whose mandate was to identify the relationship between trade measures and environmental measures and make recommendations as to whether any changes to the multilateral trading system are required. See http://www.wto.org/english/tratop_e/envir_e/issu1_e.htm [7 Dec 2005].

MEAs closer together as part of its Doha responsibilities, the latter viewpoint better reflects the current state of play with respect to the issue.³¹

The increasing awareness of environmental problems with international or global dimensions in recent years has led to a growing interest in interactions between international trade and the environment.³² The overall effect of trade liberalization on the environment can either be positive or negative depending on the case examined.³³

There is no agreement on the methodology of environmental protection at the international level. The use of trade measures such as standards, quotas, import bans and taxes to enforce compliance with environmental standards are the most controversial. If the fear of environmental degradation as a result of free trade is taken to the extreme, the aims and objectives of the GATT and WTO will be frustrated and autarky will result.³⁴

³¹ For a account of the most recent books on the trade and environment debate from the perspective of the European Union and the Americas, see Joost Pauwelyn, "Recent Books on Trade and the Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *European Journal of International Law* 575 – 592. For scholarly accounts on trade and the environment generally, see Olaf Unterberdoerster, "Trade Policy and Environmental Regulation in the Asia – Pacific: A Simulation" (2003) 26 *World Economy* 73; Eric Neumayer, "Does Trade Openness Promote Multilateral Environmental Cooperation?" (2002) 25 *World Economy* 815; John Bghin and Michel Potier, "The Effects of Trade Liberalisation on the Environment in the Manufacturing Sector" (1997) 20 *World Economy* 435; Michel J. Ferrantino, "International Trade, Environment Quality and Public Policy" (1997) 20 *World Economy* 43 and Mathew A.Cole and Robert J.R Elliot, "Do Environmental Regulations Influence Trade Patterns? Testing Old and New Trade Theories" (2003) 26 *World Economy* 1163.

³² Kirton and Maclaren op cit note 10 at 3.

³³ This is due to the ideological and economic differences between developed and developing countries. To the developed world, the most urgent priority at the moment is the environment and terrorism while developing countries are worried about poverty alleviation, hunger and low living standards that take precedence over environmental concerns. Developing countries want to take part in global trade to improve the lives of their peoples especially farmers; access to international markets may be unjustifiably and illegally protected by environmental laws.

³⁴ See the remarks of C.F Runge "Economic Trade and Environment Protection", paper prepared for the conference on environmental policy with economic and political integration: The European community and The United States, September 30-1 October 1993, University of Illinois at Urbana-Champaign. The term *autarky* refers to the absence of trade induced by inward looking trade policies. China under Mao Tsetung Cambodia under Pol Pot, Burma and Albania once tried to boycott

The exercise of comparative advantage and more open trade is not inconsistent with overexploitation of globally scarce resources.³⁴ For example if a country is endowed with a resource that is locally abundant but globally scarce, then this resource could better be conserved than traded. However other countries that hitherto traded with the fortunate country may complain and even go to the extent of approaching the WTO if there is a unilateral ban on the trading of the scarce resource in the name of preserving an exhaustible natural resource.³⁵

The WTO Committee on Trade and Environment (CTE) has engaged in debate over the relationship between multilateral environmental agreements ³⁶ (MEAs) and the WTO rules. Some of the MEAs directly refer to trade and the environment while others generally deal with pure environmental matters.

The WTO and its predecessor, the GATT has had to deal with environmentally related trade disputes and attempt a settlement. The most common issue has been whether or not a particular state may impose its own higher standards of environmental protection in order to prevent the import of goods unable to match those standards. The secondary issue that features prominently in the case law is whether those higher environmental protection standards can be applied to production activities taking place outside a state's jurisdiction.³⁷ Clearly there is a need for a reconciliation of the

international trade and focus only on domestic trade for ideological reasons but failed to sustain the boycotts.

³⁴ Runge, op cit note 26 at 19.

³⁵ This is *prima facie* legal as it complies with the exception in article XX (g) of the GATT.

³⁶ Some multilateral environmental agreements of note are: The Montreal protocol on substances that deplete the ozone layer (1987), The convention on biological diversity (1992), The framework convention on climate change (1992), The Kyoto protocol, The international timber agreement (1994), The Rotterdam convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade (1998) also known as the 'PIC' convention and others that are referred or alluded to in parts of this study. For a comprehensive list of MEAs with trade provisions, see table 8.1 in Phillip Evans and James Walsh, *The EIU Guide to World Trade under the WTO* (1995) at 62-63.

³⁷ See generally the cases discussed below in chapter Four. In the first *Tuna/dolphin* case, the United States lost because it was held that she was trying to exercise extra-territorial influence by dictating a conservation measure to the Mexicans. In the second *Tuna/dolphin* case, the Appellate body found against the United States but did leave the door open in the subsequent case for states to impose

competing interests of international trade and the protection of the environment. A solution must be found which respects the principles of sustainable development³⁹ by catering for the needs of developing states but at the same time preserving the resources of the planet to provide for the needs of future generations.⁴⁰

Decisions, which illustrate the conflict between environmentally sensitive laws and policies and the interest of free trade and unrestrained development policies, have been widely criticized by environmentalists.⁴¹

One major innovation of the Uruguay round negotiations was the adoption of detailed arrangements in respect of dispute settlement.⁴² If a dispute between WTO members cannot be settled by consultation or other informal means then the Dispute Settlement

restrictions so as to influence environmental protection for an exhaustible natural resource pursuant to an environmental agreement. In the *Shrimp/turtle* case, the United States actions in prohibiting import of shrimp from various Asian countries on the basis that their harvesting methods threatened species of turtle were held to be in breach. In the *Herring and Salmon* case, Canada insisted that salmon and herring caught in Canadian waters were to be processed in Canada before exportation for conservation and data processing purposes. The United States argued that the requirement was neither necessary nor useful. The GATT panel found that the ban on exports by Canada was not necessary for conservation as this could be achieved by other means. In the *Thai Cigarette* case, Thailand's ban on cigarette imports from the United States was found to be in compliance with article XX (b) but other less restrictive measures to trade were available.

³⁹ The term sustainable development means 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The World Commission on Environment and Development adopted this definition in 1987. Sands; *Principles of International Environmental Law* (1995) cites the same definition at 198.

⁴⁰ John Dugard, *International Law: A South African Perspective* (2003) at 323. Hereafter Duggard.

⁴¹ See further on this subject, T.J. Schoenbaum "International Trade and The Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91 AJIL 268.

⁴² Dugard, op cit note 32 at 371-372. Dispute settlement is now contained in the Dispute Settlement understanding (commonly referred to as the DSU) attached to the WTO agreement as annex 2. While the DSU is in some respects a consolidation of the practice that had developed over the years under the GATT of 1947, it goes beyond these arrangements in a number of important respects. Pursuant to article 2 of the DSU, "The DSB shall have the authority to establish panel, adopt panel and appellate body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and obligations under the covered agreements". See further, chapter three below.

Body (hereafter, DSB), upon request by a complaining party is obliged to establish a panel and adjudicate on the matter.⁴³ The DSU also provides for the establishment of a standing appellate body that shall hear appeals from panel cases.⁴⁴ Panels operate in a manner akin to other ad hoc arbitration tribunals under international law.⁴⁵

The other significant element of the legal regime of international economic relations has been the increasing trend towards regional integration through the establishment of free trade areas and customs unions.⁴⁶ The SADC as a regional grouping in transition towards becoming a free trade area is likely to confront problems that are environmentally related in the context of trade. The tribunal established by article 16 of the SADC now does have its own dispute settlement rules and indications are that should the free trade area be established, environmentally related trade problems will overwhelm the tribunal considering the disparate development situations in individual SADC member countries.⁴⁷

The experience of the NAFTA, though too limited to be a guiding example was useful in this study. NAFTA's 'green' provisions can be readily separated into six categories⁴⁸ namely: the preamble provisions, standards related measures, sanitary and phytosanitary measures, dispute resolution procedures, preservation of trade measures in international agreements and environmentally sensitive investment



University of Port Harcourt
Together in Excellence

⁴³ DSU article 6.

⁴⁴ DSU article 17.1.

⁴⁵ Dugard op cit note 32 at 323.

⁴⁶ Birnie P.W and Boyle A.E "International Law and The Environment" in Duggard, op cit note 32 at 342. An example of a regional trade grouping in the form of a free trade area is The North American Free Trade area (NAFTA). The Southern African Customs Union (SACU) whose membership includes South Africa, Namibia, Botswana, Swaziland and Lesotho exemplifies a customs union in Southern Africa. The Southern African Development Community (SADC), which is the subject of this research, intends transforming itself into a free trade area by 2008. Progress in this regard has been slow with member countries taking too long to ratify the treaty and relevant protocols.

⁴⁷ See chapter eight below for a brief discussion of SADC dispute settlement mechanisms.

⁴⁸ Ludwieszski R.B , "'Green' Language in the NAFTA: Reconciling Free Trade and Environmental Protection" (1993) 27 *The International Lawyer* 691-706 discusses the NAFTA provisions on trade and environment fully and explores how and why they should be regarded as an eye opener by other regional groupings.

provisions. Ludwizwski's article is critically analysed in chapter seven and an evaluation made as to whether to adopt the NAFTA model unmodified or with minor variations to indicate the context specificity of the SADC trade-environment model.⁴⁸

1.3 Assumptions underlying the Research

This study is based on the following underlying assumptions that do not have to be proved. Firstly, trade liberalization between nations of the world has resulted in environmental damage of some widespread proportions. Secondly, the liberalization of trade between member countries of a regional trade grouping in the form of a free trade area results in an obsession with trade at the expense of environmental protection. Thirdly, both developed and least-developed countries in the SADC region are prepared to liberalize trade with each other but have not put in place adequate measures to protect their environments from the vagaries of free trade.

1.4 Aims and Objectives of the Research

1.4.1 Aims

The study sought to pursue two aims. First, to show, through the aid of critical case commentaries that there is a conflict between trade standards and environmental standards as depicted in the WTO jurisprudence and that the global community in general and the SADC in transition in particular do not accord the matter the urgency it deserves. Second, to suggest, through an analysis of WTO and NAFTA case law, how the SADC and the WTO can resolve the conflict as it arises in the specific international and regional contexts.

1.4.2 Objectives

To do justice to the above aims, the study's main objectives were to:

- Expose and explore the extent of the conflictual relationship between trade and environment in its proper theoretical and historical context;
- Outline the dispute resolution measures in place to resolve trade and environment matters and comment on their strengths and weaknesses;
- Identify and critique trade measures commonly deployed to enforce environmental standards against a backdrop of selected case law;

⁴⁸ See chapters seven and eight below.

- Critically examine NAFTA provisions on trade and environment and extract some possible lessons for a future SADC trade-environment policy and
- Propose legal policy reform with respect to resolving the trade-environment debate with specific reference to a future SADC.

1.5 Research Methodology

The most prevalent research method which was employed in this study was a literature study coupled with the historical method and comparative law. The researcher subscribes to the views of environmentalists who argue that trade rules should be carefully couched to accommodate environmental standards. The reasons for such a subscription can be discerned from the commentary and analysis engaged in towards the end of the study.⁴⁹ The forms of literature that were examined are:

- *Legislation and Treaties:* Treaties and conventions on trade and environment, the GATT and WTO provisions, the various protocols of the SADC and multilateral agreements. Legislation in selected SADC countries, with a bearing on trade and environment matters was perused.
- *Judicial decisions:* Decisions of the various GATT panels namely, The *Herring and Salmon* case, all *Tuna/Dolphin* cases, the *US-Shrimp* case, the *Thai cigarette* case, *US-Gasoline*, *EC-Asbestos* and *EC-Hormones* among others were referred to and critically commented upon. Relevant recent cases presided over by the NAFTA tribunal were also be referred to. From a reading of the cases, some thematic lessons were drawn for the SADC in transition and suggestions as to the way forward were proffered.
- *Textbooks and Journals:* From a cursory glance at the bibliography, a picture emerges that the most recent textbooks and journal articles were consulted. However the paucity of literature on the trade and environment debate in the context of the SADC still remains the major challenge. Textbooks and journal articles perused focus on the theme of trade and environment in general, the NAFTA provisions on trade and the environment, trade and environment

⁴⁹ See specifically Chapters seven and eight below.

disputes under the GATT and WTO, NAFTA trade and environment disputes and selected aspects of the SADC dispute settlement system and other provisions on the legal framework.

- *Internet Resources:* To a large extent, this study did rely on internet sources for information. The internet was extensively used to source information from electronic journals and other scholarly articles online. The most visited websites with information that is readily relevant to this study are: <http://www.trade-environment.org/> (the official trade and environment website), www.wto.org (the official WTO website), www.tralac.org (the website for the Trade Law Advisory Centre for Southern Africa), www.un.org (the official site of the United Nations where most information on conventions and treaties was sourced), www.sadc.int (the official SADC website) and http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx (the NAFTA Secretariat website containing information on NAFTA legal texts and dispute settlement). The internet did prove to be a useful and reliable resource for updating information.

University of Fort Hare

- *Historical Method:* This method was employed in chapter two of the study in which factual and historical foundations were discussed. This chapter assumes the form of a literature review but is unique in that unlike most literature reviews, a critical appraisal of the issues raised is not attempted since the aim is to give an expository historical and theoretical foundation to the topic.
- *Comparative Law:* This method was employed in chapter six in which NAFTA provisions on trade and the environment were evaluated and tested against WTO standards. The NAFTA provisions were also compared to the SADC treaty and the relevant protocols. This method of comparing was also partially employed in chapter three where dispute settlement mechanisms were pitted against each other and in the process the most effective was isolated.

1.6 Justification and Limitations of the Study

1.6.1 Preliminary remarks

Trade and the environment as a topic has been discussed *ad nauseam*. So why must a researcher still be interested in it, let alone the literature it is reviewing? The fact of the matter is that, first of all, the debate remains unresolved and continues to evolve with new judicial and treaty-making activity; and, second, much ill-informed and heavily biased material has been published on the topic, and hence a rigorous and unbiased analysis can still capture an audience.

1.6.2 Justification of the Study

This study was motivated by the researcher's personal interest first and foremost. When the researcher participated in the module 'International Trade Law' during the final year of the LLB degree, he was fascinated by the topic 'trade and environment' due to its controversial nature and relevance to the contemporary global community. This then provoked research on the possibility of a SADC trade and environmental model that will be relevant to the needs of a SADC in transition.

From a teaching-learning point of view, the researcher sincerely hopes that the findings in this study will go a long way towards adding new knowledge to the trade and environment database and open up new academic and intellectual horizons.

The findings in this study are likely to attract the interests of governments and trade policy makers in the SADC region. Very little has been written on the subject of possible environmental implications of free trade in the SADC region hence it is hoped that this study is to some limited extent an attempt at alleviating the paucity of literature on the subject and provoke areas for further research.

It is sincerely hoped that the findings in this study especially the proposed SADC trade and environment regime will shape the future trade and environment jurisprudence in the SADC. The findings on this aspect of the study may also be a useful tool for shaping the SADC trade dispute settlement system in general in readiness for the dawn of a free trade area.

Finally, this subject deserves study both for its own sake and for the insights into the WTO and NAFTA trade and environment dispensations which comparative study can provide to the SADC and international juridical community at large. Because natural resources are limited and exhaustible, the environment has to be conserved for human survival. If this is not done, global warming, together with accompanying ills such as flooding, climate change and extinction of species will result in discomfort and other costs to humans.

1.6.3 *Limitations*

The study has inherent limitations necessitated by scope, geographical spread and financial resources. Firstly, in terms of scope, the study is confined to trade and environment matters in the context of international trade in goods only hence the monotonous reference to the GATT. It would have been desirable to cast the net wider and cover the regulation of intellectual property rights and trade in services⁵⁰ but this was not attempted here due to limitations in scope.

The cases discussed in detail in Chapters four to seven of this study are limited to the theme of trade and the environment and are chosen on the basis of their currency to the debate and their clarification of the law relating to the conservation of exhaustible natural resources or the protection of human, animal and plant life or health. The theme of environmental protection and conservation is supplemented by the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). Only one case decided on the basis of the SPS Agreement is discussed in this study.

While some standards that WTO Members may impose on goods originating from their trading partners may have some environmental implications, this study did not in any way attempt to look at the trade and environment debate from the angle of the Agreement on Technical Barriers to Trade (TBT Agreement). The study deliberately leaves this discussion out as an area of further possible research. The relationship between multilateral environmental Agreements and trade and the environment is also cursorily referred to but not discussed in detail in this study because of inherent

⁵⁰ This would have necessitated an extensive reference to and discussion of the General agreement on trade in services, GATS.

limitations in scope – the main obsession being trade and environment disputes in the context of sustainable development and the conservation of exhaustible natural resources and the protection of human, animal and plant life or health.

The proposed SADC trade and environment regime would have been more convincing if it was based on a number of free trade areas compared to each other. However in this case, the SADC was compared only to NAFTA due to limitations in scope.

Due to the geographical spread of the SADC member countries and the paucity of information on the individual countries' legislation relevant to trade, the research had to make do with the information that was readily available.⁵²

1.7 Structure of Thesis

Besides this opening chapter, the remainder of the study is organized into seven chapters as follows: Chapter two focuses on the historical and factual foundations to the trade and environment debate in various contexts namely, the history of the trade and environment debate, the prohibition of discrimination and multilateral environmental agreements. It is in essence an extension of the literature review attempted in chapter one. Chapter three describes and analyses the WTO dispute settlement regime in general together with an expository account of the rules pertaining to the interpretation of Article XX exceptions. Chapter four focuses on the analysis of three WTO disputes namely *US-Tuna (Mexico)*, *US-Gasoline* and *US-Shrimp* in as far as they canvass the theme of the conservation of exhaustible natural resources. It also includes a note on the thematic relevance of each dispute to the SADC in transition. Chapter five pursues the theme of the protection of human health through a critical examination of the *EC-Asbestos* dispute and a note on the implications thereof to SADC in transition. Chapter six is devoted to the theme of plant and animal health in the context of sanitary and phytosanitary measures. It

⁵² Most of the information is contained in textbooks and newspaper articles and the newspaper has never been a reliable source of law. Very few SADC member countries government departments have an Internet presence. With the exception of South Africa, most SADC government websites contain scanty information such as postal and physical addresses and such information is seldom updated.

critically analyses the leading *EC-Hormones* dispute and its trade and environment implications for SADC. Chapter seven presents a critical analysis of the NAFTA provisions on trade and the environment by examining disputes resolved under the auspices of NAFTA chapter 11 provisions. It identifies some weaknesses in the WTO trade and environment jurisprudence before outlining thematic lessons for SADC emanating from an analysis of the relevant NAFTA provisions. Chapter eight finally discusses general trends observed in the study including concluding remarks, an analysis of the trade and environment debate in the context of the WTO, NAFTA and SADC, proposals for WTO and SADC trade and environment law reform informed by the NAFTA regime as well as a research agenda for the future.



University of Fort Hare
Together in Excellence

CHAPTER TWO

Trade and environment as an issue, is by no means new. The link between trade and environment protection –both the impact of environmental policies on trade, and the impact of trade on the environment-was recognized as early as 1970.¹

The Historical and Factual Setting of the Trade and Environment Debate

2. Introduction

This chapter lays down the foundation to the trade and environment debate in its proper context by investigating the history and factual background of the trade and environment conflict from a WTO perspective. More specifically, it focuses on the important international trade law rule of the prohibition of discrimination,² the aims and objectives of the WTO and how their fulfilment militates against environmental protection and Multilateral Environmental Agreements (MEAs). This chapter is in essence a continuation of the literature review cursorily attempted in chapter one above.³ The chapter then concludes by an affirmation that the history of the trade and environment debate indicates that more research and investigation needs to be done especially in the context of a SADC in transition.

2.1 The WTO and the Environment: General

There are several aspects of the GATT/WTO that have significance for the environment.⁴ On subsidies, provision is made for permissible governmental assistance to promote adaptation of existing facilities to new environmental requirements. There are however conditions attached thereto such as for example, that the subsidy must be non-recurring and must be limited to 20 percent of the costs of

¹ Environment: History 1 at < http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm [26 Nov 2005].

² As encapsulated in the GATT articles I and III, namely the most favoured nation and the national treatment standards.

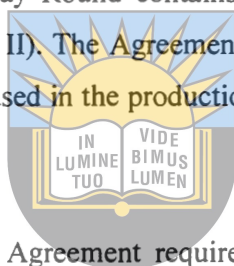
³ See chapter one above at 8-12.

⁴ See Steve Charnovitz, "The World Trade Organisation and Environmental Supervision" (1994) *International Environment Reporter* 89-93.

the subsidy must be non-recurring and must be limited to 20 percent of the costs of adaptation.⁵ Subsidies of this nature are defined as ‘non-actionable’. This means that countermeasures, which must be authorized by a WTO Committee, are available only if the environmental subsidy has ‘serious adverse effects’.

The WTO has tightened the definition of a subsidy to require a showing of a ‘financial contribution’ by a government, or an income price support. This has led to several commentators suggesting that lax environmental regulations might be considered a countervailable subsidy under GATT.⁶ However, the new text makes clear that mere governmental inaction is not countervailable.

On environmental taxes, the Uruguay Round contains a new guideline for border adjustments (subsidies, Annex I and II). The Agreement clearly makes the point that cumulative indirect taxes on inputs used in the production of an exported product can be rebated to exporters.⁷



On intellectual property, the WTO Agreement requires nations to meet minimum standards for providing legal rights to inventors. Animals may be excluded from the WTO patent requirements, but plant varieties must be legally secured either through patents or an alternative system. Nations however, may preclude patents when ‘necessary... to avoid serious prejudice to the environment’.⁸

On services, the new Agreement repeats the GATT article XX (b) exception on life or health but drops the XX (g) exception on the conservation of natural resources. In addition, the WTO will establish a working party on ‘Trade in services and the environment’ to consider the need for any other environmental provisions. The report of the Working Party was due by July 1998.⁹

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Article 27.2.

⁹ Charnovitz, op cit note 4 at 92.

The world is increasingly becoming interconnected and competitive global patterns are changing as countries follow their comparative advantage and produce more for the sake of sale to international markets.¹⁰ There is growing concern about potential adverse environmental impacts from trade. However, if countries want to protect their environments from the vagaries of free trade, they have to do so in a manner that is not discriminatory¹¹ and does not frustrate the aims and objectives of the WTO.¹²

Most trade and environment disputes have almost always taken place in the context of unfair discrimination where one country alleges that a fellow WTO member unfairly discriminates against imports under the guise of environmental protection¹³ or implementation of environmental standards. In light of the above therefore, a brief excursus on the concept of non-discrimination in the WTO context is necessary.

2.2 The Core Non-Discrimination Principles

The core non-discrimination principles are the *most favoured nation* clause and the *national treatment* provision respectively.¹⁴ The two provisions are respectively contained in articles I and III of the GATT 1994 relating to trade in goods as previously pointed out.

University of Fort Hare
Together in Excellence

Article I: I deals with customs duties and charges of any kind imposed on or in connection with importation or exportation of goods and also the method of levying such duties and charges. The article enjoins a WTO member giving any advantage, favour, privilege or immunity to any product originating in or destined for any other country to immediately and unconditionally extend to the like product originating in or destined for the territories of all other members the same advantage, favour, privilege or immunity. This is the *most favoured nation* clause that operates to

¹⁰ Fredrickson (ed) *Trade, Global policy and the environment* (1999) World Bank discussion paper no. 402 at 44.

¹¹ As required by articles I and III of the GATT.

¹² As spelt out in the preambles to the GATT and WTO and also in article II: I of the WTO agreement.

¹³ See the cases discussed in detail in chapter four to seven below.

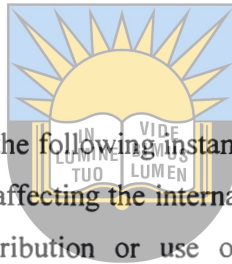
¹⁴ The contents and regulatory implications of the two provisions are discussed in detail in John Duggard, *International Law: A South African Perspective* (2003) at 369.

preclude a WTO member from discriminating against or between WTO Members in respect of all matters pertaining to the import or export of goods.¹⁵

In the context of the trade and environment debate, it would be WTO- illegal for a country to impose environmental taxes on timber exports from a WTO member, while at the same time it does not impose taxes on timber exports from its neighbour, a non-WTO member but a member of the same regional trade grouping. The respondent country will have to prove that such a measure is consistent with GATT Article I or is covered by one or more of the exceptions listed in the GATT rules.¹⁶

In contrast, the *national treatment* provision operates to preclude a WTO member from discriminating between imports from a fellow WTO member and domestic products after import.¹⁷

In summary, article III provides for the following instances. Firstly, internal taxes and other charges, laws and regulations affecting the internal (domestic) sale, offering for sale, purchase, transportation, distribution or use of products and the internal regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.¹⁸



University of Fort Hare
Pursuing Excellence

¹⁵ Duggard, Ibid.

¹⁶ The GATT rules prohibit certain trade-restrictive practices but do provide for instances when such trade- restrictive measures may be tolerated. For example article XI prohibits the use of quantitative restrictions but allows for their deployment to avert shortages, to effect standards and if the products are agricultural ones that have to be limited to enforce a governmental measure. Article XX is the general exception clause, which covers inter alia protection of public morals, human and plant life, protection of exhaustible natural resources and article XXI may be interpreted as allowing for the use of trade-restrictive measures if their use is essential in the interest of national security.

¹⁷ This is specifically regulated by article III: 1, III: 2 and III: 4 of the GATT.

¹⁸ Per article III:I of the GATT. Such a prohibition is aptly illustrated by the *Thai Cigarette* case, *Thailand-Restrictions on Importation of Cigarettes*, BISD 37S/200. For a critical appraisal of the dispute, see Robert Howse, "Human Rights in the WTO: What Rights, what humanity? Comment on Petersmann" (2002) 13 EJIL 1-12.

Secondly, imports from the territory of any member state shall not be subjected directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products.¹⁹

Thirdly and finally, imports from the territory of one member into the territory of another member, shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use.²⁰ Further, the provision of article III: 4 shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The above core non-discrimination principles are discussed here because they form the basis of the trade and environment litigation that will be discussed in detail later.²¹ Subsidies,²² quotas,²³ taxes,²⁴ sanitary and phytosanitary measures,²⁵ imposed for the sake of protecting human, animal and plant health and generally the environment, may be WTO- illegal if applied without due regard to Articles I and III of the GATT.²⁶ A violation of the above articles and other provisions of the WTO also imply that the aims and the objectives of the WTO are being frustrated. WTO member states should strive to achieve the aims and the objectives of the World Trade Organization by avoiding measures that restrict trade or become patently protectionist under the guise of environmental protection.

¹⁹ Per article III: 2 of the GATT. Again in this instance, the *Thai Cigarette* case can be used as an illustrative example of this form of discrimination.

²⁰ Per article III: 4 of the GATT.

²¹ See Chapters 4-6 below.

²² See Article XVI of the GATT.

²³ See GATT Article XI.

²⁴ Articles I, II and III of the GATT are the most relevant in this regard.

²⁵ The WTO Agreement on sanitary and phytosanitary measures (SPS Agreement). This is also alluded to in the general exceptions of the SADC (Article 9 thereof) protocol on trade.

²⁶ This like all the GATT rules is subject to one or more exceptions such as those covered in Article XIV of the GATT, which gives exception to non-discrimination in the administration of quantitative restrictions.

2.3 The WTO and the Environment: Specific Provisions

As previously stated,²⁷ the GATT does not expressly provide for the protection of the environment in the context of international trade. The closest the GATT comes to mentioning the environment is in Article XX.²⁸ With the exception of the above article therefore, the GATT may be considered as less helpful in the resolution of environmental matters. This is despite the fact that there have been some GATT panels whose decisions have hinged on the exceptions in Article XX, more specifically Articles XX (b) and XX (g).²⁹

The WTO on the other hand is more specific about international trade and the environment and boldly states that trade has to be pursued in an environmentally friendly and sustainable manner.³⁰ More specifically, the WTO contains two agreements governing national laws on the environment.³¹



²⁷ This was mentioned with specific reference to Article XX of GATT.

²⁸ General exceptions are covered by Article XX and cover wide topics including human health, the conservation of exhaustible natural resources, shortages, agricultural products and precious metals such as gold and silver.

²⁹ The *US-tuna dolphin*, the *US-Shrimp*, *EC-Asbestos* and *US-Gasoline* disputes discussed in Chapter four are illustrative of the application of Article XX exceptions.

³⁰ Item 6 of the Marrakesh declaration signed in Morocco on 15 April 1994 which later culminated in the WTO in January 1995 states that, “ministers have further more adopted a decision on trade and environment”. Furthermore, in the preamble to the *Marrakesh Agreement Establishing The World Trade Organization*, it is unequivocally stated that the parties thereto are aware that their relations in the field of trade and economic endeavor should be conducted in a manner that allows 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 for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

³¹ Namely the Agreement on Technical Barriers To Trade (TBT Agreement) which deals with government regulations on products such as auto emission standards in the manufacture of motor vehicles and the Agreement on Sanitary and Phytosanitary measures (SPS Agreement) that deals with government regulations and import bans regarding food safety and disease-spreading products. See further in this regard, chapters five and six below.

Current GATT rules³² are based on the established principle of national treatment.³³ This then means that a nation can apply its domestic standards to imports but not put imports at a disadvantage such that as a result, they become more expensive than locally produced products.³⁴ The WTO rules³⁵ are now based on new principles akin to international treatment.³⁶ This therefore implies that a nation should apply international standards to imported products especially with respect to technical requirements relating to aspects such as packaging and sanitary measures. In situations involving health or the environment, the WTO may permit the application to imports of more restrictive than international standards.³⁷

WTO Members do not lose their sovereignty by joining the WTO. Even if a nation loses a dispute about national environmental law as it affects international trade, it can choose to do nothing about the offending law and still not be met with legal sanction. The best the complaining state can do is to enter into negotiations with its adversary; it cannot force the change of the law. All the WTO tribunal can do is to ask the defendant state to revise the offending law.³⁸ The WTO cannot overturn a national environmental law.³⁹



University of Fort Hare
Together in Excellence

³² Article III.

³³ See note 17 above.

³⁴ Exceptions to the above rule do however exist and some of them were cursorily referred to above at 22-23.

³⁵ This is with specific respect to the rules adopted after the Uruguay round which lasted from 1986-1994.

³⁶ Duggard, op cit note 14 at 326.

³⁷ Duggard, *ibid*.

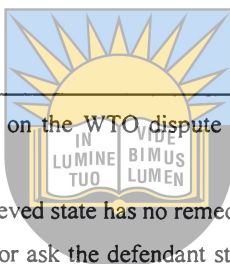
³⁸ For example in the *Tuna/dolphin* case referred to above, the offending law was the United States Marine Mammal Protection Act of 1972 that Mexico complained about. The panel ruled in Mexico's favour. The panel report was never adopted and the United States and Mexico amicably resolved the matter in terms of the two countries' NAFTA relationship. If the panel report had been adopted, the United States would have been obliged either to:

- Come into conformity with its GATT obligations by lifting the trade embargo,
- Provide compensatory trade benefits to adversely affected GATT trading partners including Mexico or
- Suffer the loss of trade concessions made by adversely affected GATT signatories. The offended states would retaliate against United States imports.

2.4 Aims And Objectives Of The WTO

It will be recalled that one of the primary aims of the WTO⁴⁰ is trade liberalization that is facilitated by minimal tariff and non-tariff barrier regimes.⁴¹

The aims of the WTO may be listed as follows: raising the standard of living across the globe, ensuring full employment, increasing the growing levels of real income and effective demand, expanding the production of and trade in goods and services, to protect and preserve the environment, to achieve sustainable development, to get more participation in international trade by developing countries, to reduce tariff and non-tariff barriers in international trade relations and to develop an integrated, viable and durable multilateral trading system.⁴²



See chapter three below for a detailed note on the WTO dispute settlement regime and whether the remedies are effective or not.

³⁹ This however does not mean that the aggrieved state has no remedies. It can impose an import ban on the product in question for a limited period or ask the defendant state to level the trading field failing which further retaliation may follow.

⁴⁰ The last paragraph of the preamble to the GATT of 1947 states as follows:

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce

[Emphasis added].

⁴¹ A tariff is a tax that is imposed at the border (port of entry) on imported goods. Generally, there are three types of tariffs namely: ad valorem, specific and mixed tariffs. An ad valorem tariff is a tax set as a percentage of the value of the import. For example, if a product costs R200 and is subject to a 10% ad valorem tariff, it will cost R220 once it enters the republic. A specific tariff is a flat charge per unit or quantity of goods, such as R10 per tonne/unit. A mixed tariff combines these two concepts, such as R10 per tonne plus 5% of value. Non-tariff barriers on the other hand are trade-restrictive measures other than tariffs that are often employed to protect domestic products from competing imports. There is no closed list but the following are notable and are emphasized here: quotas, subsidies, import bans, stringent packaging requirements, state trading enterprises, anti-dumping duties, voluntary export restraints and countervailing duties. Some of these non-tariff barriers may be used to enforce a country's environmental laws and inevitably become stringent and severely protectionist in the long run.

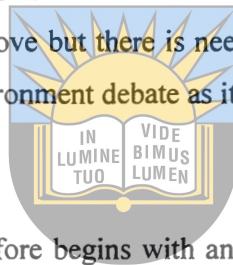
⁴² Refer to the preambles to the *Marrakesh Agreement Establishing the World Trade Organisation* and the GATT of 1994.

In the context of trade and the environment, a balance has to be struck between achieving the above trade-promotion objectives irrespective of the ensuing environmental consequences, and the enforcement of trade restrictive laws that are aimed at protecting the environment. This research aims at striking a balance between achieving the WTO aims and objectives and environmental protection for a future world in which international trade takes place in an environmentally friendly setting that is accommodative of the trade liberalization goal.

2.5 The WTO and the Environment: a Historical Overview

2.5.1 Preliminary Remarks

A preliminary presentation of the trade and environment debate will be incomplete without a discussion of its historical foundations. Some factual perspectives and groundwork has been laid out above but there is need to supplement the facts with a brief history of the trade and environment debate as it arose in the WTO jurisprudence and discussions.



This section of the chapter therefore begins with an expository account of the trade and environment debate in the GATT/WTO and identifies the recurring arguments and concerns. It also touches on multilateral Environmental Agreements of note and highlights some of their contributions to international trade and international environmental law.

2.5.2 The Early Years: Emerging Trade and Environment Debate in the WTO⁴³

Increasing awareness of environmental problems with international or global dimensions in recent years has led to an interest in interactions between international trade and the environment.⁴⁴ The 1970s is the period during which trade and

⁴³ The following historical account is based on 'ENVIRONMENT HISTORY 1 AND 2' courtesy of the WTO website at www.wto.org/English/tratop_e/envir_e/hist1_e.htm [21 Nov 2005].

⁴⁴ John J.Kirton and Virginia W.Mclaren (eds) *Forging the Trade-Environment-Social Cohesion Link: Global Challenges NAFTA Experiences* (2002), hereafter Kirton and Maclaren.

Michael Kidd, *Environmental Law: A south African Guide* (1997) at 90 (hereafter Kidd), refers to a survey conducted in the European Community in 1988 the results of which showed environmental issues ranking as the second most important political problem perceived by the electorate, second only

environment concerns became an issue deserving serious debate. At the same time, the Organisation for Economic Cooperation and development,⁴⁵ served as a lead organization considering trade and environment issues. OECD members' specific concerns focused on the issue of 'competitiveness', or how the new wave of environmental laws requiring corporations to invest in pollution reduction equipment might harm their competitive standing in the trade arena. The OECD's response to the problem was to issue a set of guidelines⁴⁶ with the hope that all member states could cooperate and alleviate any potential competition problems. The principle that received the most attention was the 'Polluter Pays Principle' (PPP).⁴⁷

Growing international concern about the impact of economic growth on social development and the environment led to a call for an international conference on how to manage the human environment.⁴⁸



University of Fort Hare
Together in Excellence

to unemployment and ahead of issues like inflation and arms control [DG information (Dec 1988) 30 Euro-barometer]. If such a survey were to be repeated in the developing world specifically Africa, the results are unlikely to be similar. The environment is likely to be ranked at the bottom of priorities. Poverty, HIV AIDS, unemployment, shrinking incomes and corruption are likely to lead. Patricia Michaels. "An introduction to trade and the environment" at www.greenature.com/article447 [9 April 2005] writes that the initial concerns about the effects that increased trade would have on the environment emerged at the beginning of the 1970s, the same time the environment movement in industrialized countries began to gain strength. Kidd, loc cit also agrees and further adds that environmental concern and awareness is more pronounced in the developed than the developing world.

⁴⁵ Hereafter OECD, a multilateral organization composed of members from the industrialized countries.

⁴⁶ OECD guiding principles concerning the international economic aspects of environmental policies.

⁴⁷ This principle suggested that the effects of competition could be muted if all member states agreed not to subsidize (reimburse) industries, but instead required them to absorb (pay for) the costs of the soon to be required pollution reduction equipment, with the cost eventually being transferred to the consumer and reflecting a more accurate price of production.

⁴⁸ The response came in the form of the Stockholm conference held between 15 and 16 June 1972. The Declaration of The United Nations Conference on The Human Environment contains seven proclamations and 26 stated principles. It can be downloaded from www.unep.org/documents [14 April 2005].

2.5.3 The 1971 GATT Study

During the preparations for the Stockholm conference in 1971, the GATT secretariat was asked to make a contribution. The secretariat then prepared a study entitled, 'Industrial pollution control and International Trade', which focused on the implications of environmental protection policies for international trade. It reflected the concern of trade officials at the time; that such policies could become obstacles to trade as well as constitute a new form of protectionism, that is, 'Green Protectionism'.

The same year saw the GATT Director-general, Olivier Long presenting the above study to the GATT members.⁴⁹ During the presentation, the GATT members were urged to examine what the implications of environmental policies might be for international trade. In the discussion that ensued, a number of GATT members suggested that a mechanism be created in the GATT for the implications to be examined more thoroughly.⁵⁰



2.5.4 Emit-GATT Group on Environmental Measures and International Trade

In November 1971, the GATT council of representatives agreed to set up a group on environmental measures and international trade (also known as the 'EMIT' group). However, despite the fact that participation would be open to all, it was not until after twenty years that the group convened in terms of the first meeting.⁵¹ In 1991, members of the European Free Trade Association (EFTA)⁵² asked the GATT Director General to convene the EMIT group as soon as possible. They gave the upcoming

⁴⁹ They were then officially called CONTRACTING PARTIES, written in capital letters.

⁵⁰ There was already a precedent. An environment committee had been set up in the OECD, and this committee had taken on board trade and environment issues, in addition to other matters.

⁵¹ This was in 1991 and the reason was that the group could only convene at the request of GATT members. Until 1991, therefore, no one asked for it to meet. Before then, the group on environmental measures and international trade did not have a concrete work plan. In 1991, when the group eventually met, the GATT debated nearly a year about a work plan for the group and finally agreed on one. But so far, the group's discussions have yielded little [Per Charnovitz, op cit note 4 at 93].

⁵² At the time members were Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

1992 United Nation's conference on Environment and Development (UNCED) as a reason for the urgent meeting and requested the GATT to contribute.⁵³

2.5.5 New Developments, 1971-1991

Between 1971 and 1991, environmental policies began to have an increasing impact on trade, and with increasing trade flows while the effects of trade on the environment had also become more widespread. This led to a number of discussions:

- During the Tokyo Round of trade negotiations (1973-1979), participants engaged with the question of the degree to which environmental measures, in the form of technical regulations and standards, could constitute obstacles to trade. The Tokyo round agreement on technical barriers to trade (TBT) was the ultimate result.⁵⁴ It called for non-discrimination in the preparation, adoption and application of technical regulations and standards and for their transparency among other things.
- During the Uruguay round⁵⁵ (1986-1994), trade-related environmental issues were once again taken up. The TBT agreement was modified and certain environmental issues were addressed in the General agreement on trade in services, the agreement on agriculture, sanitary and phytosanitary measures (SPS), Subsidies and countervailing measures and trade-related aspects of intellectual property rights (TRIPS)
- In 1982, a number of developing countries complained that products whose export had been prohibited in developed countries on environmental, health and safety grounds continued to be exported to them. With limited information

⁵³ In accordance with its mandate of examining the possible effects of environmental protection policies on the operation of the General Agreement, the EMIT group focused on the effects of environmental measures (such as eco-labeling scheme) on international trade, the relationship between rules of the multilateral trading system and the trade provisions contained in multilateral environmental agreements (MEAs) (such as the Basel Convention on the Transboundary Movement of Hazardous Wastes), and the transparency of national environmental regulations with an impact on trade (see 'ENVIRONMENT HISTORY 1 AND 2' op cit note 43).

⁵⁴ The Tokyo Round Agreement is also known as the 'standards code'.

⁵⁵ One of the major achievements of the Uruguay is to expand the supervision of environmental laws that hinder the free flow of international commerce. Although such issues have traditionally been exempt from trade agreements as matters of national autonomy, the Uruguay round strikes a new balance between commerce and the environment. See Charnovitz op cit note 4 at 89.

on these products, the developing countries could not make informed decisions regarding their continued suitability for consumption.

- At the 1982 GATT ministerial, members decided to examine the measures needed to bring under control the products whose export is prohibited domestically on grounds of human, plant or animal health or the environment. This led to the creation of a working group on the export of domestically prohibited goods and other hazardous substances in 1989.⁵⁶
- In 1991, a dispute between Mexico and the United States put the spotlight on the interaction between trade and environmental policies. The panel ruled in favour of Mexico.⁵⁷ While GATT members did not adopt the report of the panel, environmental groups which felt that trade rules were an obstacle to environmental protection severely criticized the ruling.⁵⁸
- During this period, important developments were also taking place in environmental forums. The relationship between economic growth, social development and environment was addressed at the Stockholm conference, and this continued to be examined throughout the 1970s and 80s.⁵⁹
- In 1987, the world commission on environment and development produced a report entitled *Our Common Future* (also known as the Brundtland report) in which the term 'sustainable development' was coined. The report identified poverty as one of the chief causes of environmental degradation and argued that greater economic growth, fueled in part by increased international trade, could generate the necessary resources to combat what had become known as the 'pollution of poverty'.⁶⁰

As a result of these developments, the EMIT group's proposal met with a positive response. Despite some countries' initial reluctance to have environmental issues discussed in GATT; they agreed to have a structured debate on the subject.⁶¹

⁵⁶ 'ENVIRONMENT HISTORY 1 AND 2', op cit note 43.

⁵⁷ See chapter four below.

⁵⁸ 'ENVIRONMENT HISTORY 1 AND 2' op cit note 43.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

2.5.6 Further Developments: The 1992 Rio Summit and Beyond

In 1992 UNCED, also known as the Rio “Earth Summit” drew attention to the role of International Trade in poverty alleviation and in combating environmental degradation.⁶² Agenda 21, the programme of action adopted at the conference, addressed the importance of promoting sustainable development, through, among other means, international trade. The concept of sustainable development had established a link between environmental protection and development at large. The environment and trade were to be linked more explicitly in the new constitution of the multilateral trading system that was to be signed in 1994.⁶³

Debate on trade and environment also intensified in the 1990s due to the attention drawn to these issues by the NAFTA.⁶⁴

2.5.7 1994: The Marrakesh Agreement and the Decision⁶⁵

In its preamble, The Marrakesh Agreement establishing the WTO, places environmental protection, the conservation of scarce resources and sustainable



⁶² Shadrack B.Gutto “Environmental law rights”, in Chaskalson et al *Constitutional Law of South Africa* (1996) at 32-33 opines that the Rio summit represented the latest in a long history of standard setting international instruments dealing with the environment. He further describes ‘environment’ as a broad and inclusive concept that incorporates all the specialist and older categories of pollution, conservation, health and similar concepts. It is also important to point out that the summit took place after the *Tuna/dolphin* case discussed briefly above.

⁶³ The parties signed *The Marrakesh Agreement establishing the World Trade Organization* in April 1994 in Morocco.

⁶⁴ During the negotiation of the NAFTA, environment groups in the United States were concerned that growth in trade with Mexico could jeopardize the environment. Other groups supported the economic and trade growth that NAFTA was intended to stimulate provided environmental objectives were not sacrificed for developmental objectives. Moderates sought assurances that the environment as well as trade would prosper under NAFTA. In an action plan for the NAFTA submitted to the Congress in May 1991, the then United States president stressed that the United States health, safety and environmental standards will not be compromised and that NAFTA would not result in dilution of United States minimum standards in these areas. See further in this regard Holmer and Bello, “Trade and environment. A snapshot from Tuna/dolphins to the NAFTA and beyond” (1993) 27 *The International Lawyer* 169.

⁶⁵ The full text of the Decision is available at http://www.wto.org/English/tratop_e/envir_e/hist2_e.htm [14 March 2005].

development firmly among the WTO's objectives. It states that WTO members recognize:

*That their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*⁶⁶

The fact that the first paragraph of the preamble recognizes sustainable development as an integral part of the multilateral trading system illustrates the importance placed by the WTO members on environmental protection.



2.5.7.1 Legal Interpretation of the Preamble to the Marrakesh Agreement

The importance of the preamble was stressed in 1998 in the *US-Shrimp*⁶⁷ dispute that India, Malaysia, Pakistan and Thailand brought against the United States.⁶⁸

The appeals adjudicators said:

As this preambular language reflects the intentions of negotiators of the WTO Agreement [i.e. the Marrakesh Agreement Establishing the World Trade Organization], we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement.

2.5.8 The 1994 Ministerial Decision

In Marrakesh in April 1994, ministers also signed a *Decision on Trade and Environment*⁶⁹ [emphasis added], which states that:

⁶⁶ See Preamble to the Marrakesh Agreement, op cit note 65.

⁶⁷ *United States-Import prohibition of Certain Shrimp and Shrimp products* (hereafter *US-Shrimp*), Appellate Body and panel report, adopted on 6 November 1998, WT/DS58.

⁶⁸ In this dispute, the WTO ruled against the United States ban against shrimp imports caught without turtle-excluder devices (TEDS), equipment developed to save endangered sea turtles. See chapter four below for a more detailed discussion of this case.

*There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.*⁷⁰

The above quotation notwithstanding, the policy contradiction between maintaining an open multilateral trading system and the protection of the environment seems to be manifesting itself more and more as disputes on the above issues show. The disputes so far encountered have shown only one dimension of the policy contradiction. There is a high likelihood of trade and environment disputes of a nature never encountered before and the WTO is expected to establish a firm precedent.

2.5.9 Recent Developments

The recent WTO report of 8 October 1999,⁷¹ entitled 'WTO Report: the need for environmental cooperation' reinforces the need for cooperation in environment and trade issues at the international level. In the press release of 8 October 1999 entitled "Trade liberalization reinforces the need for environmental cooperation," a new WTO secretariat report argued that international economic integration and growth reinforce the need for sound environmental policies at the national and international level. It stressed that international cooperation was crucial in addressing transboundary and global environmental challenges beyond the control of any individual nation. This would be true even if nations did not trade with one another.

The WTO secretariat's trade and environment report of 14 October 1999,⁷² argues that there is no basis for the sweeping generalizations that are often heard in the public debate, arguing that trade is either good for the environment or bad for the environment. The report asserts that real world linkages are a little bit of both, or a

⁶⁹ The full text of the Decision on Trade and the Environment is available at http://www.wto.org/English/tratop_e/envir_e/issu5_e.htm [23 February 2005]

⁷⁰ Ibid.

⁷¹ Accessed from http://www.wto.org/English/tratop_e/envir_e/ [17 April 2005].

⁷² See World Trade Organisation Bibliography at www.ppl.nl/hugo/WTObibliographyenvirodoc.htm - 69k [January 2004].

Among the questions that the report seeks to answer are the following:

- Does trade undermine the regulatory efforts of governments to control pollution and resource degradation?
- How can we ensure that economic growth driven by trade will help us to move towards a sustainable use of the world's environmental resources?

2.5.9.1 WTO Symposium: Challenges Ahead on the Road to Cancun

Session II of the WTO public symposium⁶⁴ was convened to discuss the effects of environmental regulations on developing countries. The intention of the session was to highlight concerns and then discuss possible actions that could be taken to address these concerns. The session included two speakers,⁶⁵ both of whom have extensive work experience in trade related issues in developing countries.

Ms Jha bemoaned the fact that environmental requirements were becoming more frequent and complex and standards were changing frequently without justification. These frequent changes make it difficult for developing countries to catch up. She further argued that market access was being hindered by government regulations and voluntary standards (set by both government and the private sector), labeling and packaging requirements, product taxes and charges, quotas and non-automatic licensing resulting from

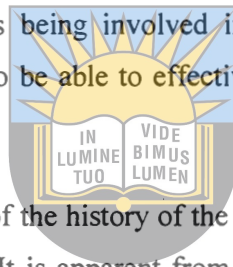
and farm workers in European Union and the United States where there is enjoyment of agricultural subsidies which are *prima facie* WTO illegal. The farmers in Mali indeed want to enjoy the high living standards and the clean environment resultant therefrom but this is not possible due to market distortions. Thanks to the farm subsidies that effectively resulted in demise of the Cancun conference.

⁶⁴ Held Monday 16 June 2003, 15h00 to 18h00. The broad theme was "The WTO negotiations on trade and environment" and the specific deliberation, facilitated by Mr. Kym Anderson, a professor in the school of economics and executive director for the center for international economic studies at the University of Adelaide in Australia, a former member of the GATT secretariat staff from 1990 to 1992 who served as a WTO dispute settlement panelist in the *EC-Banana* case (1996 to 2000), was entitled "The effect of environmental regulations on developing country exports: What are the concerns and what can be done?"

⁶⁵ Ms Veena Jha and Ms Ritu Kumar. Ms Jha is the project coordinator of the United Nations Conference on Trade and Development (UNCTAD) in New Delhi affiliated to the international trade division of UNCTAD, Geneva. Ritu Kumar is an environmental economist experienced in dealing with issues related to sustainable production and trade.

the implementation of multilateral environmental agreements (MEAs). She stressed that management of information was a problem for developing countries and that it was important to increase awareness within government and industry.

Ms Kumar agreed with Ms Jha on the above issues and positions. Her presentation emphasized that developing countries need to play a larger role in the agenda and stop being standard takers. She identified further problems of developing countries such as the high cost of labeling, lack of transparency and lack of understanding in developed countries of Southern capacities. She gave the Chinese eco-labeling programme as an example of a developing country programme that facilitates market access. She also noted the importance of developing countries being involved in the development of market requirements, if they were to be able to effectively respond and have access to international markets.



The above brief account takes care of the history of the trade and environment debate in the context of the WTO. It is apparent from the account that trade and environment as an issue is gaining more prominence as volumes of trade increase. However, from the historical epochs outlined above, developing countries are conspicuous by their absence through the major trade and environment discussions.

2.5.10 Multilateral Environmental Agreements and the WTO

In the context of the trade and environment debate at the WTO level, there is a compelling need to look at the relationship between the rules of the multilateral trading system⁶⁶ and the trade provisions contained in multilateral environmental agreements.⁶⁷ The WTO Committee on trade and environment (CTE) has engaged in debate over the relationship between MEAs and WTO

⁶⁶ As contained in the GATT provisions on trade in goods.

⁶⁷ Here we specifically look at the Montreal protocol on substances that deplete the ozone layer, CITES, The Basel convention on the control of transboundary movements of hazardous wastes and their disposal, The International Convention for the Regulation of Whaling and the Convention on the Law of the Non-navigational uses of international watercourses.

rules.⁶⁸ There are approximately 200 MEAs in existence today and only a tiny proportion of them have been of concern to WTO members. Most members within the WTO have argued that WTO rules should not be changed to accommodate trade measures⁶⁹ while others have argued in favour of a change.⁷⁰

2.5.10.1 Some MEAs with a Bearing on International Trade Law⁷¹

A network of multilateral treaties seek to protect seas, rivers, land, the atmosphere and outer space from environmental degradation, to preserve flora and fauna and to prohibit ultra hazardous activities that threaten the environment.⁷² In this section some of the MEAs that have one thing or another to do with international trade are discussed in order to highlight past achievements, identify future challenges and propose possible solutions to the trade and environment debate in the specific MEA context.

2.5.10.1.1. *The Convention on International Trade in Endangered Species of Wild Flora and Fauna*⁷³

This convention, as its name indicates regulates trade in endangered species of wild animals and plants. Appendices to this convention list species threatened or likely to be threatened with extinction and prescribe regulations for trade in such species. Article VIII of CITES specifically refers to trade.⁷⁴

⁶⁸ Richard B. Stewart “The NAFTA: Trade Competition and environmental protection” (1993) 27 *The International Lawyer* 751(hereafter, Stewart).

⁶⁹ Trade measures are any measure to which WTO rules apply such as import/export restrictions, licensing arrangements, packaging and labeling requirements contained in MEAs.

⁷⁰ Stewart op cit note 68 at 753.

⁷¹ See Philip Evans and James Walsh, *The EIU Guide To World Trade Under the WTO* (1995) at 61-63 for a complete list of multilateral environmental agreements with trade provisions.

⁷² Duggard op cit note 14 at 323.

⁷³ Hereafter, CITES.

⁷⁴ Article VIII (1) provides that the parties shall take appropriate measures to effect the provisions of the convention and to prohibit trade in specimens in violation thereof. These shall include measures:

- to penalize trade in, or possession of, such specimens or both and
- to provide for the confiscation or return to the state of export of such specimens.

2.5.10.1.2 *The Convention on the Regulation of Whaling*

A number of conventions seek to conserve marine resources. The international convention for the regulation of whaling seeks to conserve whale stocks and to control the whaling industry. In 1995, a related convention was adopted⁷⁵ which seeks to address the regulation of stocks of fish that straddle both exclusive economic zones and the high seas.⁷⁶ The convention requires parties to prevent over fishing, protect biodiversity in the marine environment and adopt measures to ensure long-term sustainability of straddling fish stocks. The convention does to a large extent have a bearing on international trade and the environment in that it seeks to regulate over fishing of certain species of fish and in some way is complimentary to CITES and in line with the exception in article XX (g) of the GATT.

2.5.10.1.3. *The Montreal Protocol on Substances That Deplete the Ozone Layer*

The protocol provides for the phased reduction of chlorofluorocarbons (CFCs), agents principally responsible for the depletion of the ozone layer, and similar harmful substances. South Africa is a party to the Montreal protocol.⁷⁷ This protocol is important to trade and environment research because the emission of certain poisonous gases from industrial processes and combustion of oil, gas and coal has to be reduced to preserve the ozone layer and avert global warming. The gases are emitted in the process of producing industrial goods destined for world markets.⁷⁸

The above provision is trade-restrictive in the interest of protecting endangered species and seems to be in conformity with article XX of the GATT in that it is necessary for the protection of animal life or helps in the preservation of an exhaustible natural resource (threatened with extinction).

⁷⁵ The convention on the conservation and management of straddling fish stocks and highly migratory fish stocks (1995) 34 ILM 1542.

⁷⁶ Duggard, op cit note 14 at 324.

⁷⁷ Duggard, op cit note 14 at 325.

⁷⁸ Article 4A of the protocol deals with the control of trade with parties and for this reason can be regarded as a trade measure. Article 4A (1) provides that where after the phased-out date applicable to it for a controlled substance, a party is unable, despite having taken all the practicable steps to comply with its obligation under the protocol, to cease production of that substance for domestic consumption, other than for uses agreed to by the parties to be essential, it shall *ban the export* [emphasis added] of used, recycled and reclaimed quantities of that substance, other than for the purpose of destruction. An export ban is one of the common trade measures used by some countries to enforce environmental laws and policies which in the long run may amount to protectionism and a frustration of the aims and

2.5.10.1.4. *The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal*

This convention, to which South Africa is a party, requires parties to prohibit the export of hazardous and other wastes to parties that have expressly (by written notification) prohibited the import of such wastes. Where a state has not expressly prohibited the importation of such waste, the waste shall not be transported to it without the receiving country's written authorization.

Parties are required *inter alia*; to take appropriate measures to prevent pollution due to hazardous wastes and to ensure that the transboundary movement of hazardous waste is 'reduced to the minimum consistent with environmentally sound and efficient management of such wastes'.⁷⁹

2.5.10.1.5. *The Helsinki Rules on the Uses of the Waters of International Rivers (1966)*

The above rules are a set of principles produced by the non-governmental international law association and have shaped jurisprudence on the use of international rivers. The guiding principle is that each basin state⁸⁰ is entitled within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin. States are further enjoined to prevent pollution of an international drainage basin because such pollution can cause substantial injury to the territory of a co-basin state.

The above principles are given treaty form in the 1997 Convention on the law of the non-navigable uses of international watercourses.⁸¹ The convention obliges states to

objectives of the GATT/WTO. Import bans as a trade measure that is sometimes used to effect domestic environmental policy by banning the import of certain products perceived to be a threat to the environment are dealt with in more detail in chapter four below.

⁷⁹ Article 4 (2) (d) of the Montreal Protocol. While cross-border dumping of hazardous waste has serious environmental implications, the effect of waste disposal of hazardous substances across borders in international trade is beyond the scope of this research.

⁸⁰ A basin state is defined as 'a state the territory of which includes the portion of an international drainage basin (Article 3).

⁸¹ (1997) 36 ILM 700.

international rivers. The guiding principle is that each basin state⁹⁰ is entitled within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin. States are further enjoined to prevent pollution of an international drainage basin because such pollution can cause substantial injury to the territory of a co-basin state.

The above principles are given treaty form in the 1997 Convention on the law of the non-navigable uses of international watercourses.⁹¹ The convention obliges states to protect and preserve ecosystems of international watercourses by preventing pollution and taking measures to preserve the marine environment.⁹²

Many countries of the world share watercourses⁹³ and have to cooperate in their uses of rivers and lakes. Rivers may be used to transport goods across borders and water may be transported from regions of excess to those of need.⁹⁴

2.5.10.2 **Kinds of Conflict That Could Arise Between WTO Rules and MEAs**

There is strong likelihood of international trade and international environmental law clashing when measures falling under both of their jurisdictions become the subject of

⁹⁰ A basin state is defined as ‘a state the territory of which includes the portion of an international drainage basin (Article 3).

⁹¹ (1997) 36 ILM 700.

⁹² Articles 20-23.

⁹³ In the SADC region, the Zambezi River is shared by the Democratic Republic of Congo, Zambia, Zimbabwe and Mozambique. The river supports communities near it with water and fish hence its pollution will adversely affect people in the different countries. In Zimbabwe, a plan to harness water from the Zambezi to the arid region of Matabeleland has been on the cards for the last decade and a half. If the plan comes to fruition, other countries have to be informed and an environmental impact assessment of the project carried out in order not to raise cross border tensions. The people of Zimbabwe are the ones who are likely to be worried about the pollution of the Zambezi River if the project succeeds [see Jakob Granit, “Management of Shared Water sources in Southern Africa and the role of External assistance” at <http://www.iwsd.co.zw/Papers/Granit.pdf>].

⁹⁴ The Lesotho highlands water project, which exports raw water to South, largely for industrial consumption is a good example of such in the SADC region. The SADC protocol on shared watercourses, although not yet ratified is a diligent attempt at cooperation in environmental issues pertaining to water resources.

one, such disputes will inevitably migrate to the WTO. We agree with this position adopted by Richard Stewart and suggest that there indeed should be a hierarchy of legal norms with the WTO rules being superior to those of an MEA.

2. The second scenario could take the form of a dispute between a party and a non-party to an MEA, both of which are WTO members, over a trade-related measure taken in the context of an MEA with an effect on non-parties. The likely response is that the non-party is likely to prefer bringing the dispute to the WTO since the MEA dispute settlement mechanism is unavailable to it. For example, a country in a manner that creates unnecessary obstacles to trade may apply a labeling requirement called for by an MEA.⁸⁷

The first and only MEA-related trade dispute brought to the WTO has been between two parties to an MEA.⁸⁸ The Swordfish dispute⁸⁹ between the European Union and Chile concerned a conservation measure taken by Chile.⁹⁰



University of Fort Hare

Together in Excellence

⁸⁷ A good example is an import ban imposed by a party to a MEA on a non-party to coerce the non-party into joining the MEA. The Montreal protocol for example prohibits trade with non-parties in ozone-depleting substances and this is likely to be viewed as a violation of the non-discrimination principle. However many countries remain non-parties to some MEAs either because they may not be convinced of the scientific evidence behind an environmental problem being tackled, may have different environmental priorities, may not have the financial resources or the technology to implement what is called for in the ME or simply wish to free-ride on the efforts of others.

⁸⁸ The MEA in question was the United Nations convention on the law of the sea (UNCLOS) which can in part be treated as an MEA.

⁸⁹ See *Chile-Measures affecting the transit and importation of swordfish, Request for the establishment of a panel by the European Communities* WTO documents WT/DS193/2 (Nov 2000). The parties succeeded in reaching a 'provisional arrangement' and have asked for the panel, which had not yet been composed to be suspended. (See WT/DS193/3 of April 2001).

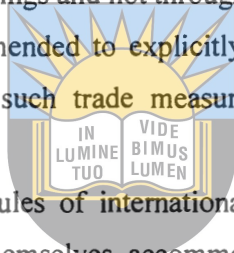
⁹⁰ The European Union complained about Chile's 1991 regulation which banned the docking of any sword fishing boats for loading, transfer and offloading of swordfish on Chilean ports for environmental reasons because shoals of this variety of fish are diminishing in the world's waters according to estimates from environmental groups. The ban not only applied to fish caught in Chilean waters but from wherever since Chile wanted to be the pacesetter in the conservation of swordfish.

2.5.10.3 Should WTO Rules be Changed to Accommodate

Trade Measures in MEAs?

The answer to the above question is not easy. Different positions have been taken some of them being:⁹⁷

- Changes to WTO rules to accommodate MEAs are unnecessary in light of the fact that no MEA-related trade dispute has come before the WTO panel. The *Swordfish* dispute is a minor exception and has been suspended in the WTO. However we submit that the fact that there have been few disputes that are MEA-related does not mean that disputes in that area are unlikely. It is better to be proactive than reactive.
- WTO rules should only accommodate MEAs in a limited fashion through guidelines and understandings and not through change to the rules.
- WTO rules should be amended to explicitly cater for trade measures taken pursuant to MEAs and such trade measures should be subjected to less stringent WTO scrutiny.
- MEAs should take the rules of international trade into account during the negotiation stage, and themselves accommodate those rules by restraining their use of trade measures.



University of Fort Hare
Together in Excellence

Whatever position one might take with regard to whether or not WTO rules should be changed to accommodate MEAs, the fact of the matter is that the issue is far from resolution and this area of international trade remains fertile ground for further future research. It is submitted in conclusion of this section that since WTO rules are specific to trade while MEAs are peripheral to the issues, the MEA trade provisions should only be used as a guide especially when the WTO rules on the same subject are not clear. There should be a complementary relationship between trade measures in MEAs and the rules of the multilateral trading system

⁹⁶ The European Union complained about Chile's 1991 regulation which banned the docking of any sword fishing boats for loading, transfer and offloading of swordfish on Chilean ports for environmental reasons because shoals of this variety of fish are diminishing in the world's waters according to estimates from environmental groups. The ban not only applied to fish caught in Chilean waters but from wherever since Chile wanted to be the pacesetter in the conservation of swordfish.

⁹⁷ See generally, Richard B. Stewart "The NAFTA: Trade Competition and environmental protection" (1993) 27 *The International Lawyer* 751.

Conclusion

The history of the international trade and the environment discourse, outlined above, which dates back to the 1970s, clearly mirrors the issues and concerns that underlie the trade and environment debate. The recurrent themes in the debate include but are not confined to industrial pollution control, cross-border control of pollution, environmental protection policies and their negative impact on trade, technical regulations and standards, import bans motivated by a desire to protect endangered species, the transparency of national environmental regulations with an impact on trade and possible areas for environmental protection. Numerous meetings have been held to deliberate on trade and environmental matters but no clear solution has been proffered and adopted. The trade and environment debate is still far from resolution. It is trite to point out once more that the history outlined above clearly accounts for the rise and rise of trade and environment concerns within the WTO.

It has been naively suggested at other forums that the solution to the trade and environment debate lies in the promulgation of MEAs with trade provisions. This solution is not very attractive because there is a multiplicity of MEAs and compliance with some MEAs provisions is mandatory only to signatories. The solution then seems to lie in a robust rules-based dispute settlement system compliance with the rules of which is compulsory. This then takes us to our next section of the study which deals with the adjudication of international trade disputes; specifically environmentally related trade disputes.

CHAPTER THREE

One of the major innovations of the Uruguay round negotiation was the adoption, as part of the WTO agreement, of detailed arrangements in respect of dispute settlement.¹

Dispute Settlement under the World Trade Organization²

3. Introduction

Having investigated the meaning, dimension, context and history of the trade and environment debate, it is now necessary to explore how environmentally related trade disputes are resolved in the WTO. The WTO provisions on dispute settlement are general to international trade disputes;³ they are not specific to environmentally related trade disputes. This should not be considered as a shortcoming because WTO Jurisprudence on the subject of trade and the environment shows the panels and the Appellate Body involved the active interpretation of the WTO rules to protect the environment from free trade. In this chapter therefore, we give an expository account of the WTO general provisions on dispute settlement. This will lay the groundwork for an understanding of how the selected environmentally related trade disputes were resolved.

University of Fort Hare
Together in Excellence

3.1 Substantive issues in Dispute Settlement

There is need to spell out in general terms why a member may resort to the dispute settlement process. In the majority of cases, a member may have recourse to the

¹ John Duggard, *International Law: A South African Perspective* (2003) at 371.

² For a general note on the GATT/WTO dispute settlement mechanisms and their effectiveness, see Alexandre Timoshenko (ed) *Dispute Avoidance and Dispute Settlement in International Environmental Law* (2001) at 32-34; W.J Davey, "Dispute Settlement in GATT" (1987) 11 *Fordham International Law Journal* 51; S.A Mota, "The World Trade Organisation: An Analysis of Disputes" (1999) 25 *North Carolina Journal of International Law and Commercial Regulation* 75; Enerst Ulrich Petersmann, *The GATT WTO Dispute Settlement System: International Law, International Organisations, and Dispute Settlement* (1995) at 42-69 and Joel P. Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40 *Harvard International Law Journal* 333.

³ The NAFTA on the other hand, (see chapter seven below) does have some provisions on dispute settlement that are specific to environmentally related trade matters.

dispute settlement process when dissatisfied with another member for action taken or failure to take some action.⁴

The ultimate relief which this process provides is authorization to the affected member to take retaliatory measures against the offending member.⁵ The Uruguay round has strengthened the dispute settlement mechanism⁶ by fixing time limits for various stages of the process and firm provisions have been made against obstructing implementation of decisions reached.

The objectives of the dispute settlement process include *inter alia* the provision of security and predictability to the multilateral trading system, the preservation of rights and obligations of members in the WTO agreement and the clarification of the provisions of these agreements without adding or extinguishing obligations embodied therein.⁷

Dispute settlement is provided for in articles XXII and XXIII of the GATT 1994. The relevant agreement is the *Understanding on the Rules and Procedures Governing the Settlement of Disputes*.⁸ To fully understand the WTO dispute settlement regime, one must consult the following: *Together in Excellence*

- a) Articles XXII and XXIII of GATT 1994, which contain some procedural matters and some important substantive provisions laying down the preconditions for starting the dispute settlement process;
- b) The dispute settlement understanding (DSU); and

⁴ Bhagirath Lal Das, *The World Trade Organization: A Guide to the Framework for International Trade* (1999) at 397 (hereafter Lal Das).

⁵ Lal Das *ibid* at 397. However this is not an effective tool to a member that is economically weak since retaliating against an economically strong member is unlikely to yield positive results for the weak member, as it will be of no effect. The other available relief to the offended member is to ask for compensation. The effectiveness of dispute settlement and its remedies depends a good deal on the will of the members to abide by it.

⁶ Hereafter, DSM.


⁷ Lal Das *op cit* note 4 at 398.

⁸ Commonly referred to as the dispute settlement understanding or simply, DSU.

- c) The provisions on consultations and dispute settlement in the relevant agreement which is the subject matter of the particular dispute.⁹

Article XXII deals with consultations between contracting parties and enjoins each contracting party to accord a sympathetic hearing to, and afford adequate opportunity for consultation regarding, representations as may be made by another contracting party with respect to any matter affecting the operation of the WTO agreement.¹⁰ Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under article XXII (1).¹¹

Article XXIII provides for the dispute settlement route in the event of nullification or impairment of a WTO benefit. Nullification or impairment may take one or all of the following forms:

- 
- a) Nullification or impairment of any benefit accruing to the member under a particular agreement or
- b) An impediment to any objective of the agreement is encountered as a result of:
- failure of another member to carry out its obligations under the agreement,¹² or *Together in Excellence*
 - the application by another member of any measure that:
 - a) conflicts with the provisions of the agreement¹³
 - b) does not conflict with the provisions of the agreement¹⁴ or
 - the existence of any other situation.¹⁵

⁹ For a general note on dispute settlement especially the issues of negotiation, mediation, inquiry, conciliation and arbitration, see J.G Merrills *Interanational Dispute Settlement* (1991) at 1-104. Notable relevant examples from the WTO maybe the Agreement on Sanitary and Phytosanitary measures or the Decision on Trade and the Environment.

¹⁰ Article XXII (1).

¹¹ Article XXII (2).

¹² Article XXIII (a).

¹³ Article XXIII (1) (b).

¹⁴ Ibid.

¹⁵ Article XXIII (1) (c).

Nullification or impairment is not discussed in detail at this stage as it is discussed in its proper juridical context below in paragraph 3.1.1.

3.1.1 Nullification or Impairment

Nullification or impairment is canvassed in detail in article XXIII of the GATT 1994 and the Dispute Settlement Understanding (DSU). In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.¹⁶ There is thus a presumption of nullification or impairment in such cases. It would then be up to the member against whom a complaint has been lodged to rebut the claim. Past experience has shown that this presumption is extremely difficult to rebut.¹⁷ In some cases the member bringing the complaint will have to adduce evidence to prove that any benefit, which it enjoyed under the agreement, has been nullified or impaired.¹⁸

Nullification or impairment may be in the form of failure to carry out an obligation under the WTO agreement or the application of a measure conflicting with the agreement. To prove the failure to carry out an obligation or the application of a measure conflicting with the GATT, it is necessary to establish that there is an obligation in the agreement which a member has failed to carry out or which conflicts with a measure taken by a member. In a nutshell, the following should be proved: The existence of an obligation in the relevant agreement or failure by a member to carry out the obligation or that a member has taken a measure and there is a provision in the relevant agreement which conflicts with the measure. If a country passes legislation that conflicts with a provision of the relevant agreement or has potential to conflict, then such legislation may be considered WTO illegal and be impugned.¹⁹

¹⁶ Per article 3 (8) of the Dispute Settlement Understanding. See also Lal Das op cit note 3 at 401.

¹⁷ The *Panel on US -Taxes on Petroleum and Certain Imported Substances* [BISD 345/157,158] noted that in several cases such a rebuttal had been tried but had not succeeded. The panel concluded that, in actual practice, the presumption had operated as an irrebuttable presumption.

¹⁸ Lal Das op cit note 4 at 401.

¹⁹ With the advent of the WTO, members are required to bring their laws and procedures into conformity with the provisions of WTO agreements. Therefore if there is a provision in the member's legislation which conflicts with any provision in a specific WTO agreement, this obligation would be considered to have been violated. As a result, the mere existence of a 'violating provision' in the

Nullification or impairment should be admissible even if there is no statistical evidence of trade damage. The authority in this regard is the *Panel on EEC-Payment and subsidies paid to processors and producers of oil seeds*.²⁰

3.1.2 Attainment of objectives being impeded

As previously mentioned,²¹ complaints have arisen under this head²² but have not been pursued. The provision has therefore, not come up for serious consideration, and criteria and guidelines have not been developed.²³ However the following cases offer guidelines.

In the *panel on EEC-Refunds on exports of sugar*,²⁴ Australia had raised the issue that the EEC system of sugar export subsidies had impeded the attainment of the objectives of the GATT. However this question was not examined as no detailed submission was made as to exactly which objective of the GATT had been impeded.

In 1983, the European Economic Community (EEC) brought a complaint against Japan arguing that the attainment of GATT objectives had been impeded and requested the establishment of a working party. The complaint was not pursued.



3.1.3 Violation and Non-Violation Cases

If the nullification or impairment is caused by a member failing to carry out its obligations under the agreement,²⁵ or a measure that conflicts with some provision of

legislation would amount to a violation, irrespective of the fact whether it is a mandatory or discretionary provision in the legislation [Lal Das op cit note 3 at 402].

²⁰ BISS 37S/86,130.

²¹ See note 12 above.

²² Article XXIII (1) last part.

²³ Lal Das op cit note 4 at 405.

²⁴ BISS 26S/290,291.

²⁵ Article XXIII (1) (a).

the agreement is applied,²⁶ then such situations are commonly called ‘violation cases’.²⁷

Non-violation cases on the other hand occur when a member applies a measure that does not conflict with the WTO agreement²⁸ yet causes nullification or impairment of a benefit. In this case, nullification/impairment occurs without an overt violation of the provisions of the agreement.²⁹ To bring a non-violation complaint, the measure, which must be applied by a government, must have the effect of altering competitive conditions established by the agreed tariff bindings and must be ‘unexpected’ in that it could not have been reasonably anticipated at the time the concessions were negotiated.³⁰

The main elements to be determined in non-violation nullification or impairment cases are the following:

- 1) Is there the existence of a benefit, for example a tariff concession?
- 2) Has there been subsequent action by a member by which the benefit is curtailed?
- 3) Did the affected member, at the time of the negotiation of the concession in question, have a reasonable expectation that the comparative conditions of the product in question would not be disturbed?

If the answer to the above three key questions is in the affirmative, then there is a *prima facie* case of a non-violation nullification or impairment.³¹ The complaining or

²⁶ Article XXIII (1) (b) first part.

²⁷ Bhagirath Lal Das op cit note 4 at 400 gives an example of a WTO member that may cause such a violation by imposing an internal tariff on an imported product, which tariff does not apply to a like domestic product thus violating the provisions of article III of GATT 1994. Similarly in the context of this study, a member may impair the benefit flowing out of its tariff binding by an environmental tax on imported products, which does not apply or applies more favourably to domestic like products.

²⁸ Article XXII (1) (b) second part.

²⁹ Lal Das op cit note 4 at 400. For example opines that a member may grant a subsidy to an industry within permissible limits but in the process adversely affect the prospects of export of another member.

³⁰ Bernard M. Hoekman, *Trade Laws and Institutions: Good Practices and The World Trade Organisation* (1995), World Bank Discussion Paper number 282 at 119.

³¹ Lal Das op cit note 4 at 401.

affected member need not have been a party to the negotiation of the concession; what is relevant is that the member has the benefit of the concession.³²

Remedies available to the aggrieved party in cases of non-violation complaints may take the form of a mutually satisfactory adjustment and compensation.³³ Compensation may be the part of a mutually satisfactory adjustment as final settlement of the dispute.³⁴ Since there is no obligation to withdraw the non-violating measure, any satisfactory adjustment may concern a different subject matter;³⁵ this then effectively becomes a case for cross-compensation.

The *Panel on the treatment by Germany of Imports of sardines*³⁶ considered whether a new tariff schedule of Germany, which treated the imports of sprats and herring differently from imports of sardines, though not violating any obligation, would still cause the nullification or impairment of benefits to Norway. The panel took the view that impairment would exist if the action of Germany resulted in upsetting the competitive relationship between the two types of products, and also that it could not reasonably have been anticipated by Norway at the time it negotiated for the tariff reduction. The panel found that these two situations did really exist and thus concluded that non-violation nullification or impairment was caused.

It is in the context of the above legal and factual state of affairs that trade disputes arise between WTO members. At a glance, the above substantive aspects of dispute settlement may seem divorced from and irrelevant to matters of trade and the environment. However it is submitted that this is not the case.

Provisions on WTO dispute settlement mechanisms apply *mutatis mutandis* to environmentally related trade disputes because some environmental measures taken by parties may impair or nullify trade benefits depending on how they are implemented. A WTO member may pass legislation that is aimed at protecting its

³² Lal Das, *ibid.*

³³ Hoekman *loc cit* note 30.

³⁴ Article 26 (1) (d) of the DSU.

³⁵ Hoekman *op cit* note 30 at 122.

³⁶ BISD 1S/53, 58.

own local environment from the vagaries of free trade but such legislation may in the long run nullify or impair the entitlements of its trading partners. This could happen for example, if the new environmental law results in unfair discrimination against imports, which become less competitive *vis-à-vis* like local products. In this context therefore, the above discussion of substantive legal issues in the WTO dispute settlement process becomes relevant to the trade and environment debate.

Having canvassed in detail substantive issues in the WTO dispute settlement process, it is now appropriate to turn to procedural aspects. The following account is a summary of the procedure for the settlement of disputes under WTO.

3.2 Procedural Aspects of the WTO Dispute Settlement Process

3.2.1 Background

The GATT secretariat initially played a passive role of simply implementing the decisions made by the contracting parties.³⁷ GATT rules and procedures for implementing articles XXII and XXIII³⁸ were developed on a *de facto* basis in particular panel cases over time. The procedure under the GATT had no fixed timetables, panel rulings were easier to block and many cases dragged on for a long time inconclusively. The GATT system seemed to be riddled with exceptions and lacked a consistent set of rules, never mind the ‘teeth’ to enforce rulings.³⁹ By contrast, the WTO, through the instrumentality of the dispute settlement understanding (DSU) on the other hand offers a single set of procedures for disputes arising under any of the covered agreements, making an important improvement over the GATT.⁴⁰ It therefore has a much stronger enforcement and dispute settlement

³⁷ Ramesh Adhikari and Prema -Chandra Athukorala “Developing Countries in The World Trading System: An overview” in Ramesh Adhikari and Prema -Chandra Athukorala (Eds) *Developing Countries in the World Trading System: The Uruguay round and beyond* (2002) at 1.

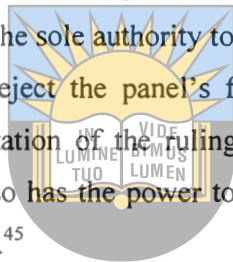
³⁸ These two articles, in conjunction with the Understanding on rules and procedures governing the settlement of disputes [DSU], attached to the WTO agreement as annex 2, deal with dispute settlement under the WTO in general.

³⁹ Marc L.Busch and Eric Reinhardt, “Developing countries and General Agreement on Tariffs and Trade/World Trade Organisation Dispute Settlement” (2003) 37 *Journal of World trade* 719 at 720. (Hereafter Busch and Reinhardt).

⁴⁰ Busch and Reinhardt, *bid.*

mechanism than what prevailed under the GATT. The WTO respects efforts by parties to settle disputes through bilateral consultations; this is an improvement to the old GATT dispute settlement regime in which the smooth settlement of disputes could be blocked at the instance of one party, namely the respondent state. The new rules on dispute settlement ushered in by the Uruguay round include greater automaticity in decisions on the establishment, terms of reference and composition of panels, such that these decisions are no longer dependent upon the consent of the parties to a dispute.⁴¹ Further, the DSU will establish an integrated system permitting WTO members to base their claims on any of the multilateral trade agreements included in the annexes to the agreement establishing the WTO.⁴²

Settling disputes is the responsibility of the dispute settlement body,⁴³ which consists of all WTO members. The DSB has the sole authority to establish panels of experts to consider a case and to accept or reject the panel's findings or the results of an appeal.⁴⁴ It monitors the implementation of the rulings and recommendations and assesses compliance therewith. It also has the power to authorize retaliation when a member fails to comply with a ruling.⁴⁵



University of Fort Hare
Together in Excellence

⁴¹ 'Commentary on the understanding on rules and procedures governing the settlement of disputes' at http://www.wto.org/english/docs_e/legal_e/45-dsvds.doc [15 May 2005].

⁴² Ibid.

⁴³ Hereafter, DSB. This body is in essence the general council of the WTO in another guise. See 'Commentary on the understanding on rules and procedures governing the settlement of disputes' loc cit note 40.

⁴⁴ 'Commentary on the understanding on rules and procedures governing the settlement of disputes', ibid.

⁴⁵ Ibid.

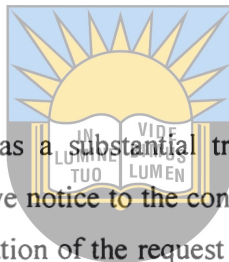
3.2.2 The various stages in the dispute settlement process ⁴⁶

3.2.2.1 Consultation

The first stage in the dispute settlement process is consultation, ⁴⁷ which requires a member to enter into consultations within 30 days of a request for consultations from another member. ⁴⁸ If after 60 days from the request for consultations there is no settlement, ⁴⁹ the complaining party may request the establishment of a panel. Where consultations fail, the complaining party may move directly to request a panel. In cases of urgency, including those that concern perishable goods, the parties to the dispute, panels and the appellate body shall make every effort to accelerate the proceedings to the greatest extent possible. ⁵⁰ The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration. ⁵¹

3.2.2.2 Other Interested Members

If any member considers that it has a substantial trade interest in the particular consultation, then it is obliged to give notice to the consulting members and the DSB within 10 days of the date of circulation of the request for consultation specifying its desire to join in the consultations. ⁵² If the member to whom the request for consultation was directed agrees that the interested party has a well-founded claim regarding substantial interest, the member desiring consultation will then be



⁴⁶ The following account of the procedural aspects of the WTO dispute settlement mechanism draws heavily from the sources on the WTO website at <http://www.wto.org>. The specific article is 'Understanding the WTO: Settling Disputes', at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#understandin [15 May 2005]. Further reliance is had on the full text of the understanding on rules and procedures governing the settlement of disputes (DSU), attached to the WTO agreement as annex 2.

⁴⁷ Ibid. See also article 4 of the DSU.

⁴⁸ Article 4 (3) of DSU.

⁴⁹ Article 4 (7) of DSU.

⁵⁰ Article 4 (9) of DSU.

⁵¹ Article 5 of DSU. Despite being frequently used, the alternative dispute resolution measures are not completely relied upon by WTO members as most disputes almost always end up at the level of either the panel or Appellate Body. Litigation is the most frequently adopted dispute settlement route.

⁵² Lal Das op cit note 4 at 408.

included.⁵³ If the request is not accepted, the member concerned may make a request for a separate consultation in accordance with the procedure for initiating a consultation.⁵⁴

3.2.2.3 The Panel Process

Where a dispute is not settled through consultations, the DSU requires that a panel be established,⁵⁵ at the latest, at the meeting of the DSB following that at which a request is made, unless the DSB decides by consensus against establishment. The respondent country can block the establishment of a panel once, but when the DSB meets for a second time, the appointment of a panel can no longer be blocked (unless there is consensus among members of the DSB against appointing the panel).⁵⁶ Parties are given 45 days to agree on the establishment of a panel, which is obliged to deliver its final report to the parties within six months or within three months in cases of urgency.⁵⁷ Where parties cannot agree on the composition of a panel, the WTO director general, in consultation with the chairman of the DSB, can appoint the panelists⁵⁸ from a list of experts maintained by the secretariat.



3.2.2.4 Panel Procedure

During the first hearing of the complaint, the procedure is as follows.⁵⁹ The complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.⁶⁰ At the panel's second meeting, countries involved submit rebuttals and oral arguments. If one side raises scientific or technical matters, the panel may consult

⁵³ Lal Das, *ibid.*

⁵⁴ *Ibid.*

⁵⁵ Per article 6 (1) of DSU.

⁵⁶ Officially, the panel is helping the DSB make rulings or recommendations but because the panel's report can only be rejected by consensus in the DSB, its conclusions, which have to be based on the agreements cited, are difficult to overturn.

⁵⁷ Hoekman *loc cit* note 30.

⁵⁸ Article 8 (7) of DSU.

⁵⁹ 'Understanding the WTO: Settling Disputes', available at

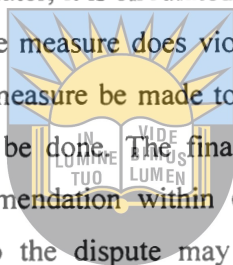
http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#understandin [15 May 2005].

⁶⁰ *Ibid.*

experts or appoint an expert review group to prepare an advisory report.⁶¹ The panel then submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

Subsequently, the panel submits an interim report, including its findings and conclusions, to the two sides giving them one week to ask for a review. When the matter goes for a review, the period of review must not exceed two weeks. During that time the panel may hold additional meetings with the two sides.⁶²

A final report is submitted to the two sides in two weeks time after the submission of the interim report⁶³ and three weeks later, it is circulated to all WTO members.⁶⁴ If the panel decides that the disputed trade measure does violate a WTO agreement or an obligation, it recommends that the measure be made to conform to WTO rules. The panel may suggest how this could be done. The final report becomes the dispute settlement body's ruling or recommendation within 60 days unless the DSB by consensus rejects it. Both sides to the dispute may appeal against the findings contained in the report.⁶⁵



University of Fort Hare
Together in Excellence

3.2.2.5 Appeals and Related Procedure

Appeals, which can be at the instance of one party to the dispute or both, have to be based on points of law such as legal interpretation.⁶⁶ They cannot re-examine existing evidence or examine new issues.⁶⁷ Three members of a permanent seven-member appellate body set up by the DSB and broadly representing the range of WTO

⁶¹ See 'Understanding the WTO: Settling Disputes', available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#understandin [15 May 2005]. Panelists for each case can be chosen from a permanent list of well-qualified candidates, or from elsewhere. They serve in their individual capacities and cannot receive instructions from any government.

⁶² See 'WORKING PROCEDURES', annexed to the DSU as 'APPENDIX 3'.

⁶³ APPENDIX 3 (12) (j).

⁶⁴ APPENDIX 3 (12) (k).

⁶⁵ Sometimes both parties to the dispute do appeal against the findings of the panel contained in the report.

⁶⁶ See Lal Das op cit note 4 at 410.

⁶⁷ Ibid.

memberships hear each appeal.⁶⁸ Normally, appellate proceedings shall not exceed 60 days, with an absolute maximum of 90 days from a date a party formally notifies its decision to appeal. The resulting report shall be adopted by the DSB and unconditionally accepted by the parties within 30 days following its issuance to members, unless the DSB decides by consensus against its adoption.⁶⁹

3.2.2.6 Possible Steps after the Dispute Has Been Decided

Once the panel report or the appellate body report is adopted, the party concerned will have to notify its intentions with respect to implementation of the recommendations.⁷⁰ If it is impracticable to comply immediately, the party concerned shall be given a reasonable period of time, the latter to be decided either by agreement of the parties and approval by the DSB within 45 days of the adoption of the report or through arbitration within 90 days of adoption.⁷¹ If the member concerned⁷² fails to act within this period, it has to enter into negotiations with the complaining member (or other members) in order to determine mutually acceptable compensation – for instance, tariff reductions in areas of particular interest to the complaining side.⁷³

If no satisfactory compensation has been agreed upon within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to impose limited trade sanctions⁷⁴ (suspend concessions or obligations) against the other side.⁷⁵

⁶⁸ <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#understandin> (Visited on 15 May 2004). Members of the appellate body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade and not affiliated with any government.

⁶⁹ Ibid. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. See also article 17 (14) of DSU.

⁷⁰ See article 21 (3) of DSU.

⁷¹ Ibid.

⁷² The 'member concerned' is the party to the dispute to which the panel or appellate body recommendations are directed.

⁷³ Article 22 (2) of DSU.

⁷⁴ The imposition of trade sanctions by a weak member against an economically strong member has been described as ineffective and defeatist in the long run. The weak member is likely to lack the economic power with which to threaten retaliation.

Disagreement over the proposed level of suspension may be referred to arbitration.⁷⁶ In principle, concessions should be suspended in the same sector as that in issue in the complaint.⁷⁷ If this is not practicable or effective, the suspension can be made in a different sector of the same agreement.⁷⁸ In turn if this is not effective or practicable and if the circumstances are serious enough, the suspension of concessions can be made under another agreement.⁷⁹ The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.⁸⁰ The Dispute Settlement body (DSB) monitors how adopted ruling are implemented and any outstanding case remains on its agenda until the issue is resolved.

3.3 Notable Criticisms against WTO Dispute Settlement Procedures

There has been growing criticism of the WTO dispute settlement process in terms of which the following points are notable.

Firstly, some critics have characterized the dispute settlement process as non-transparent and shrouded in secrecy.⁸¹ Non-governmental organizations (NGOs) like *Friends of the Earth* have called for a lifting of most confidentiality restrictions on documents, opening hearings to the public and that private parties be allowed to submit briefs to panels and the appellate body.⁸²

⁷⁵ See article 21(3) of DSU. The DSB must grant this authorization within 30 days of the expiry of 'the reasonable period of time' unless there is a consensus against the request.

⁷⁶ In terms of article 21 (3) (c) of the DSU, the expression 'arbitrator' shall be interpreted as referring either to an individual or a group.

⁷⁷ Article 22 (3) (a) of DSU.

⁷⁸ Article 22 (3) (b) of DSU.

⁷⁹ Article 22 (3) (c) of DSU.

⁸⁰ Hoekman, op cit note 29 at 127.

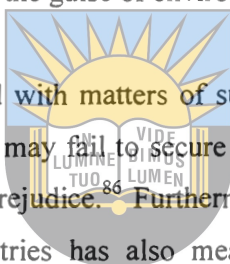
⁸¹ This is because the proceedings are closed to the public and private parties are not allowed to submit their views or information directly to the public. See in this regard T.N Srinivasan "Emerging Issues In the World Trading System" in Ramesh Adhikari and Prema –Chandra Athukorala (eds) *Developing Countries in the World Trading system: The Uruguay Round and Beyond* (2002), op cit note 37 at 3.

⁸² This however is likely to be problematic as parties may be tempted to disrupt proceedings by playing to the gallery to gain political mileage. See Srinivasan, ibid.

Experience with the Dispute settlement mechanism over the years suggests that unilateralism in setting WTO rules has not altogether disappeared as large and stronger states like the United States (hereafter the U.S or simply U.S) still win more cases.⁸³ Smaller developing states complain that settling disputes under the DSM is costly.⁸⁴

It has also been argued that the fact that the dispute settlement mechanism only involves national governments as either plaintiffs or defendants is a legal misnomer. This is because private investors in the form of transnational corporations (TNCs) and private individuals should also have access to the dispute settlement mechanism in existence.⁸⁵ This would ensure more effective policing of government measures aimed at restricting free trade under the guise of environmental protection.

There are also problems associated with matters of substantive and procedural law. For example, one of the disputants may fail to secure a legal representative and as a result be disadvantaged or suffer prejudice.⁸⁶ Furthermore, the fact that the disputes occur faraway in individual countries has also meant that the panels have had difficulties in establishing factual aspects of disputes.⁸⁷



University of Fort Hare

Together in Excellence

⁸³ See generally Busch and Reinhardt op cit note 39 at 719 about how

developing countries have fared in the GATT/WTO dispute settlement regime so far.

⁸⁴ Busch and Reinhardt op cit note 39 at 720 further argue that this is also compounded by lack of legal capacity and developing countries, which have been missing out on early settlement, need more assistance before litigation commences in order to capitalize on the non-litigious process of consultation provided for in article 4 of the DSU.

⁸⁵ It is argued that national governments do not adequately represent the views of private groups in their own countries; political interest is instead paramount [Srinivasan op cit note 36 at 4]. See on a related note Edwini Kessie, "Enhancing Security and Predictability for Business Operators under the Dispute Settlement System of the WTO" (2000) 34 *Journal of World Trade* 1-17.

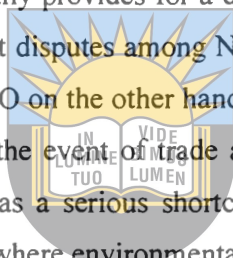
⁸⁶ Srinivasan op cit note 37 at 155 cites a WTO panel case on the U.S –EU banana dispute in which the WTO panel ousted private lawyers who were advising some Caribbean countries after the U.S and the EU had objected to their presence on the ground that they were not permanent government officials.

⁸⁷ Ibid. It is submitted that the above criticism is vexatious because even in domestic tribunals in individual countries, the presiding officers have to determine factual disputes that took place very far away from the seat of the court. In some instances, the witnesses have to be brought in from very remote places that are more than a thousand kilometers away. This does not affect the tribunal in its determination of factual disputes.

Conclusion

This study is primarily about the resolution of trade and environment disputes hence the foregoing detailed discussion of dispute settlement mechanisms. The reasons why disputes arise in general and the way they are settled are relevant to the trade and environment debate since environmentally related trade disputes are resolved just like ordinary disputes through the dispute settlement mechanisms in place.

At the WTO level, disputes arise because a WTO member has abdicated on its duties in terms of a WTO agreement or it has interpreted a WTO provision in a manner that nullifies or impairs a benefit for a fellow WTO member. The same, it is submitted should logically generally apply to disputes under the NAFTA and the SADC.⁸⁸ The NAFTA goes further and specifically provides for a dispute settlement mechanism in the event of trade and environment disputes among NAFTA member states.⁸⁹ This is most welcome and novel. The WTO on the other hand does not provide for a specific dispute settlement mechanism in the event of trade and environment disputes. This however should not be regarded as a serious shortcoming because the WTO does provide for exceptional situations where environmental measures may be employed to restrict trade.⁹⁰



University of Fort Hare
Together in Excellence

⁸⁸ Although, as previously pointed out, the SADC dispute settlement mechanism has not been used yet and its impact or effectiveness is yet to be determined.

⁸⁹ See chapter seven below for a detailed discussion of the pertinent NAFTA provisions.

⁹⁰ The relevant provisions are Articles XX (b) and XX (g) of the GATT together with the Chapeau provisions thereof. Article XX (b) allows WTO members to restrict trade in the interest of human, animal or plant life or health. Article XX (g) on the other hand allows for a departure from GATT rules in the interest of the conservation of exhaustible natural resources. The Chapeau to Article XX serves the purpose of qualifying the exceptions above and seeks to prevent abuse of the exceptions by WTO members.

CHAPTER FOUR

The GATT in this respect (i.e. environmental protection) is not an instrument for deregulation, in the sense that WTO Members did not give up their right to pursue autonomous environmental policies by accepting a harmonized multilateral agreement in this respect, and should not be interpreted as such.¹

Trade and Environment Jurisprudence: The conservation of Exhaustible Natural Resources

4. Introduction

This chapter specifically focuses on environment-related trade disputes dealt with under the auspices of the GATT secretariat and progressively moves on to those disputes decided by the WTO after 1 January 1995. The disputes discussed in the chapter are biased towards the conservation of exhaustible natural resources such as *dolphins*, *clean air* and *sea turtles*. The disputes have been selected on the basis of their relevance to the trade and environment theme in general and trade and environment in the context of a transforming SADC in particular.

University of Fort Hare
Together in Excellence

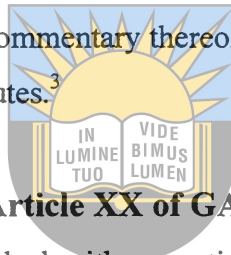
Most of the cases having one thing or another to do with trade and the environment involved import bans or other non-tariff restrictions on trade about which adversely affected WTO Members complained. Trade bans and other non-tariff restrictions are specifically discouraged in the WTO unless covered by one or more exceptions in the GATT. While WTO Members are at liberty to pass legislation within their territories aimed at environmental protection, the enforcement of the legislation should not be such that it amounts to a discriminatory, arbitrary practice that is in essence a disguised restriction on international trade.² The cases discussed and analysed below will show how GATT/WTO panels and the Appellate Body have interpreted the relevant provisions of the WTO in order to ensure the conservation of exhaustible natural resources.

¹ Petros C.Mavroidis, "Trade and the environment after the *Shrimps-Turtles* litigation" (2000) 34 (1) *Journal of World Trade* 73 at 73 (hereafter Mavroidis).

² See in this particular regard Articles I and III of GATT 1994 together with the Chapeau to article XX thereof.

With the above objectives in mind, an attempt will be made to link each dispute discussed to the theme of trade and environment in a changing SADC. The attempted link aims at showing how the disputes, arising in a different geographical, environmental, economic, social, political and even cultural context from the SADC region are relevant to our own SADC in transition.

Before a discussion of the case law, it is appropriate to first of all state the WTO law in general terms as it applies to disputes involving the conservation of exhaustible natural resources. In this regard, Article XX (g) of GATT is the applicable provision. In the three disputes that are dealt with in this chapter, the general provisions of Article XX as well as the specific provisions of Article XX (g) and the Chapeau were applied and interpreted. The law is stated uncritically here as commentary thereon is reserved for later paragraphs where the law is applied in actual disputes.³



4.1 The Applicable provisions of Article XX of GATT 1994⁴

The cases referred to in this section deal with exceptions under Article XX of GATT 1994.⁵ Article XX on the General exceptions lays out a number of specific instances in

University of Fort Hare
Together in Excellence

³ See paras 4.2-4.5 below.

⁴ The following outline of the WTO practice under GATT article XX on General exceptions draws largely from “Trade and environment Backgrounder-Brief History-GATT 1994” at http://www.wto.org/english/tratop_e/envir_e/envir_background_e/c7s3_e.htm and “GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) and (g) WT/CTE/W/203 8 March 2002” at <http://www.docsonline.wto.org/ddfdocuments/t/wt/ict/w203.doc> [both visited 11 September 2005]. For a further account of environmental provisions in the 1994 Agreement Establishing the WTO, see Ernest – Ulrich Petersmann, *International and European Trade and Environmental Law after the Uruguay Round* (1995) at 99-125; WTO Geneva, *Guide to WTO Law and Practice Vol 1 Articles I-XXI* (1995) at 562-573; and Aaditya Mattoo and Petros C. Mavroidis, “Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT” in Ernest – Ulrich Petersmann (ed) *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) at 327-343.

⁵ Under the GATT, six panel proceedings involving an examination of environmental measures or human or plant health-related measures under article XX have been completed namely: *United States-Prohibition of imports of Tuna and Tuna Products from Canada* (hereafter *US-Canadian Tuna*), adopted on 22 February 1982, BISD 29S/91, *Canada-Measures affecting exports of unprocessed Herring and Salmon*

which WTO members may be exempted from GATT rules. With specific reference to the conservation of exhaustible natural resources,⁶ the specific Article states that:

*Subject to the requirement that such measures are not applied in a manner
Which would constitute a means of arbitrary or unjustifiable discrimination
between countries where the same conditions prevail, or a disguised restriction
on international trade, nothing in this agreement shall be construed to prevent the
adoption or enforcement by any contracting party of measures:*

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



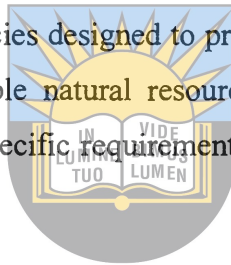
(hereafter *Canada-Salmon and Herring*) adopted 22 March 1988, BISD 35S/98, *Thailand-Restrictions on importation of and internal taxes on cigarettes* (hereafter *Thailand-Cigarettes*) adopted on 7 November 1990, BISD 37S/200, *United States-Restrictions on imports of Tuna* (hereafter *US-Tuna (Mexico)*) circulated on 3 September 1991, not adopted, DS 21/R, *United States-Restrictions on imports of Tuna*, circulated on 16 June 1994, not adopted, DS29/R, (hereafter *US –Tuna (EEC)*) and *United States – Taxes on automobiles* (hereafter *US-Automobiles*), circulated on 11 October 1994, not adopted, DS31/R. Out of the six reports, three remained unadopted (*US-Tuna (Mexico)*, *US –Tuna (EEC)* and *US-Automobiles*). Under the WTO so far, three disputes led to the adoption of panel and Appellate Body reports (*United States- standards for reformulated and conventional Gasoline* (hereafter *US-Gasoline*), Appellate Body and panel report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R, *United States-Import prohibition of Certain Shrimp and Shrimp products* (hereafter *US-Shrimp*), Appellate Body and panel report, adopted on 6 November 1998, WT/DS58 and *European Communities-Measures affecting asbestos and asbestos containing products* (hereafter *EC-Asbestos*), Appellate Body and panel report, adopted on 5 April 2001, WT/DS135). One case (*US-Shrimp*) decided under article 21.5 procedure of the DSU (referred to hereafter as *US-Shrimp (article 21.5)*) was also decided. In this chapter however, focus is on some and not all of the above cases due to their currency and relevance to the various facets of the trade and environment debate.

⁶ See the “Trade and environment: Background-Brief History-GATT 1994”, op cit note 4. The relevant paragraphs are Articles XX (b) and XX (g), which deal with the protection of human, animal and plant life and the conservation of exhaustible natural resources respectively.

Matters pertaining to trade and the environment in this regard have revolved around the conservation of exhaustible natural resources such as dolphins,⁷ salmon and herring,⁸ clean air,⁹ petroleum¹⁰ and sea-turtles.¹¹

4.1.2. General requirements under Article XX

As set out in the *US-Gasoline* case¹² the defending party must demonstrate, first that the measure complained of falls under at least one of the exceptions,¹³ and second, that it is not applied in a manner that would constitute ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ and that it is not ‘a disguised restriction on international trade’.¹⁴ In applying the exceptions under article XX, panels and the Appellate Body first identify whether the policy pursued through the measure falls within the range of policies designed to protect human, animal or plant life or health,¹⁵ or to conserve exhaustible natural resources.¹⁶ Secondly, panels and the Appellate Body determine whether specific requirements, such as the necessity test, are met under articles XX (b) and XX (g).



University of Fort Hare

Together in Excellence

⁷ See the three *Tuna-Dolphin* cases discussed at <http://www.intfish.plus.com/cases/other/gatt1994/> [11 November 2005].

⁸ See *Canada-Measures affecting exports of unprocessed herring and salmon*, L/6268 - 35S/98, report of the panel adopted 22 March 1988.

⁹ See *United States — Standards for Reformulated and Conventional Gasoline*, Appellate Body Report and Panel Report, adopted on 20 May 1996 available at <http://www.ejil.org/journal/Vol9/No1/sr1a.html> [11 November 2005].

¹⁰ *United States — Standards for Reformulated and Conventional Gasoline*, *supra* note 9.

¹¹ See in this particular regard the case of *United States-Import prohibition of certain shrimp and shrimp products*, Appellate body and panel report, AB-2001-4, WT/DS58/AB/RW, Adopted by Dispute Settlement Body, 21 November 2001, available at <http://www.ejil.org/journal/curdevs/sr28.html> [12 November 2005].

¹² *Supra* note 9.

¹³ Either article XX (b) or XX (g).

¹⁴ This would amount to a shift from XX (b) and XX (g) to the Chapeau (introductory part, akin to a Preamble) to Article XX of GATT 1994.

¹⁵ As provided for in XX (b) of GATT 1994.

¹⁶ As provided for in article XX (g) of GATT 1994.

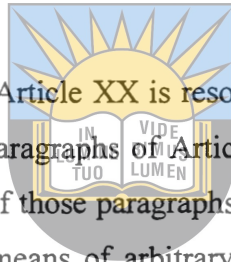
4.1.3 Requirements under Article XX (g)

This article of GATT 1994 specifically deals with measures that may transgress the spirit and letter of WTO law but be found to be justifiable on the premise that they are necessary for the conservation of exhaustible natural resources.¹⁷

A measure would qualify as ‘relating to the conservation of natural resources’ if the measure exhibited a substantial relationship with, and was not merely incidentally or inadvertently aimed at the conservation of exhaustible natural resources.¹⁸ Article XX (g) also contains an additional requirement that the measure at stake shall be ‘made effective in conjunction with restrictions on domestic production or consumption.’¹⁹

4.1.4 Article XX Chapeau

The Chapeau (introductory clause) of Article XX is resorted to once a measure satisfies the conditions set out by one of the paragraphs of Article XX.²⁰ The Chapeau requires that in order to be justified under one of those paragraphs, measures must not be ‘applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’²¹



University of Fort Hare
Together in Excellence

4.1.4.1 Arbitrary or unjustifiable Discrimination

The Chapeau in express terms, does not question a measure or a measure’s specific contents but the manner in which the measure is applied.²² Therefore, in terms of the

¹⁷ The term ‘exhaustible natural resources’ initially troubled GATT panels but it is now established law and practice that even renewable resources such as sea turtles and clean air are juridically classified as exhaustible natural resources. See in this regard *US-Shrimp supra* note 11 and *US-Gasoline supra* note 9.

¹⁸ Per Appellate Body Report in the *US-Gasoline case, supra* note 9.

¹⁹ This is a mandatory requirement that the measures concerned impose restrictions not just in respect of imported products, but also with respect to domestic ones.

²⁰ In this context, Article XX, paragraphs (b) and (g).

²¹ “GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g) WT/CTE/W/203 8 March 2002”, op cit note 4.

²² Ibid.

Chapeau to article XX, a measure may discriminate but not in an arbitrary or unjustifiable manner.²³

In order to determine whether a measure has been applied in an unjustifiable manner, two requirements have been identified namely:

(a) Whether a serious effort to negotiate has been made by the member country adopting the measure and

(b) Whether the measure is flexible.²⁴ As for arbitrariness in the application of the measure, there should have been ‘rigidity and inflexibility’ in the application of a measure.²⁵

4.1.4.2 *A Disguised Restriction on International Trade*

Panels and the Appellate Body have progressively introduced three criteria in order to determine whether a measure is a disguised restriction on international trade or not.²⁶ The following criteria has been identified:

(i) The publicity test; - has the measure been publicly announced?

(ii) the consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination; and

(iii) the examination of the ‘design, architecture and revealing structure’ of the measure at issue.²⁷



University of Fort Hare
Together in Excellence

²³ Ibid. See specifically, the *US-Gasoline* case, *supra* note 9.

²⁴ Per Panel and Appellate Body Reports in *US-Shrimp* and *US-Shrimp (article 21.5)* dispute, *supra* note 5.

²⁵ See Appellate Body report in *US-Shrimp* dispute, *supra* note 11.

²⁶ “GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) and (g) WT/CTE/W/203 8 March 2002”, *op cit* note 4.

²⁷ Ibid.

4.2 The Tuna-Dolphin Dispute²⁸

4.2.1 Background²⁹

There has been a long history of dolphins being killed in the Eastern Tropical Pacific. This became worrisome in the 1950s when tuna fishermen began to exploit the unique relationship that exists between the tuna and the dolphin.³⁰ The fishermen used the purse-seine net fishing method, which sealed off any escape routes, catching both the dolphins and the tuna, resulting in many dolphins being killed in this process.³¹

The kill rate was initially low but with fishing methods and techniques improving due to technological innovations,³² the kill rate rose to alarming levels.³³ The general public became concerned with the high kill rates and Congress responded to the concerns by

²⁸ *United States- Restrictions on Imports of tuna* circulated on 3 September 1991, unadopted, DS 21/R (hereafter *US- Tuna Mexico*). This case was preceded by *United States- Prohibition of imports of tuna and tuna products from Canada*, adopted 22 February 1982, BISD 29S/91, in which an import prohibition was introduced by the United States after Canada had seized 19 fishing vessels and arrested United States fishermen fishing for albacore tuna, without authorization from the Canadian government, in waters considered by Canada to be within its jurisdiction. The United States did not recognize this jurisdiction and introduced an import prohibition on tuna and tuna products from Canada in retaliation under the 1976 Fishery Conservation and Management Act (Section 205). See also I. Cheyne, "Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles" (2000) 12 *Journal of Environmental Law* 293.

²⁹ See generally, 'Tuna-Dolphin GATT case (Tuna Case)' at <http://www.gurukul.ucc.american.edu/tes/tuna.htm> [11 September 2004].

³⁰ 'Tuna-Dolphin GATT case (Tuna Case)', loc cit note 29. The tuna schools swim below the surface-swimming dolphins and the fishermen used this relationship to their advantage by using dolphins to track, chase and encircle tuna.

³¹ While some dolphins suffocated due to flipper rostrum (beak) and fluke entanglement, others were crushed by the weight of the tuna or by passing through the power blocks during net retrieval.

³² For instance, with the development of pyretic hydraulic power blocks and lighter stronger nets, fishermen began to use larger nets, which enabled them to encircle a large percentage of both the tuna and the dolphin herd.

³³ For example in 1959, it was estimated that 590 sets were made on dolphins and the following year this number rose to 5400 sets – the highest yellow fin tuna catch per standard day.

passing the Marine Mammal Protection Act (MMPA) in 1972.³⁴ The Act *inter alia*, established a permit system, setting a fixed ceiling for dolphin kills and limiting the taking rate for species that were endangered.

The MMPA greatly reduced the number of dolphins killed by United States vessels. However, the composition of ships also changed and the total number of dolphins killed did not decline. Foreign vessels from countries such as Mexico, Venezuela, Vanuatu, Spain, Cayman Islands, Costa Rica, El Salvador and Panama dominated the American seas in search of tuna. In 1984, Congress inserted the ‘comparability provision’ or the direct embargo provision³⁵ into the MMPA. The goal of this provision was to decrease foreign kills by prohibiting the importation of yellow fish tuna from nations that did not have regulatory programs and mortality rates comparable to the United States.

During the period 1990/1991, the United States imposed tuna embargoes on Mexico, Venezuela, Ecuador, Panama and Vanuatu (primary nation embargo). In addition, imports of tuna from countries purchasing tuna from countries subject to the primary nation embargo were also prohibited (intermediary nation embargo). In 1991, countries affected by the intermediary nation embargo were Costa Rica, France, Italy, Japan and Panama.³⁶ Mexico resisted the dolphin safe measures and continued to kill a substantial number of dolphins during fishing expeditions.

4.2.2 Establishment of the Panel: The Parties’ Contentions

On 25 January 1991, Mexico requested that a GATT panel determine the legality of the United States direct and intermediary tuna embargoes, the Pelly Amendment Act³⁷ and the Dolphin Protection Consumer Information Act.³⁸ Mexico claimed that the import

³⁴ This Act aimed at reducing dolphin kills to levels approaching zero by legally requiring United States tuna fishermen to incorporate the ‘back down’ method in which the vessel would reverse when one half to two thirds of the net was retrieved, thus allowing the net to sink and dolphins to escape.

³⁵ Section 101 (a) (2).

³⁶ See *Tuna Mexico* panel report at paragraph 2.11.

³⁷ 22 USC §§ 1971-1979.

³⁸ 16 U.S.C. 1361 – 1370, Public Law 101-627, November 28, 1990 (104 Stat. 4465). This Act establishes conditions for protection of dolphins by ocean vessels when harvesting tuna with purse seine nets. It

prohibition on yellow fish tuna was inconsistent with articles XI, XIII and III of GATT 1994.³⁹ The United States on the other hand requested the panel to find that the direct embargo was consistent with Article III and in the alternative, was covered by Articles XX (b) and XX (g). The United States also argued that the *intermediary nation* embargo was consistent with Article III, and in the alternative, was justified by Articles XX, paragraphs (b) and (g).⁴⁰

4.2.3 The Panel's Findings

The panel found that the import prohibitions under the *direct* and *intermediary* embargoes did not constitute internal regulations within the meaning of Article III, were inconsistent with Article XI: 1 and not justified by Article XX paragraphs (b) and (g). Moreover, the *intermediary* embargo was not justified under Articles XX (b), (d) or (g).⁴¹ On the basis of the drafting history, the panel found that Article XX (b) did not extend to measures protecting human, animal or plant life outside the jurisdiction of the country taking the measure.⁴² The panel further opined that if a broad interpretation agitated by the United States were to be adopted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the GATT.⁴³ The panel and the parties implicitly accepted that the protection of dolphin life or health was a policy that could fall under Article XX (b).⁴⁴ In the panel's view, the United States measure could not be

provides labeling standards for tuna products that are exported from or offered for sale in the United States and it sets the penalty for noncompliance at an amount not exceeding \$100,000 for any, single action. See 'Digest of Federal Resource Laws of Interest to the U.S Fish and Wildlife Service' at <http://www.fws.gov/laws/lawsdigest/dolphin.html> [11 Nov 2005].

³⁹ *US-Tuna Mexico*, *supra* note 2 at paragraph 3.1. Article XI deals with the general elimination of quantitative restrictions, Article XIII with non-discrimination in the administration of quantitative restrictions and Article III deals with non-discrimination between domestic products and imports.

⁴⁰ *US-Tuna Mexico*, paragraphs 3.6-3.7.

⁴¹ *US-Tuna Mexico*, paras 5.38-5.40.

⁴² *Ibid.* Para 5.26.

⁴³ *Ibid.* Para 5.27. The panel rejected the extra judicial application of Article XX (g) as well.

⁴⁴ *Ibid.* Paras 5.24-5.29.

considered to be necessary within the meaning of Article XX (b) as the United States had failed to demonstrate that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the GATT, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many seas and the high seas.⁴⁵

The panel also examined the second aspect of Article XX (d) – whether those laws or regulations were not inconsistent with the provisions of GATT.⁴⁶ The panel noted that the United States had argued that the *intermediary nations* embargo was necessary to support the direct embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo's effect by exporting to the United States indirectly through third parties. The panel held that since it had found that the embargo was inconsistent with the General Agreement, the *intermediary nations* embargo and the provisions of the Marine Mammal Protection Act (MMPA)⁴⁷ under which it was imposed could not be justified under Article XX (d) as a measure to secure compliance with 'laws or regulations not inconsistent with the provisions of this Agreement'.⁴⁸



On Article XX (g), the panel recalled that the United States linked the maximum incidental dolphin-taking rate which Mexico had to meet to the taking rate actually recorded for the United States fishermen. The panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as primarily aimed at the conservation of dolphins in terms of Article XX (g).⁴⁹ In addition, the panel found that the MMPA import standards were too unpredictable to be necessary because the United

⁴⁵ Ibid. Para 5.28.

⁴⁶ Article XX (d) requires that the laws and regulations with which compliance is being secured be themselves 'not inconsistent' with the General Agreement.

⁴⁷ Marine Mammal Protection Act of 1972 as amended. The MMPA prohibits, with certain exceptions, the take of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S.

⁴⁸ *US-Tuna Mexico*, para 5.40.

⁴⁹ Ibid. Para 5.33.

States government did not initially implement the embargoes when Congress enacted them.⁵⁰

4.2.4 Commentary/Analysis

There are notable weaknesses inherent in the manner in which the above dispute was handled. First, the panel concluded that the prohibited tuna originated from Mexico and was therefore not under the jurisdiction of the United States. In other words, the natural resource, wildlife and health exceptions could not be applied unilaterally or extra jurisdictionally. Such a finding is disturbing when one considers that environmental issues are transboundary in nature in the sense of cutting across the borders of nation states.

The unreliability and uncertainty of the judgment is exacerbated by the fact that dolphins swim across territorial waters straddling a number of nations. It is unfortunate that the dispute immediately following this one⁵¹ did not help the situation as it endorsed and buttressed the flawed decision in the present case of *US-Tuna Mexico*. The panel in *US-Tuna (EEC)* found that measures taken so far to force other countries to change their policies could not be considered 'necessary' for the protection of animal life or health in the sense of Article XX (b),⁵² or primarily aimed at the conservation of exhaustible natural resources, or at rendering effective restrictions on domestic production or consumption, within the meaning of Article XX (g).⁵³

However there is a glimmer of hope provided by the case of *United States- Import prohibition of certain shrimp and shrimp products*,⁵⁴ since this case recognizes the reality that environmental issues are transboundary in the majority of instances and the need for

⁵⁰ Ibid.

⁵¹ *United States-Restrictions on Imports of Tuna*, circulated on 16 June 1994, not adopted, DS 29/R (hereafter, *US-Tuna (EEC)*).

⁵² See *US-Tuna (EEC)* at para 5.39.

⁵³ Ibid. Para 5.27.

⁵⁴ Hereafter, *Shrimp-Turtle* case, Appellate body and Panel reports, WT/DS58, adopted on 6 November 1998.

their extraterritorial breath is more important than ever before. The case recognized the fact that a finding of unjustifiability of a measure under either Article XX (b) or XX (g) does not mean that a country cannot adopt conservation measures that apply extraterritorially.

The problem with abating transborder or global environmental problems is the absence of a supranational enforcement authority, as individual countries' sovereignty has to be respected.⁵⁵ Individual countries' cooperation has to be secured but the challenge is that such cooperation is on a voluntary basis only; no country can force another to enter into negotiations with it to protect the environment from free trade.⁵⁶

To sum up the foregoing discussion, this dispute represents the limited influence of the environment in trade policy and suggests that environmental rules are desperately needed. The jurisdiction ruling does not address the transnational nature of environmental problems or ensure the protection of the global environmental heritage. Secondly, the case may also affect a number of international Agreements, which ban free trade to protect the environment.⁵⁷ These include the Montreal Protocol on Substances that Deplete the Ozone Layer,⁵⁸ The Basel convention on the control of transboundary wastes



University of Fort Hare
Together in Excellence

⁵⁵ John J.Kirton "Trade, global policy and the environment" in John J.Kirton and Virginia W.Mclaren (eds) *Linking Trade, Environment and Social Cohesion: NAFTA Experiences, Global Challenges* (2002) at 134.

⁵⁶ *Ibid.* At 135.

⁵⁷ Such Agreements are generally referred to as multilateral environmental Agreements (MEAs). See generally, Chapter two above for a note on some prominent MEAs.

⁵⁸ The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987. This is a landmark international agreement designed to protect the stratospheric ozone layer. The treaty was originally signed in 1987 and substantially amended in 1990 and 1992. The Montreal Protocol stipulates that the production and consumption of compounds that deplete ozone in the stratosphere – chlorofluorocarbons (CFCs), halons, carbon tetrachloride, and methyl chloroform – are to be phased out by 2000 (2005 for methyl chloroform) [source <http://www.ciesin.org/TG/PI/POLICY/montpro.html>]. The Vienna Convention on the Ozone Layer (1985), which outlines states' responsibilities for protecting human health and the environment against the adverse effects of ozone depletion, established the framework under which the Montreal Protocol was negotiated.

and their disposal⁵⁹ and the Convention on international trade in endangered species (CITES).⁶⁰ It is heartening to note however, that the *US-Tuna Mexico* case was not adopted hence it possesses neither persuasive nor binding force to future WTO panels or the Appellate Body.

The outcome of the *US-Tuna Mexico* case was indeed a nightmare come true for environmentalists who mourned ‘the betrayal of United States environmental objectives’ by ‘faceless’ GATT bureaucrats whose ‘secret’ trade negotiations constitute a ‘sneak attack’ on democracy.⁶¹

4.3 The Gasoline Dispute⁶²

4.3.1 Background

On 20 May 1996, the first Appellate Body report, *US-Gasoline*, was adopted under the new WTO system. The case has two major highlights. First it was initiated by two developing countries (Venezuela and Brazil), which filed a complaint against a developed country, the United States, contrary to common GATT practice. Secondly, the case



University of Fort Hare

Together in Excellence

⁵⁹ The Basel Convention on the Control of Transboundary wastes and their disposal was adopted by the Conference of the Plenipotentiaries on 22 March 1989 and entered into force on the 5th of May 1992 after ratification by 20 countries. The key objectives of the Convention are to reduce the generation of hazardous waste; ensuring that hazardous waste is disposed of within the country of generation; controlling the importation/exportation of hazardous waste and preventing or avoiding the shipment of hazardous waste to countries with no capacity to dispose of the waste in an environmentally sound manner. The full text of the Convention is available at <http://www.basel.int/text/con-e.htm> [11 Nov 2005]

⁶⁰ Convention on International Trade in Endangered Species of Wild Flora and Fauna. The main objective of CITES is to ensure international Cooperation among states in order to conserve exhaustible plant and animal species especially those threatened with extinction. CITES does have trade provisions which strictly regulate trade in endangered species and potentially endangered species. See Philip Evans and James Walsh, *The EIU Guide to World Trade Under the WTO* (1995) at 62.

⁶¹ See Editorial, *Washington Post* newspaper, ‘Sabotage! of America’s health, food safety and environmental laws’ December 14 1992 at page A20. The full text of the editorial can be downloaded at <http://www.etext.org/Politics/Trade.News/Volume.1/tnb-01.210> [15 August 2005].

⁶² *United States-Standards for Reformulated and Conventional Gasoline*, panel report and Appellate body report, adopted 20 May 1996, WT/DS2/R and WT/DS2/AB/R (hereafter, *US-Gasoline*).

involved environmental issues and drew the attention of environmentalists and environment policy makers in government.⁶³

The facts of the dispute may briefly be summed up as follows. Faced with a serious environmental problem caused by the toxic pollutants emitted by factories and vehicles, the United States Congress amended the Clean Air Act in 1990.⁶⁴ Following the amendment, the United States Environmental Protection Agency (EPA) promulgated the Gasoline Rule⁶⁵ on the composition and emission effects of gasoline. The regulation was designed to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States.

The gasoline rule employed either individual (established by the entity itself) or statutory (established by the EPA) gasoline quality baselines, depending on the nature of the entity concerned. Domestic refiners, blenders and importers were allowed to establish an individual baseline representing the quality of their 1990 gasoline before they were forced to use the statutory baseline set by the EPA, while foreign refiners were not given the same latitude. This disparity in establishing the baselines provoked many complaints from foreign countries like Venezuela and Brazil, which exported gasoline to the United States because the statutory baseline was allegedly stricter than individual baselines.⁶⁶

4.3.2 Establishment of the Panel: The Parties' Contentions

Brazil and Venezuela claimed that the gasoline rule was prejudicial to their exports to the United States and that it favoured domestic producers. They argued that the rule was inconsistent, with, *inter alia*, Articles III and XXIII: 1 (b) of GATT 1994, Article 2.2 of the TBT Agreement and was not covered by Article XX of the GATT.⁶⁷ The United

⁶³ This environmental theme had been introduced and controversially handled in the three *Tuna-dolphin* cases, specifically *US-Tuna (Mexico)*.

⁶⁴ See Clean Air Amendment Act of 1990, 42 U.S.C, 7545 9 (k) (1994).

⁶⁵ *Regulation of fuel and fuel additives-standards for reformulated and conventional gasoline.*

⁶⁶ See Panel report, *US-Gasoline*, paras 3.12-3.13.

⁶⁷ *US-Gasoline*, panel report, para 3.1-3.2.

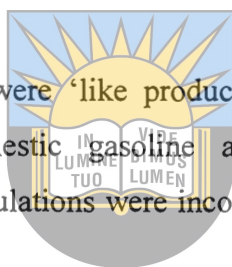
States on the contrary argued that the gasoline rule was consistent with Article III and was in any event justifiable under Article XX (b) (d) and (g). It further argued that the rule was also consistent with the relevant provision of the TBT Agreement.⁶⁸

4.3.3 The Panel's Findings

On the overall, the panel concluded that the baseline establishment methods contained in part 8 of Title 40 of the Code of Federal Regulations were not consistent with Article III:4 of GATT and could not be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.⁶⁹

The following key findings of the panel are notable:

(i) Imported and domestic gasoline were 'like products' and imported gasoline was treated 'less favourably' than domestic gasoline and accordingly, the baseline establishment rules of the gasoline regulations were inconsistent with Article III:4 of the General Agreement;⁷⁰



University of Fort Hare

Together in Excellence

(ii) The finding in (i) above rendered it unnecessary to examine the consistency of the gasoline rule with Article III:1;⁷¹

(iii) The 'aspect of baseline establishment methods' found inconsistent with Article III: 4 was not justified under Article XX (b) of the GATT as 'necessary to protect human, animal or plant life or health';⁷²

(iv) The maintenance of discrimination between imported and domestic gasoline, contrary to Article III:4, was not justified under Article XX (d) as 'necessary to secure

⁶⁸ Ibid. Para 3.4.

⁶⁹ See *US-Gasoline*, Appellate Body report, part C, para 8.1.

⁷⁰ *US-Gasoline*, panel report para 6.16.

⁷¹ *US-Gasoline*, panel report Para 6.17.

⁷² Ibid. Para 6.29.

compliance with laws or regulations’ which are not inconsistent with the provisions of the GATT;⁷³

(v) Clean air was an exhaustible natural resource within the meaning of Article XX (g) of the GATT;⁷⁴ and

(vi) Baseline establishment rules found to be inconsistent with Article III:4 could not be justified as *a measure relating to* (emphasis added) the conservation of exhaustible natural resources.⁷⁵

4.4.4 Issues Raised on Appeal

The United States appealed the panel report but limited its appeal only to the panel’s interpretation of Article XX of GATT 1994. The notice of appeal was filed on 29 April 1996 and the Appellate Body report was adopted on 20 May 1996.

The United States argued that the panel erred in law by ruling that the baseline establishment rules did not constitute a measure relating to the conservation of clean air within the meaning of Article XX (g) of the GATT and consequently, by failing to further examine the Chapeau of Article XX.⁷⁶

4.4.5 The Appellate Body’s Decision

The Appellate Body made informative determinations by pronouncing on Article XX of GATT 1994. It analyzed the term ‘measures’ and proceeded to look at the meaning of the phrase, ‘relating to the conservation of exhaustible natural resources’ before finally examining the provision: ‘if such measures are made effective in conjunction with

⁷³ Ibid. Para 6.33.

⁷⁴ Ibid. Para 6.37.

⁷⁵ Ibid. Para 6.40.

⁷⁶ *US-Gasoline*, Appellate Body report, at para 9. See also, Sungjoon Cho, “Gasoline: United States- Standards for Reformulated and Conventional Gasoline” at <http://www.ejil.org/journal/vol19/no1sr/a.html> [13 November 2005].

restrictions on domestic consumption and production'. Finally, the Appellate Body considered the introductory provisions of Article XX of the GATT (the Chapeau).

With respect to the term 'measures',⁷⁷ the Appellate Body raised the question whether the term referred to the gasoline rule as a whole or only to the particular provision of the rule, namely the baseline establishment rules.⁷⁸ It is interesting to point out that the Appellate Body did not answer that question but merely noted that no disputant had urged an interpretation of the term 'measures' which would encompass the gasoline rule in its totality.⁷⁹

With respect to the concept, 'relating to the conservation of exhaustible natural resources', the Appellate Body noted that the panel report took the view that clean air was a 'natural resource' which could be depleted and accordingly, a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX (g). However, the panel had also concluded that 'the less-favourable baseline establishment methods' were not primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX (g). The Appellate Body ruled that the panel erred by finding that 'relating to' means 'primarily aimed at' and opined that it found it difficult to follow the conclusion that 'the less-favourable' baseline establishment methods in this case were not primarily aimed at the conservation of an exhaustible natural resource.⁸⁰ Therefore, the Appellate Body concluded that the measure at issue (baseline establishment rules) was appropriately

⁷⁷ The term appears in both the chapeau to Article XX and in Article XX (g).

⁷⁸ *US-Gasoline*, Appellate Body report at paras 13-14.

⁷⁹ *Ibid.*

⁸⁰ *US-Gasoline*, Appellate Body report, Para 19. See also Gustavo Nogueira, "The first WTO Appellate Body Review: United States-Standards for Reformulated and Conventional Gasoline" (1996) 30 (6) *Journal of World Trade* 5. According to the Appellate Body, this amounted to a fundamental error in treaty interpretation in light of the Vienna Convention on the Law of Treaties, Concluded on May 23, 1969, entering into force on January 27, 1980, U.N. DOC.A/CONF.39/27,8 I.L.M 679 (1969) (hereafter, Vienna Convention).

regarded as ‘primarily aimed at’ and consequently, ‘relating to’ the conservation of natural resources for the purposes of Article XX (g).⁸¹

Coming to the second clause of Article XX (g) that, ‘such measures are made effective in conjunction with restrictions on domestic production or consumption’, the Appellate Body held that, since the measure (baseline establishment rules) affected both domestic and imported gasoline, the measure was made effective in conjunction with restrictions on domestic production or consumption.⁸² The Appellate Body focused on the dictionary meanings of ‘made effective’ and ‘in conjunction with’ and defined these terms as ‘operative’ (‘in force, or having come into effect’) and ‘together with’ (‘jointly with’), respectively.⁸³ The baseline establishment rules of the gasoline regulations therefore fell within the terms of Article XX (g) of GATT 1994.⁸⁴

On the applicability of the Chapeau to Article XX of GATT,⁸⁵ the Appellate Body emphasized that the Chapeau addresses the manner in which a questioned measure is applied, rather than the measure itself or its specific contents and, accordingly, the purpose of the Chapeau is ‘generally the prevention of abuse’ of the exceptions in Article XX.⁸⁶ The Appellate Body concluded that the application of the United States regulation amounted to unjustifiable discrimination and to a disguised restriction on trade⁸⁷ because

⁸¹ *US-Gasoline*, Appellate Body report, *ibid.* According to the Appellate Body, this was due to the fact that baseline establishment rules were designed to permit scrutiny and monitoring of the level of compliance by refiners, importers and blenders with ‘non-degradation’ requirements.

⁸² *Ibid.* Paras 20-21.

⁸³ *US-Gasoline*, Appellate Body report, para 21. See also Sungjoon Cho, *supra* note 76.

⁸⁴ At Para 21.

⁸⁵ The Chapeau qualifies the application of exceptions under Article XX by reason of the fact that the exceptions be invoked ‘subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.

⁸⁶ *US-Gasoline*, Appellate Body Report, para 22.

⁸⁷ The Appellate Body compared ‘arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction on international trade’ and concluded at para 25 that ‘disguised restriction’ was the broadest of the three and was inclusive of the other two.

of two omissions on the part of the United States. The two omissions were the failure by the United States authorities to explore adequate means, including cooperative arrangements for mitigating administrative problems and the apparent disregard on the part of the United States authorities of the costs to foreign refiners that would result from the imposition of statutory the baselines.⁸⁸ The Appellate Body stressed that the United States should have explored the possibility of entering into ‘cooperative arrangements’ with both foreign refiners and the foreign governments by which the United States would have overcome the alleged administrative problems.⁸⁹ The Appellate Body therefore concluded that the two omissions above constituted ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade’.⁹⁰

4.4.6 Commentary/Analysis

While the above judgment is laudable for the pronouncements it makes on the application of Article XX including the Chapeau thereof, there are notable inherent weaknesses that are cause for concern. The notable points are the applicability of the TBT Agreement, the replacement of legal analysis by consensus of disputants, treaty interpretation and the application of the Chapeau.



University of Fort Hare
Together in Excellence

Venezuela and Brazil had raised a conditional argument that, if the Appellate Body were to reject the Panel’s findings on Article XX (g), and not find in favour of Venezuela and Brazil with respect to other requirements under Article XX, it should then proceed to examine their claim under the TBT Agreement.⁹¹ The ‘condition’ which was posed by Venezuela and Brazil had not materialized but the Appellate Body nonetheless, proceeded to find that, ‘even if this condition had been fulfilled’, it would not have addressed the applicability of the TBT Agreement.⁹² One of the reasons given for such a declinature was that the issues appealed by the United States (the panel ruling on Article

⁸⁸ *US-Gasoline*, Appellate Body Report, para 26.

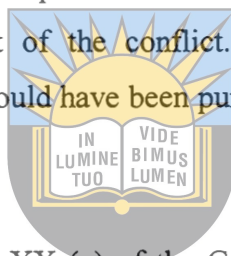
⁸⁹ *Ibid.* Para 27.

⁹⁰ *Ibid.*

⁹¹ *US-Gasoline*, Appellate Body Report, para 10.

⁹² *Ibid.* Para 34.

XX (g)) could be decided without at the same time necessarily resolving the applicability of the TBT Agreement.⁹³ The Appellate Body in this instance appeared to follow the long standing GATT panel practice of ‘judicial economy’, which generally dictates that a panel, which concludes that a GATT measure is inconsistent with a specific provision of the GATT 1947, should not examine whether the measure in question is also inconsistent with other GATT provisions.⁹⁴ This form of judicial reasoning carried much weight in the GATT regime but is misguided in the current rules-based WTO system, which has dramatically changed the legal landscape to a more judicial one.⁹⁵ It is also important to point out that in terms of the General Interpretive Note to Annex 1A (Multilateral Agreement on Trade in Goods) of the WTO Agreement, in the event of ‘conflict’ between a provision of GATT 1994 and a provision of side Agreements, the provisions of the latter shall prevail to the extent of the conflict.⁹⁶ Therefore, the issue of the applicability of the TBT Agreement should have been pursued vigorously and resolved to the satisfaction of the appellants.



In analyzing arguments under Article XX (g) of the General Agreement, the appellate body initially raised the question whether measures, used both in the Chapeau of Article XX and Article XX (g), referred to the entire gasoline rule or, alternatively, only to the baseline establishment rules.⁹⁷ The Appellate Body response to the above query was however elusive, since it merely noted that no disputant had urged this interpretation.⁹⁸ Likewise, in the interpretation of ‘relating to the conservation of exhaustible natural resources’, the Appellate Body noted that since all the disputants accepted the same legal interpretation (‘primarily aimed at’), it did not need to examine the interpretation

⁹³ Ibid.

⁹⁴ See Sungjoon Cho *supra* note 76 and the cases cited therein at footnote 36.

⁹⁵ Sungjoon Cho, *ibid*.

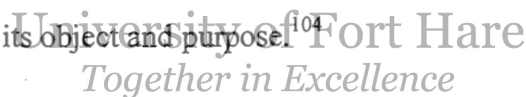
⁹⁶ The General Interpretive note to Annex 1A (Multilateral Agreement on Trade in goods) of the WTO Agreement.

⁹⁷ *US-Gasoline*, Appellate Body Report, para 13.

⁹⁸ Ibid.

further.⁹⁹ It is submitted that the Appellate Body must exercise its mandate of legal analysis or treaty interpretation when it is faced with an issue of law.¹⁰⁰ This task is the duty of the Appellate Body and is not within its discretion, neither is the Appellate Body exempted from this duty simply because the disputing parties choose to keep silent on a specific issue of law.¹⁰¹ The avoidance exhibited in this case compromises an essential legal issue with the parties' acquiescence, thereby reducing the possibility of the Appellate Body reports guiding the future and undermines the credibility and transparency of the WTO system.¹⁰²

On the aspect of treaty interpretation, two issues discussed by the Appellate Body are relevant. The two issues are the interpretation attached to the concepts, 'relating to the conservation of exhaustible natural resources' and 'if such measures are made effective in conjunction with restrictions on domestic consumption or production'. The Appellate Body sought to rely on the Vienna Convention as its basic interpretative methodology. According to Article 31 of the Vienna Convention,¹⁰³ a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.¹⁰⁴



With respect to the terms, 'relating to the conservation of exhaustible natural resources', the Appellate Body first observed that the panel failed to take adequate account of the words actually used by Article XX in its paragraphs such as 'necessary' in XX (a) (b) and

⁹⁹ The Appellate Body remarked as follows, "we see no need to examine this point further, save, perhaps, to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX (g)" [At paras 18-19].

¹⁰⁰ See generally 'Dispute Settlement Mechanisms', Chapter Three above and Articles 11 and 7 of the Dispute Settlement Understanding (DSU).

¹⁰¹ Sungjoon Cho, op cit note 76 at 6.

¹⁰² Sungjoon Cho, *ibid.*

¹⁰³ Article 31 of the Vienna Convention on the Law of Treaties, op cit note 80 is the general rule of interpretation of treaties.

¹⁰⁴ Vienna Convention, loc cit note 103, Article 31.

(d) and ‘relating to’ in paragraphs (c) (e) and (g).¹⁰⁵ However, instead of delving into the ordinary meaning, namely the plain dictionary meaning of ‘relating to’, the Appellate Body directly resorted to the interpretive sources of context as well as purpose and object.¹⁰⁶ It is submitted the Appellate Body should have, at the very least, clarified in the initial stage of interpretation that because the ordinary meaning of ‘relating to’ was ambiguous or likely to produce multiple interpretations, it needed to proceed to the next stage of interpretation – an analysis of context, purpose and object.¹⁰⁷

Coming to the terms, ‘if such measures are made effective in conjunction with restrictions on domestic production or consumption’, the Appellate Body appropriately started its interpretation with the dictionary meaning of ‘made effective’ (‘operative’, ‘in force’ or ‘come into effect’) and ‘in conjunction with’ (‘together with’ or ‘jointly with’). Then, taking the two phrases together, the Appellate Body construed the second clause of Article XX (g) as ‘governmental measures being brought into effect together with restrictions on domestic production or consumption of natural resources’.¹⁰⁸ The Appellate Body examined the second clause of Article XX (g) ‘in a slightly different manner’ and finally concluded that the clause is a requirement of evenhandedness in the imposition of restrictions, in the name of conservation, upon production or consumption of exhaustible natural resources.¹⁰⁹ In doing so, the Appellate Body erred in attributing this requirement (evenhandedness) to Article XX (g).¹¹⁰ A measure, which, in Appellate Body terms, would simply be a blatant discrimination aimed at protecting locally produced goods, is likely to constitute a disguised restriction on international trade, and consequently instead, should fall within the ambit of the Chapeau.¹¹¹ Such an

¹⁰⁵ *US-Gasoline*, Appellate Body Report, para 17.

¹⁰⁶ *Ibid.*

¹⁰⁷ Sungjoon Cho, *op cit* note 76 at 7.

¹⁰⁸ Sungjoon Cho, *op cit* note 76 at 7.

¹⁰⁹ *US-Gasoline*, Appellate Body Report, paras 20-21.

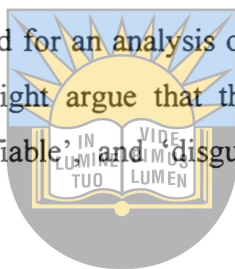
¹¹⁰ Sungjoon Cho, *op cit* note 76 at 8.

¹¹¹ *Ibid.*

interpretation by the Appellate Body would render the Chapeau redundant in light of its interpretation of Article XX (g).¹¹²

The purpose and object of the Chapeau of Article XX is to avoid possible abuse or misuse of the exceptions stipulated in Article XX.¹¹³ The Appellate Body also noted that the chapeau is not designed to address specific contents of a questioned measure, but rather the manner in which the measure is applied.¹¹⁴

In the course of interpreting the chapeau, the Appellate Body noted that the US had had 'more than one alternative' measure whose use may have avoided any discrimination.¹¹⁵ Surprisingly, this test, which is often cited as the 'least trade-restrictive' test, is the core of the 'necessary' test usually reserved for an analysis of paragraphs (a), (b), and (d) of Article XX.¹¹⁶ In this sense, one might argue that the Appellate Body replaced its interpretation of 'arbitrary', 'unjustifiable' and 'disguised' with an interpretation of 'necessary'.¹¹⁷



Considering the importance of the chapeau as a final gateway before the application of an Article XX exception, the establishment of a useful and meaningful yardstick by which a Panel or the Appellate Body can guide its interpretation of the chapeau is an important future task of the WTO dispute settlement system.¹¹⁸ It must be emphasized that, if a necessary test were applied to both paragraphs (a), (b) and (d) of Article XX and the Chapeau, the Chapeau would be rendered redundant.

¹¹² Ibid.

¹¹³ *US-Gasoline*, Appellate Body Report, para 25.

¹¹⁴ Ibid. Para 22.

¹¹⁵ Ibid. Para 25.

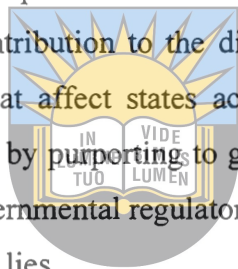
¹¹⁶ See for example, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes* (hereafter *Thailand-Cigarettes*) adopted on 7 November 1990, BISD 37S/200.

¹¹⁷ Sungjoon Cho, op cit note 76 at 9.

¹¹⁸ Ibid.

It is very significant that the Appellate Body based its ruling on the chapeau, namely an interpretation of “unjustifiable discrimination” and a “disguised restriction on international trade”, on the lack of the U.S. government’s efforts in exploring the possibility of entering into *cooperative* arrangements with the governments of Venezuela and Brazil.¹¹⁹ It is submitted that such cooperation should always be encouraged and member states should consult extensively before embarking upon unilateral measures. This cooperation may yield positive results for free trade and environmental protection and obviate sometimes frivolous and vexatious litigation between WTO members.

Despite the above weaknesses in the case such as over reliance on ‘judicial economy’ (or acquiescence of the disputants) and the questionable methodology of treaty interpretation, this decision makes an important contribution to the discipline of ‘trans-governmental regulatory cooperation’ in matters that affect states across their borders. The case is important in that it looks to the future by purporting to guide future regulatory behaviour of member countries towards intergovernmental regulatory cooperation. This is where the real value of the *US-Gasoline* decision lies.



University of Fort Hare
Together in Excellence

¹¹⁹ *US-Gasoline*, Appellate Body Report, paras 27.

4.5 The Shrimp-Turtle Dispute¹²⁰

4.5.1 Background

Seven species of sea turtles have to date been identified.¹²¹ They are distributed around the world in subtropical and tropical areas, where they spend their lives at sea, migrating between their foraging and nesting grounds.

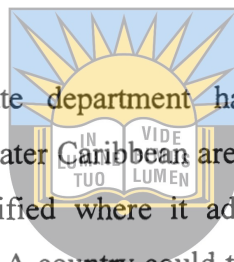
Sea turtles have been adversely affected by human activity directly, for the exploitation of their meat, shells and eggs, and indirectly, through incidental capture in fisheries, destruction of their habitats and pollution of the oceans. Thousands of sea turtles drown every year when they are caught in shrimp nets.



¹²⁰ *United States-Import prohibition of Certain Shrimp and Shrimp products* (hereafter *US-Shrimp*), Appellate Body and panel report, adopted on 6 November 1998, WT/DS58. The following account draws largely from 'United States-Shrimp' at <http://www.docsonline.wto.org/ddfdocuments/t/wt/cte/w203.doc>, 'Shrimp and Sea Turtle' at <http://garakul.ucc.american.edu/ted/SHRIMP.HTM>, 'India etc versus U.S.: Shrimp-Turtle' at http://www.wto.org/english/tratop_e/edis08_e.htm and Robert Howse, "The Appellate Body Rulings in the *Shrimp-Turtle* Case: A new Legal Baseline for the Trade and Environment Debate" (2002) 27 *Columbia Journal of Environmental Law* 489 (hereafter Howse 1). For further commentary on this dispute, see D.Ahn, "Environmental Disputes in the GATT/WTO: Before and after US-Shrimp Case" (1999) 20 *Michigan Journal of International Law* 819; A.E Appleton, "Shrimp/turtle: Untangling the Nets" (1999) 2 *Journal of International Economic Law* 477; J.R Berger, "Unilateral Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case" (1999) 24 *Columbia Journal of Environmental Law* 355; J.A Bernazani, "The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures" (2000) *Connecticut Journal of International Law* 207; J.H Jackson, "Comments on Shrimp/Turtle and the Product/Process Distinction" (2000) 11 *European Journal of International Law* 303; B. Puls, "The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy" (1999) 8 *Minnesota Journal of Global Trade* 343; E.L Richards and M.A McCrory, "The Sea Turtle Dispute: Implications for Sovereignty, the Environment and International Trade Law" (2000) 71 *University of Colorado Law Review* 295 and B. Simmons, "In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report" (1999) *Columbia Journal of Environmental Law* 413.

¹²¹ Some of the notable species, which have been identified as threatened with extinction, are the hawksbill, green, leatherback, kemp's ridley and loggerhead.

In response to this unfortunate situation, the United States required domestic shrimpers to use protective technology called turtle excluder devices (TEDs)¹²² when harvesting shrimp. To protect sea turtles, in the 1980s the United States enacted measures to reduce the number of sea turtles killed by United States trawlers. In 1989, the government attempted to impose the TED requirement on shrimpers elsewhere in the world.¹²³ Section 609 of the United States Public Law 101-102 enacted in 1989 provided *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.¹²⁴



Until 1995, the United States State department had only applied the pertinent requirements of Section 609 to the greater Caribbean areas and on the basis of guidelines that permitted a country to be certified where it adopted a programme to require shrimpers to use TEDs on their boats. A country could take up to three years to phase in the comprehensive programme, and further guidelines issued in 1993, extended somewhat the final deadline by which a foreign country must implement its programme in order to be certified. United States environmental Non Governmental Organisations challenged the limitation in the application of section 609 to the greater Caribbean and other state department interpretations of the law before the United States Court of International Trade in 1995. The Court of International trade ruled in favour of the Non

¹²² A TED is simply a cage-like structure that fits the neck of a trawl net, preventing turtles and large fish from being caught. Since the turtle cannot pass through the cage, it is forced upward through an escape hatch.

¹²³ Department of Commerce, Justice and State, The Judiciary and related Agencies Appropriations Act of 1990, Pub.L.101-162 § 609, 103 Stat. 988, 1037-38 (Codified as Endangered Species Act), 16 U.S.C § 1537 (1994).

¹²⁴ In practice, countries that had any of the five endangered species of sea turtles within their jurisdiction, and harvested shrimp mechanically, had to impose on their fishermen requirements comparable to those borne by United States shrimpers if they wanted to be certified to export shrimp products to the United States. This essentially meant the use of TEDs all the time.

governmental Organisations and held that there was no statutory basis for limiting the application of the law to the greater Caribbean region.

4.5.2 Establishment of the Panel: The Parties' Contentions

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the United States on the importation of certain shrimp and shrimp products.

The complainants argued that the import prohibition on shrimp and shrimp products was inconsistent with Article XI: 1,¹²⁵ Article I.1¹²⁶ and with Article XIII.1¹²⁷ of GATT 1994 as it restricted the importation of shrimp and shrimp products from countries which had not been certified, while like-products from other countries which had been certified could be imported freely into the United States.¹²⁸ On the other hand, the United States claimed that the measures at issue were justified under Article XX (b) and (g) given that these provisions did not contain jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved.¹²⁹ The complainants countered the United States justification arguments by averring that Articles XX (b) and XX (g) could not be invoked to justify a measure applying to animals outside the jurisdiction of the Member enacting the measure.¹³⁰

4.5.3 The Panel Findings

The Panel found that the United States measure was unjustified within the meaning of the Chapeau of Article XX and therefore did not qualify for any exception from the prohibition of Article XI. The Panel first considered the Chapeau of Article XX, before

¹²⁵ *US-Shrimp*, panel report para 7.11.

¹²⁶ *US-Shrimp*, panel report Para 7.18.

¹²⁷ *Ibid.* Para 7.19.

¹²⁸ *Ibid.* Para 7.20.

¹²⁹ *Ibid.* Para 7.24.

¹³⁰ This was a veiled reference to a finding on the same issue in *US-Tuna (Mexico)* despite its inherent shortcomings as highlighted by a critique of the dispute above. For a further caustic critique of the *ratio* in *US-Tuna (Mexico)*, see Howse 1 op cit note 120 at 492-493.

proceeding to an examination of Article XX (b) and XX (g). It placed the burden of proof on the United States, as the party asserting the affirmative defense of Article XX.

In analyzing the Chapeau, the panel first found that the countries that were certified and those that were not ‘were countries where the same conditions prevail’ and that therefore, the United States measure was discriminatory.¹³¹ The following pronouncements of the Panel on the concept of ‘unjustified discrimination between countries where the same conditions prevail,’¹³² are notable:¹³³

- Unjustified discrimination would encompass any measure that would undermine the WTO multilateral trading system making it unnecessary for the identification of a discriminatory element in the ordinary meaning of the word;
- a measure constitutes ‘unjustified discrimination’ in this sense regardless of its individual impact on the integrity of the World trading system, it is enough that if measures of this particular kind or class proliferate, the integrity of the World trading system would be affected;
- measures that condition access for imports on home country regulation undermine Members’ expectations as to the competitive relationship between their products, at least where they proliferate; and
- the United States measure complained of was a measure that conditioned access of shrimp imports on home country regulation.

¹³¹ The Panel purported to follow principles of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose (Article 3.1). In a similar vein, Article 3 of the Dispute Settlement Understanding (DSU) of the WTO provides that the dispute settlement understanding of the WTO serves to clarify existing provisions of the (WTO) Agreements in accordance with customary rules of interpretation of public international law.

¹³² See generally the Chapeau of Article XX of GATT 1994.

¹³³ The pronouncements are recited here courtesy of Robert Howse “The Turtles Panel-Another Environmental Disaster in Geneva” (1998) 32 (5) *Journal of World Trade* 73 (hereafter Howse 2).

To sum up the findings, the Panel concluded that the ban imposed by the United States was inconsistent with Article XI.¹³⁴ The Panel had therefore concluded that the United States ban could not be justified under Article XX, as it constituted ‘unjustifiable discrimination between countries where the same conditions prevail’ and thus was not within the scope of measures permitted under Article XX.¹³⁵ It (panel) had reasoned that allowing such a ban would undermine Members’ autonomy to decide their own policies.¹³⁶ Since the Panel had found that the United States measure at issue was not within the scope of measures permitted under the Chapeau of Article XX, it did not find it necessary to examine whether the United States measure was covered by paragraphs (b) and (g) of Article XX.¹³⁷

4.5.4 Issues Raised on Appeal

In its arguments to the Appellate Body, The United States contended that the panel had misinterpreted the Chapeau of Article XX, thereby effectively erasing Article XX from the GATT in any case in which there is a ‘threat to the multilateral trading system’.¹³⁸ On the other hand, the joint appellees (India, Pakistan and Thailand) maintained that the panel’s ruling on the Chapeau of Article XX was correct and should be upheld by the Appellate Body.¹³⁹ Specifically, the United States raised the following issues on appeal:

- a) whether the panel erred in finding that accepting non-requested information from non governmental sources would be incompatible with the provisions of the DSU as currently applied;¹⁴⁰ and
- b) Whether the panel erred in finding that the measure at issue constitutes ‘unjustifiable discrimination between countries where the same conditions prevail’ and thus is not within the scope of measures permitted under Article XX of GATT 1994.¹⁴¹

¹³⁴ *US-Shrimp*, Panel Report, para 7.17.

¹³⁵ *Ibid.* Para 7.49.

¹³⁶ *US-Shrimp*, Panel Report, Para 7.51.

¹³⁷ *Ibid.* Paras 7.62 - 7.63.

¹³⁸ See claims of error by the United States, *US-Shrimp*, Appellate Body report paras 10-28.

¹³⁹ *Ibid.* Para 34.

¹⁴⁰ *Ibid.* Para 98. It is submitted that there is no need to dwell a lot on this query since it is not directly relevant to the trade and environment debate.

4.5.5 The Appellate Body Findings

In this case, the Appellate Body did two things. First, it reversed certain key findings of the panel, including the finding that the Article XX chapeau creates a firm exclusion of unilateral trade measures to protect the global environment.¹⁴² Second, the Appellate Body went on to ‘complete the analysis’- an expression the Appellate Body has used in previous cases for the jurisprudential technique of going forward to apply the law as correctly understood to the facts of the dispute.¹⁴³

The Appellate Body found three errors of law in the panel’s treatment of the Chapeau.¹⁴⁴ First, the panel erred by first considering the Chapeau provisions before the issue of justification under Article XX.¹⁴⁵ The Appellate Body reasoned that this was due to the fact that it is not possible to determine whether an exception is being abused without first determining whether the exception is otherwise available.¹⁴⁶

The second error of law in the panel’s approach was that it ignored the fundamentally limited ambit of the chapeau.¹⁴⁷ The Appellate Body stressed that in *US-Gasoline*,¹⁴⁸ it had made it quite clear that the chapeau is concerned only with the application of measures, not whether the measures themselves are justified under Article XX.¹⁴⁹

¹⁴¹ Ibid. Our analysis of both the panel and Appellate Body findings in *US-Shrimp* is biased towards this issue because we consider it central to the trade and environment debate.

¹⁴² Howse 2, op cit note 133 at 496.

¹⁴³ Howse 2 op cit note 133 at 496. This jurisprudential technique must be understood in light of the absence of any explicit authority of the Appellate Body to remand a case to the original panel for re-decision in light of the Appellate Body’s clarification of the law.

¹⁴⁴ Ibid.

¹⁴⁵ The Appellate Body recalled that in the *US-Gasoline* case, *supra* note 62, it had focused on the use of the reference to the manner in which the measure is applied, clarifying that the chapeau is not concerned with the nature of the measure itself but rather the manner in which it is applied.

¹⁴⁶ *US-Shrimp*, Appellate Body report, para 120.

¹⁴⁷ Howse 2, op cit note 133 at 497.

¹⁴⁸ *Supra* note 62.

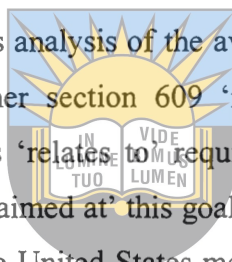
¹⁴⁹ This point had been emphasized upon in *US-Shrimp*, Appellate Body report, paras 115-116.

The third error of law made by the panel was to assume that unilateral measures that condition market access on the policies of the exporting countries are, as a matter of general principle, not justifiable under Article XX.¹⁵⁰

The Appellate Body, after the above wholesale rejection of the panel's legal reasoning and conclusion, proceeded to make findings on the issues raised on appeal. It remarked thus: 'having reversed the panel's legal conclusion...we believe that it is our duty and our responsibility to complete the legal analysis'.¹⁵¹

The Appellate Body found that Article XX (g) referring to 'exhaustible natural resources' includes living resources such as sea turtles.¹⁵²

The Appellate Body continued with its analysis of the availability of an exception under Article XX (g) by examining whether section 609 'relates to' the conservation of exhaustible natural resources'.¹⁵³ This 'relates to' requirement has been interpreted to require that the measure be 'primarily aimed at' this goal.¹⁵⁴ The Appellate Body applied a means-ends analysis, finding that the United States measure satisfied this test (despite the fact that it might be construed as aimed at changing exporting state policy, rather than



University of Fort Hare
Together in Excellence

¹⁵⁰ *US-Shrimp*, Appellate Body report, para 121. Robert Howse 2 op cit note 133 at 498 opines that this was an assumption common to the Panel ruling in *US-Shrimp* and to the older *Tuna-Dolphin* rulings. He further argues that in identifying this error of law, the typically cautious Appellate Body used emphatic language, suggesting disapproval of the basic approach taken in *Tuna-Dolphin* as well as by the panel in *US-Shrimp*, especially at para 121.

¹⁵¹ *US-Shrimp*, Appellate Body report, para 123.

¹⁵² At paragraph 128, the Appellate Body remarked that, "we do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources".

¹⁵³ *US-Shrimp*, Appellate Body report, para 135.

¹⁵⁴ See Joel.P.Trachtman "United States-Import prohibition of certain shrimp and shrimp products" at <http://www.ejil.org/journal/VOL10/NO1/sr4.html> [hereafter Tachtman, accessed 11 November 2005].

directly protecting turtles).¹⁵⁵ The Appellate Body also found that the United States measure also satisfied the third leg of Article XX (g) – that it was made in conjunction with restrictions on domestic harvesting of shrimp.¹⁵⁶

With respect to the application of the Chapeau, the Appellate body here relied heavily on its previous analysis in the *US-Gasoline*¹⁵⁷ case, to the effect that the measures falling within the particular exceptions must be applied reasonably; with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.¹⁵⁸ The Appellate Body ruled that discrimination resulted not only when countries in which the same conditions prevail were treated differently, but also when the application of the measure at issue did not allow for any enquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting countries.¹⁵⁹

The Appellate Body engaged in a means-ends analysis and found that the United States measure was overboard in so far as it required foreign governments to adopt the same policies as adopted by the United States.¹⁶⁰ Such an approach failed to consider the different conditions that obtain in other members' territories.¹⁶¹ Furthermore, the Appellate Body questioned whether domestic measures alone could be effective.¹⁶²

Secondly, the Appellate Body turned its attention to the Section 609, which does not permit the import of shrimp caught using turtle-Excluder Devices but originating in a

¹⁵⁵ “In our view therefore, section 609 is a measure ‘relating to’ the conservation of an exhaustible natural resource within the meaning of Article XX (g) of the GATT 1994” [*US-Shrimp*, Appellate Body report, para 142].

¹⁵⁶ *US-Shrimp*, Appellate Body report, paras 144-145.

¹⁵⁷ *Supra* note 62.

¹⁵⁸ *US-Shrimp*, Appellate Body report, para 151.

¹⁵⁹ *Ibid.* Para 165.

¹⁶⁰ *Ibid.* Para 161.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* Para 165. Such a questioning may suggest that unilateral measures are not an effective means to the desired end.

State that is not certified. The Appellate Body held that this approach amounts to a form of *sui generis* discrimination.

Thirdly, the failure by the United States to engage in serious, across-the board international negotiations with appellants as well as other Members exporting shrimp to the United States, with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before unilaterally enforcing the import prohibition against the shrimp exports of those Members, was also taken into account and weighed against the United States measure.¹⁶³ The Appellate Body pointed out that while the United States had signed the as yet unratified Inter-American Convention for the protection and conservation of sea turtles, that convention contains a requirement to respect Article XI of GATT.¹⁶⁴ The existence of the Inter-American convention demonstrates that a less-trade restrictive measure was available (at least in terms of its consensual origins, if not in terms of its potential to restrict trade).¹⁶⁵

Indeed the Appellate Body criticized the panel for departing from the text of the GATT and for not examining the ordinary meaning of the text.¹⁶⁶ Furthermore, the Appellate Body held that a teleological interpretation should consider the provision itself being interpreted, not the whole of the WTO Agreement.¹⁶⁷ The Appellate Body, while acknowledging that maintaining rather than undermining the multilateral trading system is an important premise of the WTO Agreement, remarked that this is not a right or an obligation; neither is it an interpretative rule which can be employed in the appraisal of a given measure under the Chapeau of Article XX.¹⁶⁸ The decision shows a measured, analytical approach to teleological interpretation, helping to develop the jurisprudential tool of international law.¹⁶⁹ The Appellate Body recognized that the unidimensional

¹⁶³ *US-Shrimp*, Appellate Body report Para 166.

¹⁶⁴ *Ibid.* Para 169.

¹⁶⁵ Per Trachtman, *op cit* note 154 at 6 .

¹⁶⁶ Joel Trachtman *supra* note 122.

¹⁶⁷ *Ibid.*

¹⁶⁸ *US-Shrimp*, Appellate Body report, para 116.

¹⁶⁹ Trachtman *loc cit* note 154.

teleology of the panel was too blunt an instrument for accurate adjudication.¹⁷⁰ The Appellate Body in this case also defined its interpretative tools by rejecting a strict ‘original intent’ interpretation of Article XX (g) in favour of a more dynamic interpretation to fit modern circumstances.¹⁷¹

Finally, the Appellate Body found real discrimination in the way the United States negotiated multilateral agreements and applied phase-in periods to different countries. The Appellate Body considered this discrimination ‘unjustifiable’ within the meaning of the Chapeau. The rigidity of Section 609 including its failure to distinguish between countries in which different conditions prevail, as well as the lack of transparency of the certification process, made this discrimination also ‘arbitrary’ under the Chapeau.¹⁷²

To sum up, the *US-Shrimp* decision is significant because of the following highlights. First the Appellate Body made it clear that under WTO rules, countries have the right to take trade action to protect the environment (in particular, human, animal or plant life or health, endangered species and exhaustible natural resources). The WTO does not have to allow countries this right. Secondly, the Appellate Body said that the measure to protect sea turtles would be legitimate under GATT Article XX, provided certain criteria such as non-discrimination were met. The United States lost the case, not because it sought to protect the environment but because it discriminated between WTO Members.¹⁷³

4.5.6 Commentary/Analysis

The above decision provided important clarifications in favour of the right of governments to protect the environment through unilateral measures.¹⁷⁴ However, the

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² *US-Shrimp*, Appellate Body report, para 177. See also Trachtman, *ibid*.

¹⁷³ The United States provided countries in the western hemisphere-mainly in the Caribbean-technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices. It did not give the same advantages, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.

¹⁷⁴ See Petros C.Mavroidis, *loc cit* note 1.

government taking such measures in this case once again found itself in violation of WTO obligations. The clarification in favour of the environment can be discerned from the Appellate Body remarks when it remarked thus:

*It appears to us however that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt a policy or policies unilaterally prescribed by the importing Member may, to some degree be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX...*¹⁷⁵

Some analysts and commentators have interpreted the above-cited paragraph as dicta of uncertain legal significance in future cases.¹⁷⁶ However, when the Appellate Body ruled on Malaysia's challenge to the United States implementation of its original ruling,¹⁷⁷ the Appellate Body went out of its way to make it clear that paragraph 121 of *US-Shrimp* was not obiter, but rather a fundamental basis of the original holding in its first decision.¹⁷⁸ The above commentary and the relevant cited paragraph lay to pasture the long-standing erroneous interpretation of Article XX of GATT according to which conditioning market access to prior acceptance of certain policies was in violation of the GATT.¹⁷⁹ As far as the above point (extra-territorial application of environmental measures) is concerned, the decision in *US-Shrimp* makes a positive jurisprudential contribution, albeit in an obscure and indirect manner.

On a negative note, there is a contradiction in the reasoning of the Appellate Body. The Appellate Body criticized the panel for not following a specific sequence of steps in its

¹⁷⁵ Per *US-Shrimp*, Appellate Body report, para 121. See also Howse 2 op cit note 133 at 498.

¹⁷⁶ Howse 2, op cit note 133 at 499.

¹⁷⁷ See *United States-Import prohibition of certain shrimp and shrimp products, Recourse to Article 21.5 by Malaysia*, Appellate Body and panel report, adopted 21 November 2001, WT/DS58/AB/RW (hereafter *US-shrimp Article 21.5*).

¹⁷⁸ Howse 2, op cit note 133 at 499.

¹⁷⁹ Petros C. Mavroidis, op cit note 1 at 74.

analysis of Article XX.¹⁸⁰ However, the Appellate Body in the *US-Shrimp* dispute under discussion never addressed the potential applicability of Article XX (b),¹⁸¹ opting to confine its decision on the law to Article XX (g). Under the Appellate Body's reasoning, this leaves open the possibility that if an exception were available under Article XX (b), a different analysis of the applicability of the Chapeau might be adopted.¹⁸² The possible persistence of such a contradiction in future decisions is regrettable.

Conclusion

It is appropriate to conclude this chapter by reiterating that the conservation of natural resources, both renewable and non-renewable, is of paramount importance to both developing and developed countries. In both the *Tuna-Mexico* and *US-Shrimp* cases, developing countries complained about the imposition of conservation measures by a developed nation namely the United States. The United States lost in both disputes because it did not consult and engage with its trading partners before invoking unilateral conservation measures such as the imposition of the 'intermediary country' embargo in *Tuna-Mexico* and the mandatory requirement of the use of TEDs in *US-Shrimp*. It is important to point out that the cases discussed above provide very clear authority that WTO members are free to adopt trade-restrictive policies that transcend borders as long as they inform their trading partners and try to negotiate an agreement with them. It would be more appropriate to conclude on this point by stating that the WTO panels and

¹⁸⁰ The Appellate Body argued that the panel had failed to evaluate whether the specific exceptions of Article XX are available before analyzing the applicability of the Chapeau. The Appellate Body further argued that it is impossible to analyze compliance with the Chapeau without knowing how the measure qualifies for an exception, and which exception.

¹⁸¹ The United States had invoked Article XX (g) ('in relation to the conservation of exhaustible natural resources'), and in the alternative, Article XX (b) ('necessary for the protection of....animal life') but preferred to make its case under Article XX (g) because its requirement of fit between measure and objective is less onerous than the one imposed by Article XX (b).

¹⁸² Joel Trachtman loc cit note 154.

the Appellate Body are not very agreeable to unilateralism unless it is based on the precautionary principle.¹⁸³

With respect to the *Gasoline* dispute, both the panel and the Appellate Body agreed that clean air is an exhaustible natural resource whose conservation and sustainable use would preoccupy WTO members.¹⁸⁴ To conserve clean air, the United States government amended the clean air act in 1990 which amendment empowered the United States Environmental Protection Agency (EPA) to promulgate the gasoline rule on the composition and emission effects of gasoline. This rule was *prima facie* discriminatory in favour of domestic refiners to the chagrin of their international counterparts. Despite the Appellate Body's conclusion that baseline establishment rules were primarily aimed at the conservation of the natural resource,¹⁸⁵ it nonetheless concluded that the application of the United States regulation amounted to unjustifiable discrimination where the same conditions prevailed and also amounted to a disguised restriction on trade.¹⁸⁶ Once again in this dispute, the need to take into account the effects of a trade measure on fellow WTO members and the importance of consulting are brought to the fore.

University of Fort Hare

Together in Excellence

The importance of the above decisions to the WTO jurisprudence on the conservation and sustainable use of natural resources may be aptly summed up as follows: Countries have the right to take trade action in order to protect the environment as long as the

¹⁸³ For a full exposition of the precautionary principle and how it has been applied in WTO disputes, see *European Communities-Measures Affecting Meat and Meat Products*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, adopted by the Dispute Settlement Body, February 13 1998 (hereafter *EC-Hormones*). This case is discussed in detail in Chapter six below and focuses on the extent and application of the precautionary principle in WTO disputes, together with its inherent limitations.

¹⁸⁴ See the *US-Gasoline* panel report at para 6.37.

¹⁸⁵ *US-Gasoline*, Appellate Body Report, Para 19.

¹⁸⁶ *US-Gasoline*, Appellate Body Report, Para 27. The Appellate Body Mentioned two omissions by the United States authorities as the reason for its decision – Failure by the US authorities to cooperate with other states at mitigating administrative huddles associated with the implementation of the Gasoline rule and the apparent disregard by US authorities of costs to foreigners that would result from the imposition of statutory baselines.

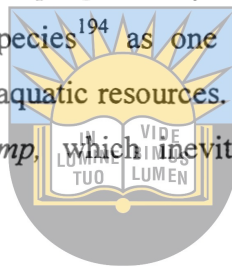
implementation of the trade action is not done in a discriminatory fashion/manner. The United States lost its cases in the *US Tuna-Mexico* and *US-Shrimp* disputes due to the discriminatory application of its trade restrictive policies to WTO members such as India and Pakistan. Conditioning foreign market access on a domestic policy, unlike the erroneous panel reasoning in *US-Tuna Mexico*¹⁸⁷ is still GATT/WTO legal as long as such conditioning is not implemented in a discriminatory manner and does not amount to a disguised restriction on international trade.

It is also appropriate at this point to reflect on some implications of the above cases for the SADC in transition. The subject matter in each of the above disputes is very relevant to the SADC, which is also preoccupied with the trade and environment debate in the context of conserving exhaustible natural resources. The SADC region is endowed with exhaustible natural resources such as minerals, water, wildlife, clean air and marine resources whose conservation and sustainable exploitation needs not be overemphasized. The above resources are tradable between SADC members and disputes arising out of restrictions in their trade between SADC member states are more than likely to arise when the envisaged free trade area materializes. The most important question in this respect is: Is the SADC dispute settlement mechanism adequate and robust enough to resolve trade and environment dispute as they arise? An attempt to answer this question is made in Chapters seven and eight below.

Trade bans and embargos were employed as trade-restrictive tools in the above cases and the plaintiffs took their cases to the GATT/WTO on the basis that such embargoes and trade bans were a blatant violation of WTO rules and objectives. On the other hand, the defendants sought to justify their trade restrictive actions through an invocation of the exceptions in Article XX of GATT. Talking about the SADC, the Protocol on Wildlife

¹⁸⁷ Despite this glaring weakness in the legal reasoning of the panel in this case, *US-Tuna Mexico* is still important because it held quite correctly that the U.S had failed to demonstrate that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the GATT such as negotiating international cooperative arrangements since dolphins roam the waters of many seas.

Conservation and Law Enforcement¹⁸⁸ provides that sanctions may be imposed against any state party, which persistently fails without good reason to fulfil its obligations assumed under the protocol, or implements policies that go against the objectives¹⁸⁹ and principles of the protocol.¹⁹⁰ In a similar vein, the SADC Protocol on Fisheries¹⁹¹ enjoins state parties to promote sustainable trade and investment in fisheries and related goods and services by reducing barriers to trade and investment.¹⁹² This does not mean that reducing barriers to trade implies a relaxation of environmental standards since the same Protocol urges state parties to address the causes of aquatic environmental degradation by taking measures in conformity with the SADC treaty and its protocols and other environmental treaties and conventions of relevance to the environment.¹⁹³ The Protocol urges the introduction of measures to progressively replace fishing gear and other technologies that are hazardous to species¹⁹⁴ as one of the measures aimed at the conservation¹⁹⁵ and sustainable use of aquatic resources. This is somewhat similar to the mandatory use of TEDs in *US-Shrimp*, which inevitably led to lengthy litigation.



¹⁸⁸ The full text of the SADC Protocol on Wildlife Conservation and Law Enforcement may be downloaded from the site <http://www.tralac.org/scripts/content.php?id=460>.

¹⁸⁹ Some of the notable objectives of the Protocol are the promotion of sustainable use of wildlife, harmonization of legal instruments governing wildlife use and conservation, the promotion of the conservation of shared wildlife resources through the establishment of transfrontier conservation areas and assistance in the building of national and regional capacity for wildlife management, conservation and enforcement of wildlife laws.

¹⁹⁰ See Article 10.5.1 (a) and 10.5.1 (b) of the SADC Protocol on Wildlife Conservation and Law Enforcement.

¹⁹¹ The full text of the Protocol is available at <http://www.tralac.org/scripts/content.php?id=449>.

¹⁹² Article 16.1 (a) of the SADC Protocol on Fisheries.

¹⁹³ Article 14.3 of the SADC Protocol on Fisheries.

¹⁹⁴ Per Article 14.4 (b) of the SADC Protocol on Fisheries.

¹⁹⁵ The term 'conservation' is defined in the SADC Protocol on Wildlife Conservation and Law Enforcement as the protection, maintenance, rehabilitation, restoration and enhancement of wildlife and includes the management of the use of wildlife to ensure the sustainability of such use. On the other hand, 'sustainable use' is defined as the use in a way and at a rate that does not lead to the long-term decline of wildlife species.

Additionally, state parties are urged to promote the use of energy efficient and clean technologies in the fishing and aquaculture sectors.¹⁹⁶

Dictating to fellow WTO members and or SADC member states how certain species of wildlife should be conserved may be trade restrictive but in the long run amount to a furtherance of the objectives of the above SADC protocols. This definitely falls into the category of an attempt at the conservation and sustainable use of exhaustible natural resources, which may be justified in terms of one or more of the exceptions in Article XX of the GATT. The decisions in *US-Tuna Mexico* and *US-Shrimp* are relevant and informative to the transforming SADC since the pursuit of a trade restrictive policy by a SADC member state against its neighbours and other WTO members may be offensive not only to the SADC protocols but also to WTO rules and obligations.

SADC member states are also urged to adopt legal instruments for the conservation and sustainable use of wildlife.¹⁹⁷ These legal instruments could be negotiated and adopted by SADC member states and be binding at the regional level or they could be domestic laws in individual countries whose application is extraterritorial. This is buttressed by the provision in the Protocol on fisheries, which enjoins each state party to adopt the necessary legislative and administrative measures to prevent pollution of waters by inland, coastal or offshore activities.¹⁹⁸

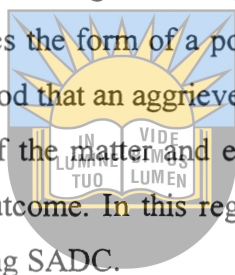
No single SADC member state is entirely self-sufficient in its energy requirements hence energy is imported and exported across the region. The generation and production of energy has environmental implications and some SADC member states, depending on

¹⁹⁶ Article 14.10 of the SADC Protocol on Fisheries.

¹⁹⁷ Article 7 of the SADC Protocol on Wildlife Conservation and Law Enforcement. Once again one is reminded of the Marine Mammal Protection Act [MMPA] of 1972 in *US-Tuna Mexico* and the amendment of the Clean Air Act in *US-Gasoline*.

¹⁹⁸ Article 14.8 of the SADC Protocol on Fisheries. This provision may be liberally interpreted as giving state parties the power to legislate and administer laws that purport to protect the environment and promote sustainable use of exhaustible natural resources even if trade restrictive and *prima facie* GATT/WTO illegal.

their technological advancement, may generate energy in an environmentally friendlier way than others. Principle 8 of the SADC Protocol on Energy¹⁹⁹ explicitly provides that one of the general principles of the Protocol is to ensure that the development and use of energy is environmentally sound. This is also supported by Article 14 of the Protocol on Fisheries which provides that state parties shall promote the use of energy efficient and clean technologies in the fishing and aquaculture sectors.²⁰⁰ Despite the fact that *US-Gasoline* was primarily concerned with the conservation of clean air in light of increasing toxic pollutants emitted by factories, the dispute is essentially about sustainable use of energy resources. The dispute may be informative to SADC member states that intend passing legislation aimed at sustainable generation of energy. This is likely to be the case if such legislation will affect both local and regional energy producers and consumers. On the other hand, if such legislation takes the form of a policy pronouncement adopted by the SADC as a region, there is likelihood that an aggrieved SADC member may approach the SADC tribunal for adjudication of the matter and eventually take the matter to the WTO if it is not satisfied with the outcome. In this regard therefore, *US-Gasoline* is a very important case for the transforming SADC.



University of Fort Hare

Together in Excellence

In closing, the lessons for SADC and its membership in terms of the legal norms and regulatory policies are as follows: Firstly, from the cases discussed, the WTO's incursion into domestic regulatory autonomy is apparent. This therefore implies that SADC member states should couch their trade regulatory policies carefully since they are not exempt from WTO scrutiny. It will not be a valid defense to allege that despite transgressing some established WTO regulations, the impugned measure is a domestic regulatory instrument. To be on the safe side of WTO rules, SADC member states should seek guidance from the Agreement on Technical Barriers to Trade (TBT Agreement)²⁰¹ which acknowledges members' regulatory autonomy over internationally traded goods

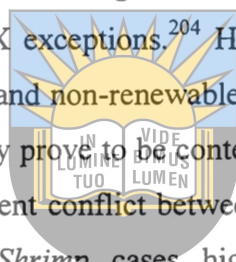
¹⁹⁹ The full text of the SADC Protocol on Energy is available at <http://www.tralac.org/scripts/content.php?id=448>.

²⁰⁰ Article 14.10 of the SADC Protocol on Fisheries.

²⁰¹ See chapter five below for a detailed discussion of the relevant provisions of the TBT Agreement.

while at the same time disciplining such regulatory autonomy.²⁰² On a related note, adopting international standards in line with the Agreement on Sanitary and Phytosanitary (SPS Agreement)²⁰³ measures and the TBT will reduce tension between SADC members in the event of a trade-environment dispute. This therefore brings to the fore the need to harmonize regulatory regimes so that SADC members do not trade accusations of ‘unjustifiable discrimination where the same conditions prevail’ or ‘a disguised restriction on international trade’.

The second lesson in terms of legal norms and regulatory practices both for SADC and its membership is that Process and Production Methods (PPMs) may be prescribed to prevent the importation of certain goods as long as the restriction is WTO-compliant and justifiable in terms of the Article XXIV exceptions.²⁰⁴ Health and safety aspects of new technologies, depletion of renewable and non-renewable sources of energy, environment pollution and use of prison labour may prove to be contentious trade policy issues which become the source of trade-environment conflict between SADC member states.²⁰⁵ The dolphin-friendly *US-Tuna* and *US-Shrimp* cases highlight the potentially adverse environmental externalities in fisheries and the need to formulate appropriate trade measures to deal with such issues.²⁰⁶



University of Fort Hare
Together in Excellence

²⁰² Many modern domestic regulations such as purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies and sanitary and phytosanitary measures are excluded from the scope of the TBT. See TBT Agreement Articles 1.1.4 and 1.1.5.

²⁰³ We discuss the SPS Agreement fully in chapter six below and examine how some of its provisions were applied in the *EC-Hormones* dispute.

²⁰⁴ PPMs involve some countries desiring to regulate international trade in goods and services by prescribing how the specified good or service was produced. The focus is on the inputs and process technologies utilised in their production. If a commodity is produced using environmentally unfriendly technology, then its importation may be restricted on environmental grounds.

²⁰⁵ See generally Robert Read, “Process and Production Methods and the Regulation of International Trade” at <http://www.lancs.ac.uk/staff/ecarar/ppms.doc> [21 Nov 2005].

²⁰⁶ Robert Read, *ibid.*

Thirdly and finally, from our analysis of the *US-Gasoline* dispute, it emerges that from a SADC trade regulatory perspective, health and safety issues arising from the use of ‘dirty technologies’ such as using DDT²⁰⁷ to fumigate Agricultural land or to kill mosquitoes that spread malaria are generally matters for national legislation. The above matters remain the preserve of national legislation unless trade in goods produced through ‘dirty technologies’ is engaged in. It may only be a matter of time before the importation of such goods is blocked by a SADC member state. Should this happen and the dispute spill into the SADC or WTO dispute settlement arena, the same principles of justifiability in terms of Article XX exceptions as was held in *US-Gasoline* would be applicable. Developing countries especially those in the SADC region may still be reliant on dirty technologies due to additional costs of clean technologies which reduce their international competitiveness by raising export costs. Indeed, in the *US-Gasoline* dispute, the objective was to limit toxic vehicle emissions in order to prevent/reduce adverse health effects arising from gasoline consumption. Such an objective, probably justified and very noble in terms of domestic regulation of health issues, was found to be WTO-illegal by both the panel and Appellate Body. This should be a good lesson in terms of legal norms and regulatory practices/policies both for SADC and its member states.

University of Fort Hare
Together in Excellence

²⁰⁷ DDT, also known under the chemical name *dichlorodiphenyltrichloroethane* was developed as the first of the modern insecticides early in World War II. It was initially used with great effect to combat mosquitoes spreading malaria, typhus, and other insect-borne human diseases among both military and civilian populations. Due to its toxicity to both human and animal life, the use of DDT has been banned in many countries [Source: <http://en.wikipedia.org/wiki/DDT>]. See on a related note, SABC News, 17 March 2004, “Controversial Pesticide DDT under the Spotlight” at http://www.sabcnews.com/south_africa/general/0,2172,76041,00.htm in which a leading academic, Professor Tiaan de Jager, criticizes South Africa’s continued use of DDT to combat malaria. The learned Professor argues that exposure to DDT can be through many routes such as food, drinking water, the air and direct contact through the skin.

CHAPTER FIVE

Trade and Environment Jurisprudence: The Protection of Human Health¹

5. Introduction

Human health is generally speaking not directly an environmental concept, neither is it a topic that raises immediate environmental concerns. However, when one considers the fact that the pollution of the environment be it water, air and natural food sources has adverse effects on human health, the issue suddenly assumes an environmental dimension. The WTO provides that nothing in the WTO agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human health.²

Chrysotile (white) asbestos is generally considered to be a highly toxic material, the exposure to which poses significant threats to human health such as risks of asbestosis, lung cancer or mesothelioma.³ However, due to their special qualities (for instance resistance to very high temperatures and to different types of chemical attack), asbestos fibres have found wide use in industrial and other commercial applications.⁴ To protect the health of its citizens, the French government adopted a Decree banning the import of asbestos and asbestos products in 1997. Asbestos producing countries namely Canada sought to challenge the Decree as unjustified and GATT/WTO illegal.

¹ For a general bird's eye view of WTO law and how it relates to health issues, see George. A. Bermann and Petros C. Mavroidis (eds) *Trade and Health in the World Trade Organisation*, forthcoming in January 2006.

² Per Article XX (b) of GATT, first part. The same Article extends the exception to the protection of both animal and plant life or health but at this point the main focus is on human health only. It is also submitted that Human health may, like plant and animal health, be protected under the Agreement on Sanitary and Phytosanitary Measures (See in this regard Chapter six below).

³ *EC – Asbestos* case, Panel report, para 3.66. See note 12 below for a full citation of the case. There are also two other main types of asbestos, namely crocidolite and amosite, which have different physical and chemical characteristics than the long spiral fibred chrysotile asbestos fibre.

⁴ *Ibid.* Para 2.2.

In this chapter therefore, we analyze the *EC – Asbestos* case with a view of exposing its trade and environment implications as far as human health is concerned. This dispute has been specifically selected because it seeks to address the trade and environment debate from the perspective of a violation of basic WTO rules and not the ancillary agreements.⁵

Before our discussion of the *EC-Asbestos* dispute, it is appropriate to discuss the WTO provisions that deal with health exceptions in general and show how they have been interpreted in practice in other cases. This would provide an appropriate background statement of the law before proceeding to show how it was applied in the dispute in question. It is also appropriate at this stage to discuss the Agreement on Technical Barriers to Trade (TBT) fully in all its ramifications as it was discussed in *EC-Asbestos*. Our discussion of the law here is brief and uncritical because the intention is just to state the law and comment critically on its application later in the actual dispute.



5.1 Requirements under article XX (b): The Necessity Test

Under article XX (b), permissible measures must be necessary 'to protect human, animal or plant life or health'. This was illustrated in *Thailand-Cigarettes*,⁶ in which the panel applied a 'least-trade restrictive' requirement and held that import restrictions imposed by Thailand could be considered to be 'necessary' in terms of article XX (b) only if there were no alternative measures consistent with the General Agreement or less-inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.⁷

⁵ The notable relevant ancillary agreements of the WTO in this regard are the agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary measures (SPS).

⁶ *Thailand-Restrictions on importation of and internal taxes on cigarettes* (hereafter *Thailand-Cigarettes*) adopted on 7 November 1990, BISD 37S/200.

⁷ See, "Trade and environment Backgrounder-Brief History-GATT 1994" at http://www.wto.org/english/tratop_e/envir_e/envir_background_e/c7s3_e.htm and "GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) and (g) WT/CTE/W/203 8 March 2002" at <http://www.docsonline.wto.org/ddfdocuments/t/wt/ict/w203.doc> [both visited 11 September 2005].

The necessity test entails weighing and balancing a series of factors.⁸ The test has subsequently evolved from the ‘least- trade restrictive’ approach to a ‘less-trade restrictive’ one supplemented with a proportionality test (a process of weighing and balancing a series of factors).⁹ In *EC-Asbestos*, for the very first time, an ‘environmental measure’ passed the necessity test.¹⁰ The Appellate body noted that the more vital or important the common interests or values pursued, the easier it would be to accept as ‘necessary’ measures designed to achieve those ends.¹¹

5.2 The Agreement on Technical Barriers to Trade¹²

The TBT Agreement covers all product regulations, such as size, grade, quality etc, hence its discussion here does not imply that the agreement is primarily aimed at environmental regulation. The TBT Agreement is an extension and clarification on the Agreement on Technical Barriers to Trade reached in the Tokyo Round.¹³

The TBT Agreement seeks to ensure that technical regulations and standards as well as certification procedures do not create unnecessary obstacles to trade, but it recognizes that countries have the right to establish protection at levels that they consider appropriate,¹⁴ and should not be prevented from taking measures necessary to ensure that those levels of protection are met. The TBT Agreement encourages

⁸ “Trade and environment Backgrounder-Brief History-GATT 1994” at http://www.wto.org/english/tratop_e/envir_e/envir_background_e/c7s3_e.htm and “GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) and (g) WT/CTE/W/203 8 March 2002” at <http://www.docsonline.wto.org/ddfdocuments/t/wt/cte/w203.doc>, op cit note 7. The appellate Body has decided that the factors prominently include the contribution made by the measure to the enforcement of the regulation at issue, the importance of the common interests or values protected by the regulation, and the accompanying impact of the measure on imports or exports.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² The full text and commentary on the TBT Agreement is available at <http://www.wto.org/english/rese/analyticindexe/tbt01e.htm#articleB1> [17 October 2005]. See further, Steve Charnovitz, “The World Trade Organisation and Environmental Supervision” (1994) *International Environment Reporter* 89-99 (hereafter Charnovitz).

¹³ Ibid.

¹⁴ Ibid. A good example is protection for the sake of human, animal or plant life or health.

countries to use international standards where these are appropriate, but it does not request them to change their levels of protection as a result of standardization.¹⁵

Prominent new features of the revised Agreement are that it now extends to processing and production methods (known as PPMs) related to the characteristics of the product itself.¹⁶ The coverage of conformity assessment procedures is enlarged and the disciplines made more precise.¹⁷

The TBT Agreement requires that ‘relevant international standards’ be used as a basis for national regulation ‘except when such international standards or relevant parts of them would be an ineffective or inappropriate means to the fulfillment of the legitimate objectives pursued’.¹⁸ The term ‘legitimate objective’ includes protection of health or the environment.¹⁹ If a country uses such international standards,²⁰ then regulations based on them are ‘rebuttably presumed’ to be consistent with the agreement.²¹ This further means that an exporting nation challenging an international standard would bear the burden of proof.²² According to the TBT Agreement, national regulations ‘shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create’.²³ Furthermore, such regulations shall not be maintained as circumstances change, if such changed circumstances or objectives can be addressed in a less trade-restrictive manner.²⁴

The TBT Agreement is discussed briefly because of all environment – related disputes that referred or alluded to the TBT, not one of them was decided on the basis of the

¹⁵ TBT Agreement, loc cit note 12.

¹⁶ See our discussions of PPMs in chapter four above.

¹⁷ Ibid.

¹⁸ Article 2.4 of the TBT Agreement.

¹⁹ Charnovitz, op cit note 12 at 94.

²⁰ For example, standards from the International Organization for standardization.

²¹ Charnovitz, op cit note 12 at 94.

²² The TBT Agreement, op cit note 12. The Agreement is unclear as to who has the burden of proof when an exporting nation challenges a nationally set standard.

²³ TBT Agreement, bid. Article 2.2.

²⁴ Ibid. TBT Agreement article 2.3.

TBT Agreement.²⁵ The dispute that seems to deal with the TBT Agreement in some detail,²⁶ which was concerned about an EC regulation, (EEC) 2136/89, adopted by the Council of the European Communities on 21 June 1989, setting common marketing standards for preserved sardines, does not have anything to do with trade and the environment. As far as the trade and environment debate is concerned, the TBT Agreement remains virgin territory upon which WTO panels and the Appellate Body are yet to make significant legal pronouncements. For the above reasons, the discussion of the TBT Agreement rests here and the ensuing discourse on pertinent trade and environment disputes will be confined to the interpretation of GATT article XX (b) exceptions and the relevant provisions of the Chapeau thereof.



University of Fort Hare
Together in Excellence

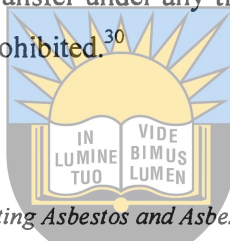
²⁵ In *EC-Hormones*, the complainants (The United States and Canada) claimed that measures taken by the European Communities were inconsistent with (i) GATT Articles III and XI; (ii) Articles 2, 3, and 5 of the SPS Agreement; (iii) article 2 of the TBT Agreement and (iv) Article 4 of the agreement on agriculture. The panel, referring to article 1.5 of the TBT Agreement, found that since the measures at issue were sanitary measures, the TBT Agreement was not applicable to the dispute. In *EC-Asbestos*, Canada claimed that the decree issued by France, banning the use of certain asbestos products violated articles 2.1, 2.2, 2.4 and 2.8 of the TBT Agreement while the EC argued that the TBT Agreement did not cover the decree. Neither did the panel nor the Appellate body make an important finding on the above averment.

²⁶ See in this regard, *European Communities- Trade description of sardines*, WT/DS231/AB/R, panel and Appellate Body report, adopted 26 September 2002, hereafter *EC-Sardines*.

5.3 The Asbestos Dispute²⁷

5.3.1 The Factual Background

Against a milieu of the protection human health, namely the health of workers, the French government, which had previously imported large amounts of chrysotile asbestos, adopted a Decree, which banned the import and use of asbestos and asbestos products.²⁸ The Decree provided that for the purpose of protecting workers, the manufacture, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.²⁹ Secondly, the Decree provided that with some limited exceptions, for the sake of protecting consumers, the manufacture, import, domestic marketing, exportation, and possession for sale, offer, sale and transfer under any title whatsoever of any product containing asbestos fibres shall be prohibited.³⁰



²⁷ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body and Panel report, adopted on 5 April 2001, WT/DS135 (Hereafter, *EC-Asbestos*). Some notable scholarly articles on the dispute so far are: J. Neumann, “Necessity Revisited – Proportionality in WTO law after Korea Beef, EC-Asbestos and EC-Sardines” (2003) 37 *Journal of World Trade* 199; Robert Howse and Elizabeth Turk, “The WTO Impact on International Regulations – a case study of the Canada *EC-Asbestos* dispute” forthcoming in George A. Bermann and Petros C. Mavroidis (eds) *Trade and Health in the World Trade Organisation* (2006); Robert Howse and Elizabeth Turk “WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute”, in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001) at 324-327;

Sydney M. Cone, “The *Asbestos* Case and Dispute Settlement in the World Trade Organisation: The Uneasy Relationship Between Panels and Appellate Body” (2001) 23 *Michigan Journal of International Law* 103; Mary Footer and Saman Zia-Zarif, “*EC-Asbestos*: The World Trade Organisation on Trial for its handling of occupational Health and Safety Issues” (2002) 3 *Melbourne Journal of International Law* 120; and Joost Pauwelyn, “Cross Agreement Complaints Before the Appellate Body: A Case Study of the *EC-Asbestos* Dispute” (2002) 1 *World Trade Review* 63.

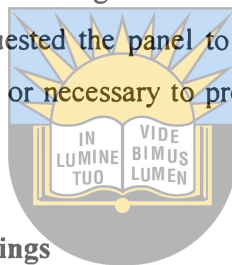
²⁸ Decree Number 96-1133, adopted on 24 December 1996, entered into force on the 1st of January 1997.

²⁹ Part I of the Decree. The Decree is quite comprehensive and wide as it covers asbestos and asbestos-products that have asbestos infused in them in whatever chemical combination.

³⁰ Part II of the Decree. On an exceptional and temporary basis, the bans instituted under Article I shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

5.3.2 Establishment of the Panel: The parties' Contentions

Canada requested the establishment of a panel on 8 October 1998 and the panel was established on 25 November of the same year. Canada moved to challenge the ban at the WTO on behalf of its Quebec-based asbestos industry, which is the world's second largest producer and the largest exporter of chrysotile asbestos. Canada argued that the Decree violated Articles III: 4 and XI of GATT 1994 and the TBT Agreement Articles 2.1, 2.2, 2.4 and 2.8. Canada further argued that the Decree nullified or impaired benefits under GATT Article XXIII: 1 (b). The European Communities justified its prohibition on the grounds of human health protection, arguing that asbestos was hazardous not only to the health of construction workers subject to prolonged exposure, but also to the population subject to occasional exposure. Specifically, the EC argued that the TBT Agreement did not cover the Decree. With regard to GATT 1994, the EC requested the panel to confirm that the Decree was either compatible with Article III: 4 or necessary to protect human health within the meaning of Article XX (b).



5.3.3 Summary of the Panel's Findings

At the first substantive meeting with the parties, the Panel announced its intention to seek opinions from individual scientific experts when necessary. The EC challenged this proposal, arguing that when a panel consults scientific experts, there should be an 'expert review group', formed under the Dispute Settlement Understanding (DSU) Appendix 4 or, if applicable, under the TBT Agreement Article 14.2. The panel disagreed and instead, sought the opinions of individual scientific experts, pursuant to DSU Articles 13.1 and 13.2.

The parties had a strong disagreement over whether the TBT Agreement applied to the measure at issue. The panel considered that for the TBT Agreement to apply here, the measure must fall within the definition of 'technical regulation' as provided for in the TBT Agreement Annex 1.1.³¹ The interpretation of this term, the panel went on to say, would be guided by articles 31 and 32 as well as the 'spirit' underlying Article 33

on the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices; on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof.

³¹ EC – *Asbestos*, panel report, para 8.28.

of the Vienna Convention on the Law of Treaties.³² The panel noted that the Decree is composed of a *general prohibition* as well as certain *exceptions*, including the administrative regime applicable to the exceptions, and stated that there should be a separate examination of the provisions concerning the *ban* and those concerning the *exceptions to the ban*.³³ The panel examined the definition of ‘technical regulation’ as provided for in the TBT Agreement Annex 1.1 and emphasized that as a preliminary matter, it considered asbestos itself to be a product, rather than merely an input into other products.³⁴ The panel concluded, basing its conclusion on the meaning of the definition of ‘technical regulation’, that the TBT Agreement applies to measures which define the technical specifications that one or more given products meet in order to be authorized for marketing.³⁵

The panel noted that there is no specific reference in the TBT Agreement to a total ban, and it appears that the purpose of the TBT Agreement is to address situations that are more complex than an unconditional ban.³⁶ Finally, the panel found nothing in the context of the definition to support the view that an outright ban constitutes a ‘technical regulation’. In this regard, the panel noted that a measure such as the ban is still subject to the disciplines of the GATT, even if the TBT Agreement does not cover it.³⁷

Basing its findings on the foregoing analysis, the panel concluded that a measure constitutes a ‘technical regulation’ if:

- a) the measure affects one or more given products;
- b) the measure specifies the technical characteristics of the product (s) which allow them to be marketed with the product; and
- c) compliance with the measure is mandatory.

³² Article 33 of the Convention addresses the interpretation of treaties authenticated in two or more languages. See the full text of the Vienna Convention on the Law of Treaties, 1969 at <http://www.un.org/law/ilc/texts/treaties.htm> [15 Nov 2005].

³³ *EC – Asbestos*, panel report, para 8.33.

³⁴ *Ibid.* Paras 8.34-8.35.

³⁵ *Ibid.* Para 8.43.

³⁶ *Ibid.* Paras 8.48-8.49.

³⁷ *Ibid.* Paras 8.53-8.56 and 8.63.

Under the third standard, the panel found that the asbestos ban did not constitute ‘technical regulations’. In conclusion, the panel reasoned that the exceptions to the ban on asbestos fell within the scope of the definition of ‘technical regulation’.³⁸ However, because Canada did not make any specific claims concerning the exceptions to the ban, the panel concluded that it was not required to make any findings on whether the exceptions are consistent with the substantive provisions of the TBT Agreement.

As a preliminary matter before turning to a full analysis of Article III: 4, the panel considered whether the provisions of Article III: 4 of GATT 1994,³⁹ and/or the provisions of Article XI: 1⁴⁰ applied to the measure. In that respect it concluded that GATT Article III: 4 applied to the ‘ban on importing asbestos and asbestos-containing products’ under the Decree.⁴¹ The panel noted further that such a finding was based on the fact that asbestos and asbestos substitutes had to be considered ‘like products’ within the meaning of Article III of GATT. The panel further remarked that the health risks associated with asbestos were not a relevant factor in the consideration of product likeness. Because it found that Article III: 4 applied to the measure, the panel did not consider it necessary to determine whether Article XI: 1 applied as well. The panel therefore concluded that the Decree violated Article III: 4 in that it afforded ‘less favourable’ treatment to imported products than to ‘like’ domestic products.⁴²

Despite finding against the EC on the issue of a violation of Article III: 4, the panel found that the French ban could be justified under Article XX (b).⁴³ Elaborating on this point, the panel, citing the *US – Gasoline* case,⁴⁴ (in which it was stated that a party invoking Article XX (b) must prove, that ‘the policy in respect of the measures

³⁸ EC-Asbestos, panel report, paras 8.64 - 8.70.

³⁹ This Article requires *inter alia*, that national laws, regulations and requirements provide national treatment to imported goods.

⁴⁰ The provisions of Article XI: 1 prohibit among other things, quantitative restrictions on imports.

⁴¹ *EC – Asbestos*, panel report, para 8.99.

⁴² *Ibid.* Para 8.158.

⁴³ *Ibid.* Para 8.240.

⁴⁴ *United States – Standards for reformulated and Conventional Gasoline*, Panel Report and Appellate Body Report, adopted 20 May 1996, WT/DS2/AB/R (hereafter, *US-Gasoline*). See Chapter four above for a full discussion of *US – Gasoline*.

for which Article XX is invoked falls within the range of policies designed to protect human life or health’) first of all noted that the words, ‘policies designed to protect human life or health’ imply the existence of a health risk. Second, the panel reiterated that under Article XX (b), a party must prove that ‘the ...measures...are necessary to fulfill the policy objective’. In this regard, the panel noted that previous panels had judged the ‘necessity’ of a measure based on ‘the existence of other measures consistent or less-inconsistent with the GATT in the light of the health objectives pursued’.⁴⁵

The panel further noted that the experts consulted confirmed the health risks associated with exposure to chrysotile asbestos in its various uses and, therefore, a prohibition of chrysotile asbestos fell within the range of policies designed to protect human life or health (Article XX (b)).⁴⁶ The panel also found that there was no reasonable alternative available to the European Communities such as the controlled use of asbestos products as was suggested by Canada.⁴⁷ The panel therefore concluded that the ban was justified as ‘necessary to protect...human life or health’ under Article XX (b).⁴⁸

University of Fort Hare

Concerning the Chapeau of Article XX, the panel found that the application of the Decree did not constitute arbitrary or unjustifiable discrimination,⁴⁹ and that the examination of the design, architecture and revealing structure of the Decree could not lead to a conclusion that the Decree had protectionist objectives.⁵⁰ Specifically, the panel found no evidence that the Decree had been applied in a discriminatory manner between supplier countries, and it concluded that the decree did not lead to arbitrary or unjustifiable discrimination under the Article XX Chapeau.⁵¹ With regard to whether the measure constituted a ‘disguised restriction on international trade’, the

⁴⁵ *EC – Asbestos*, panel report, paras 8.169-8.172.

⁴⁶ *Ibid.* Para 8.194.

⁴⁷ *Ibid.* Para 8.221.

⁴⁸ *Ibid.* Para 8.220.

⁴⁹ *Ibid.* Para 8.230.

⁵⁰ *Ibid.* Para 8.238.

⁵¹ *Ibid.* Para 8.229.

panel extensively relied on the Appellate Body decision in the *US – Gasoline* case,⁵² and opined that ‘disguised restriction’ ‘conceals’ the pursuit of trade-restrictive objectives.⁵³ The panel concluded that the measure satisfied the condition of the Article XX Chapeau, and as it fell within Article XX (b), it was therefore justified under Article XX.⁵⁴

Canada had also claimed that even if the Decree did not violate any WTO rules, it nevertheless nullified or impaired benefits under GATT Article XXIII: 1 (b). The European Communities had countered this averment by arguing, first that the rules on non-violation nullification apply only if the measure in question does not fall under other provisions of the GATT, and second, that there cannot be a ‘legitimate expectation’ in the case of a measure that concerns the protection of human health. The panel emphatically rejected both arguments by the EC. However, it rejected Canada’s argument on nullification or impairment because Canada did not meet its burden of providing ‘a detailed explanation why it could have reasonably anticipated that France would not adopt measures ‘restricting the use of asbestos’.⁵⁵

5.3.4 Matters Raised on Appeal

On appeal, Canada disputed two aspects of the panel’s findings namely: whether the use of chrysotile cement products posed a risk to human health and whether the measure at issue was ‘necessary to protect human life or health’.⁵⁶ Specifically, Canada argued that certain of the panel’s findings relating to GATT Articles III: 4 and XX (b) and to the TBT Agreement were in error. In a cross-appeal, the EC, although

⁵² *US-Gasoline*, *supra* note 44.

⁵³ *EC – Asbestos*, panel report, paras 8.235-8.236.

⁵⁴ *Ibid.* Para 8.240.

⁵⁵ *Ibid.* Paras 8.292-8.293.

⁵⁶ *EC – Asbestos*, Appellate Body Report, para 155. In response to Canada’s argument that the panel had an obligation to quantify the risk in order to ascertain whether the adopted trade measure was necessary, the Appellate Body ruled that the panel had no such obligation (see “Dispute Settlement Commentary: Appellate Body Report European Communities – Measures Affecting Asbestos and Asbestos Containing Products” (hereafter commentary) at [http://www.worldtradelaw.net/dscsamples/ec-asbestos\(dsc\)\(ab\)\(sample\).pdf](http://www.worldtradelaw.net/dscsamples/ec-asbestos(dsc)(ab)(sample).pdf)) [13 Nov 2005]. The Appellate Body also ruled (at paras 174-175) that the controlled use of asbestos as suggested by Canada was not a viable alternative hence the Decree was necessary.

it agreed with the panel's ultimate conclusion on the issue, appealed certain aspects of the panel's reasoning under GATT Article XXIII: 1 (b).

5.3.5 Highlights of the Appellate Body's Findings

1. The Appellate Body reversed the panel's approach to examining whether the measure at issue was a 'technical regulation' covered by the TBT Agreement; found that the measure was a 'technical regulation' covered by the TBT Agreement, but found that there was not an adequate basis upon which to complete the panel's legal analysis and determine whether the substantive provisions of the TBT Agreement had been violated;⁵⁷

2. The Appellate Body reversed the panel's finding that the products at issue were 'like' products and therefore reversed the panel's conclusion that the measure violated GATT Article III: 4;

3. It upheld the panel's conclusion that the measure fell within the scope of application of the non-violation nullification or impairment remedy under GATT Article XXIII: 1 (b).⁵⁸



University of Fort Hare
Together in Excellence

5.3.6 Summary of Appellate Body Findings

Canada appealed against the panel's finding that the ban did not constitute a 'technical regulation' and argued that the panel erred by considering the ban and the exceptions to the ban separately.⁵⁹ The Appellate Body ruled that the ban, if viewed as a whole, was not a total prohibition.⁶⁰ It also found that the core of the definition of 'technical regulation' is the laying down of one or more product characteristics, in

⁵⁷ The Appellate Body clarified the law and held that a measure may fall within the scope of a technical regulation as long as the measure makes the product identifiable for example with reference to its characteristics (see commentary, *op cit* note 56).

⁵⁸ The panel's substantive finding that Canada did not meet its burden of proving its non-violation claim was not appealed.

⁵⁹ *EC – Asbestos*, Appellate Body Report, paras 60-62.

⁶⁰ *Ibid.* Para 64.

either positive or negative form: that is, as a requirement or as a prohibition.⁶¹ The Appellate Body therefore found that the ban on asbestos fibres under the Decree must be understood as a ban on asbestos products containing asbestos fibres. The Appellate Body concluded that the Decree, viewed as a whole, laid down ‘characteristics’ for certain products (those that might otherwise contain asbestos), and was accordingly a ‘technical regulation’ under the TBT Agreement.⁶² The Appellate Body however emphasized that this did not mean that all internal measures covered by Article III: 4 of GATT are necessarily ‘technical regulations’.⁶³ Thus the Appellate Body reversed the Panel’s finding that the TBT Agreement did not apply to the part of the Decree imposing a ban on asbestos.⁶⁴

Having reversed the panel’s finding, the Appellate Body then considered whether it could complete the legal analysis of claims made by Canada under the TBT Agreement Articles 2.1, 2.2 and 2.4. In this case, after citing with approval the decision in *Canada – Periodicals*,⁶⁵ the Appellate Body concluded that it could not complete the legal analysis of these issues. In reaching this conclusion, the Appellate Body noted among other considerations, that the panel had not made findings on the substantive claims under the TBT Agreement, and that the TBT Agreement has never been previously interpreted by panels or the Appellate Body.⁶⁶ Therefore, the Appellate Body stated that it did not have an ‘adequate basis’ to examine Canada’s substantive claims under the TBT Agreement.⁶⁷

⁶¹ See Joel P.Trachtman, “European Communities-Measures Affecting Asbestos and Asbestos-Containing Products” at <http://www.ejil.org/journal/curdevs/sr13.html> [30 October 2005] (hereafter, Trachtman).

⁶² *EC – Asbestos*, Appellate Body Report, para 75.

⁶³ *Ibid.* Para 77.

⁶⁴ *Ibid.* Paras 75-76.

⁶⁵ See *Canada – Certain Measures Concerning Periodicals*, Appellate Body and Panel Report, adopted 30 July 1997, WTDS31/AB/R. This case involved a dispute between the United States and Canada over measures taken by the Canadian Government to protect the Canadian magazine industry as a medium of Canadian ideas and interests, and a tool for the promotion of Canadian culture.

⁶⁶ Such submissions by the Appellate Body is disturbing news since the Appellate Body could have seized the opportunity and make a ruling on the issue for the first time so that future panels and the Appellate Body do not seek to rely on the same lame excuse.

⁶⁷ *EC – Asbestos*, Appellate Body Report, paras 80-83.

The EC had also appealed the panel's findings that chrysotile asbestos fibres and PVA, cellulose and glass fibres ('PCG fibres') are 'like products' under GATT Article III:4 and the finding of the panel that 'less-favourable treatment' was accorded to imported asbestos and asbestos-containing products than to domestic 'like products' contrary to Article III:4.⁶⁸ The Appellate Body reversed the panel's findings and made it clear that the scope of 'like' as used in Article III: 4 was broader than 'like' as used in Article III: 2, although not broader than the combined scope of 'like' or 'directly competitive or substitutable' as used in Article III: 2.⁶⁹ The Appellate Body next reviewed the panel's findings that cement-based products containing chrysotile asbestos fibres are 'like' cement-based products containing PCG fibres. The Appellate Body found that the panel's reasoning was once again insufficient to support a finding of 'likeness'. In particular, the panel had made the following errors: it failed to take into account the 'risk' associated with the product; it failed to examine consumer tastes and habits,⁷⁰ and it did not properly examine how the incorporation of the different types of fibres in the product affects end-users.⁷¹ Having reversed the panel's findings that the products at issue were 'like' products, the Appellate Body consequently reversed the panel's conclusion that the measure was inconsistent with GATT Article III: 4.⁷²



University of Fort Hare
Together in Excellence

The Appellate Body found that it had sufficient information to complete the analysis on likeness of products, on the basis of the factual findings of the panel and the undisputed facts in the panel record.⁷³ It examined the evidence under four categories of physical properties, end-uses, consumer tastes and habits and tariff classification. The Appellate Body found differences in physical properties and emphasized their

⁶⁸ *EC – Asbestos*, Appellate Body Report, paras 84-86.

⁶⁹ *Ibid.* Para 99.

⁷⁰ Other considerations taken by the Appellate Body to determine likeness were physical properties, end uses and tariff classification. See Federico Ortino "From Non-Discrimination to 'Reasonableness': A Paradigm Shift in International Economic Law" at <http://www.jeanmonnetprogram.org/papers/05/050101.pdf> [13 Nov 2005] at 19.

⁷¹ *EC – Asbestos*, Appellate Body Report, paras 127-131.

⁷² *Ibid.* Para 132.

⁷³ Trachtman, *op cit*, note 61 at 4.

importance relative to the other three factors considered above.⁷⁴ The Appellate Body further found that the panel had identified only a ‘small number’ of overlapping end-users, but was not sure as to how many other overlapping end-users there might be.⁷⁵ Combined with the fact that there was no evidence on consumer preferences, this left the ‘burden of proof,’ mandated by an examination of the physical difference unmet.⁷⁶ In actual fact, one member of the Appellate Body, in a concurring statement, found that there was sufficient evidence for an affirmative finding that the chrysotile asbestos fibres are unlike PCG fibres.⁷⁷

The panel found that the Decree was justified under Article XX (b) as a measure necessary ‘to protect human...life or health’. On appeal, Canada argued that two aspects of the panel’s finding on this issue were in error.⁷⁸ Firstly, Canada did not agree with the panel’s statement, as part of the basis of its determination that the Decree is a measure that falls within the scope of the phrase, ‘to protect human life or health’, that the evidence showed that the handling of chrysotile – cement products constitutes a risk to human health. Secondly, Canada argued against the panel’s finding that the Decree was ‘necessary’ to protect public health under Article XX (b) because there was no reasonably available alternative.

University of Port Hare
Together in Excellence

Canada also argued that the panel erred in applying the ‘necessity test’ under Article XX (b) in the following respects. First she queried the panel’s finding that asbestos products at issue posed a risk to human health.⁷⁹ Second, Canada argued that the panel had an obligation to ‘quantify’ the risk, and not simply rely on the ‘hypotheses’ of French authorities.⁸⁰ Thirdly, Canada further claimed that the panel had also erred by

⁷⁴ Trachtman, op cit, note 61 at 4.

⁷⁵ Trachtman, bid.

⁷⁶ *EC – Asbestos*, Appellate Body Report, paras 141-142.

⁷⁷ Ibid. Paras 152-153.

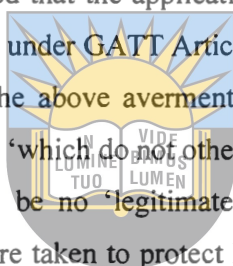
⁷⁸ *EC – Asbestos*, Appellate Body Report, at para 157.

⁷⁹ The panel rejected this argument, noting that it had already dismissed Canada’s claim that the panel’s finding of a health risk was not supported by evidence (at para 166).

⁸⁰ The Appellate Body again rejected this argument, stating that there is no obligation for panels to quantify such risks, and besides, the panel did not simply rely on the French hypotheses but assessed the qualitative nature of the risk (at para 167). Robert Howse, “Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann” at

assuming that the Decree would ‘halt’ the spread of the health risks at issue, as it did not take into account the risks posed by substitute products.⁸¹ Finally, Canada argued that the panel erred in finding that the ‘controlled use’ of asbestos was not a reasonably available alternative. The Appellate Body stated that the question was whether there was an alternative measure that would achieve the same ends but being less restrictive than a total prohibition.⁸² It agreed with the panel that the effectiveness of ‘controlled use’ had not been demonstrated, and therefore, no reasonably available alternative existed. Accordingly, the Appellate Body upheld the panel’s finding that the EC had demonstrated that the Decree was ‘necessary to protect human...life or health’ under Article XX (b).⁸³

Before the panel, Canada had claimed that the application of the Decree nullified or impaired benefits accruing to Canada under GATT Article XXIII: 1 (b).⁸⁴ The EC had raised a two-pronged objection to the above averment. First it argued that Article XXIII: 1 (b) only applies to measures ‘which do not otherwise fall’ under other GATT provisions, and secondly, there can be no ‘legitimate expectations’ under Article XXIII: 1 (b) with respect to a measure taken to protect human life or health justified



University of Fort Hare

Together in Excellence

<http://www.ejil.org/journal/Vol13/No3/art2.pdf> [15 Nov 2005] argues that a measure may be found to be necessary even if it is not indispensable to achieving a particular goal. He further agrees (at 9) with the Appellate Body ruling that where values such as human life are at stake, the margin of appreciation for domestic regulators should be particularly wide. Pursuant to Article XX (b), governments clearly are given the right to determine their own health policy objectives (Appellate Body Report, para 168. See also Julian Clare Cohen, “Commentary on EC-Asbestos” at www.utoronto.ca/ai/canada-korea/papers/JillianCohenpaper12.doc)[15 Nov 2005]

⁸¹ *EC – Asbestos*, Appellate Body Report, para 168. The Appellate Body rejected this argument and agreed with the panel’s assessment that any health risk from the substitutes is less than the risk from asbestos.

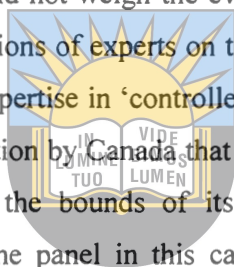
⁸² *Ibid.* Paras 169-172.

⁸³ *EC – Asbestos*, Appellate Body Report, paras 174-175.

⁸⁴ The idea underlying the provisions of Article XXIII: 1(b) is that *the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement.* In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement (at para 185, emphasis added by the Appellate Body).

under Article XX (b). The Appellate Body despite concurring with the finding in *Japan-Film*,⁸⁵ that the remedy in Article XXIII: 1 (b) ‘should be approached with caution and should remain an exceptional remedy’,⁸⁶ rejected the above claim by the EC and remarked that drawing a distinction between health and commercial measures would be very difficult in practice.⁸⁷ Consequently, the Appellate Body rejected the EC’s appeal and upheld the panel’s finding that Article XXIII: 1 (b) applied to the Decree.⁸⁸

As part of its argument that the panel erred in finding that the Decree was justified under GATT Article XX (b), Canada had claimed that the panel failed to make an objective assessment of the matter in terms of the DSU Article 11. In Particular, Canada argued first that the panel did not weigh the evidence before it properly and second, that the panel accepted opinions of experts on the controlled use of asbestos, even though those experts had no expertise in ‘controlled use’.⁸⁹ The Appellate Body held, with respect to the first contention by Canada that the panel’s application of the evidence in this case was within the bounds of its discretion.⁹⁰ Moreover, the Appellate Body stated that while the panel in this case followed the view of the majority scientific opinion, a panel is not required to follow, in every instance, the



University of Fort Hare
Together in Excellence

⁸⁵ See *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report, WT/DS44/R, circulated 20 March 1998.

⁸⁶ *EC-Asbestos*, Appellate Body Report, paras 185-186.

⁸⁷ *Ibid*, at paras 188-189.

⁸⁸ *Ibid*, at para 191. It is noteworthy that *EC-Asbestos* was the third case since the establishment of the WTO in 1995, after *Japan – Film* (*supra* note 85) and *Korea – Measures Affecting Government Procurement*, Panel Report, Circulated on 1 May 2000, WT/DS163/R, in which the non-violation remedy had ever been applied. For a further note on the nature of the non-violation remedy and how it has been applied thus far, see Locknie Hsu, “Non-violation Complaints: World Trade Organisation Issues and Recent Trade Agreements” (2005) 39 *Journal of World Trade* 205-237; Armin Von Bogdandy, “The Non-violation Procedure of Article XXIII, GATT: Its Operational Rationale” (1992) 26 *Journal of World Trade* 95-111; and Thomas Cottier and Krista Nadakavukaren Schefer, “Non-Violation in WTO/GATT Dispute Settlement: Past, Present and Future” in Thomas Cottier and Krista Nadakavukaren Schefer (eds) *International Trade Law and The GATT/WTO Dispute Settlement System* (1997) at 145-183.

⁸⁹ *EC – Asbestos*, Appellate Body Report, para 176.

⁹⁰ *Ibid*. Para 177.

majority scientific opinion.⁹¹ With respect to the second argument, the Appellate Body rejected Canada's claim that the panel erred by consulting particular experts. The reasons given by the Appellate Body for such a rejection were that the expert selection process was carried out properly, Canada never objected to the selection of the experts and the experts only answered questions in their fields of expertise.⁹² Therefore, the Appellate Body rejected Canada's appeal under DSU Article 11.⁹³

5.3.7 Commentary/ Analysis

This decision is very important in reaffirming the policy view that free trade should not be pursued at the expense of human health. Concern for human health triumphed over the obsession with trade liberalization and once again, the applicability of GATT Article XX exceptions was brought to the fore. The nagging issue of judicial economy in both the panel and Appellate Body exercise of their judicial discretion also reared its ugly head once again.⁹⁴

The Appellate Body's bifurcated Article III: 4 analysis represents a significant clarification, not to mention a significant improvement over the panel's decision to ignore health effects.⁹⁵ However, the two-part test employed by the Appellate Body leaves some important questions unresolved.⁹⁶ With respect to products in sufficient competitive relationship, the first test would make perfect sense.⁹⁷ On the other hand, the second test – whether foreign products as a class are subject to less favourable treatment – will require further explication over time.⁹⁸ It is not clearly certain to

⁹¹ *EC – Asbestos*, Appellate Body Report para 178.

⁹² *Ibid.* Para 179.

⁹³ *Ibid.* Para 181.

⁹⁴ Both the panel and the Appellate Body did not adequately canvass the issue of the applicability of the TBT Agreement, neither was the panel's substantive finding that Canada did not meet its burden of proving its non-violation complaint investigated and explored on appeal. It is important to point out with reference to this matter that despite Canada not having appealed against the substantive finding, it is still the job of the Appellate Body to review all legal issues raised by the panel to the satisfaction of the disputing parties.

⁹⁵ Trachtman, *op cit*, note 61 at 6.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

point out that it will evolve into an ‘aim and effects test’ that requires a discriminatory intent or simply looks at different outcomes.⁹⁹

Juxtaposed with and complemented by *Korea – Beef*¹⁰⁰, this decision indicates the Appellate Body’s willingness to undertake a balancing exercise in applying the necessity test to an extent previously unanticipated. This balancing test would examine not only the degree of contribution to the domestic regulatory goal, but also the importance of the regulatory goal, the degree of conflict with free trade and, perhaps, the degree of multinational agreement on the domestic regulatory goal.¹⁰¹

With respect to Canada’s claim that the application of the Decree nullified or impaired benefits accruing to her under Article XXIII: 1 (b), the Appellate Body appears to have determined that it is possible, at least in theory, to bring a claim of non-violation nullification or impairment in connection with a matter that is otherwise eligible for exception under Article XX of GATT.¹⁰² Such a finding is retrogressive since it could significantly reduce the value of the Article XX exceptions to member states.

University of Fort Hare

It is also interesting to note the fact that the Appellate Body referred to the decision in *Korea – Beef*,¹⁰³ in which it was held that in determining whether another alternative method is reasonably available, it is appropriate to consider the extent to which the alternative measure ‘contributes to the realization of the end pursued’.¹⁰⁴ This is a significant departure from the conventional understanding of ‘reasonably available’, which would consider the costs of the alternative regulation but not the degree of its contribution to the end.¹⁰⁵ In fact, the degree of contribution to the end seemed before to be inviolable: states were entitled to complete the accomplishment of the end

⁹⁹ Ibid.

¹⁰⁰ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB-2000-8 WT/DS161, 169/AB/R (00-5347), adopted by Dispute Settlement Body, 10 January 2001(hereafter, *Korea Beef*).

¹⁰¹ Trachtman, op cit, note 61 at 6.

¹⁰² *EC – Asbestos*, Appellate Body Report, para 187.

¹⁰³ *Korea-Beef*, *Supra* note 100.

¹⁰⁴ *EC – Asbestos*, Appellate Body Report at para 172, was citing from *Korea – Beef* paras 163-166.

¹⁰⁵ Trachtman, op cit, note 61 at 5.

reflected in their regulations.¹⁰⁶ This is not the ordinarily understood meaning of necessity as a search for the least-trade restrictive alternative reasonably available: that formulation would not ordinarily involve an evaluation, or any compromise, of the end pursued.¹⁰⁷

In this case, the Appellate Body went out of its way to emphasize the sovereign right of each WTO member to maintain a strict level of precaution against health risks;¹⁰⁸ a message that was picked up and applauded by some of the more moderate and better informed civil society groups.¹⁰⁹

This decision is very important because we are dealing here with the leading known cause of occupational cancer in human populations all over the world, and one of the most thoroughly studied toxic dusts ever breathed.¹¹⁰ Environmentalists and labour bodies from all over the world especially Trade Unions in the developing World should warmly welcome this decision because of its implications for environmental and public health concerns coupled with a furtherance promotion of the worldwide workers' campaign for a global ban on chrysotile asbestos.



The logo of the University of Fort Hare is a circular emblem. It features a central sun with rays, a book, and a lamp. The Latin motto 'VITE BIVMUS LUMEN TUO' is inscribed within the emblem. The text 'University of Fort Hare' and 'Together in Excellence' are positioned above and below the emblem, respectively.

University of Fort Hare

Together in Excellence

Conclusion

The above dispute is crucial to the trade and environment debate in the context of the protection of human health. The world is agreed that despite earning a lot of money in both local and foreign currency, asbestos is a product that has well known health

¹⁰⁶ Trachtman, bid.

¹⁰⁷ Trachtman, op cit, note 61 at 5.

¹⁰⁸ It is noteworthy to point out that the risk level set by the EC was zero. Where a zero-level risk is set, the Appellate Body ruled that other risk management measures that might carry a risk failure were not a reasonably available alternative measure to meet the zero risk tolerance level set by the government[per Appellate Body Report at paras 173-174].

¹⁰⁹ Marc L. Busch and Robert Howse "A (genetically modified) Food Fight: Canada's WTO Challenge to Europe's Ban on Genetically Modified Products" (2003) 186 *C.D Howe Institute Commentary* 1 at 9.

¹¹⁰ Barry Castleman, ScD "The WTO Asbestos Case and Its Health and Trade Implications" at http://www.btinternet.com/~ibas/bc_wto_seattle.htm [11 September 2005].

implications.¹¹¹ There is a growing trend towards encouraging research into possible substitutes for asbestos fibres. The EC convincingly argued that asbestos is dangerous to the health of workers who are subject to prolonged exposure and to the general population that is subject to occasional exposure. Both the Panel and Appellate Body supported such an argument, with both dispute settlement forums lauding the French Decree on the use of asbestos products as necessary to protect human health. In a nutshell, the ban, despite violating some standing WTO regulations, was found to be justified under Article XX (b) of the GATT.

The decision in *EC – Asbestos* may directly or indirectly impact on the economies of some developing countries including SADC member states.¹¹² In Southern Africa, Zimbabwe is one of the premier producers of asbestos and asbestos products. There is a likelihood of some SADC member states banning the importation of asbestos products from Zimbabwe or any other producer in the region, taking a cue from *EC – Asbestos*. In actual fact, according to the Financial Gazette,¹¹³ South Africa's new regulations proscribing the importation and exportation of asbestos and asbestos containing materials are likely to result in significant job losses in both Zimbabwe and South Africa. The regulations, gazetted on November 4, 2005 will come into force

¹¹¹ See generally *The Herald online*, a Zimbabwean Daily newspaper "ZCTU Campaigns for a World Wide Ban on Asbestos Use" at <http://www.zimbabweherald.com/index.php?id=44139&pubdate=2005-06-08> [13 June 2005].

¹¹² With specific reference to Zimbabwe, *The Herald online*, *ibid* reports that apart from the job losses that would occur as a result of the ban on asbestos, the closures of the main asbestos producing mines, namely Shabanie and Mashava, would have a contagious effect on a number of downstream industries such as construction, transport, manufacturing, textiles and motor vehicle assembly. Zimbabwe, a very interested party in the *EC-Asbestos* dispute, participated as a third party during the panel proceeding; she however did not file a third participant's submission in the appellate proceeding, but nevertheless requested permission to attend the oral hearing as a "passive observer." Noting that no participants or third participants objected to this request, the Appellate Body granted Zimbabwe permission to attend the oral hearing in this capacity (see Appellate Body Report para. 7).

¹¹³ See Ruramai Mutizwa, "Asbestos Industry: 10 000 Jobs on the Line" *The Financial Gazette online* at www.fingaz.co.zw/storv.aspx?stid=238 [24 Nov 2005]. In the article, the Mutizwa reports that South Africa has passed regulations proscribing the importation of asbestos and asbestos containing materials into the country, or export of such materials from the Republic unless, the purpose of such import or export is solely for analysis and research. Such analysis and research should not be for the purpose of developing new uses of asbestos.

into force in 2006.¹¹⁴ It would be interesting to see how the SADC Dispute settlement Mechanism would deal with such an issue should a dispute be declared. Asbestos and asbestos containing products affect human health, which the SADC as a regional grouping regards as a matter of great priority.¹¹⁵ SADC member countries are urged to collaborate, cooperate and assist each other in regional environmental issues and other concerns such as toxic waste, waste management, port health services, and pollution of air, land and water and the general degradation of natural resources.¹¹⁶ The *EC – Asbestos* dispute therefore has significant legal and sociopolitical thematic relevance to the SADC in transition. The ban on asbestos indeed touches the nerve and bone of some SADC member states whose economic prowess heavily hinges on the exploitation and exportation of the pernicious dust.¹¹⁷ Should the campaign for a worldwide ban on asbestos continue as current trends show, it may be sooner rather than later that the WTO may have to hear another dispute pertaining to the same subject matter. It is important to emphasize at this point that both the Panel and Appellate Body decisions on the above dispute address only one part of the problem – whether or not the ban is justified in terms of article XX of the GATT.

On another level, in the context of a SADC in metamorphosis, the dispute lays down an important regulatory lesson about individual countries regulatory autonomy in

¹¹⁴ Ruramai Mutizwa, op cit note 113.

¹¹⁵ See in this regard the SADC Protocol on Health at <http://www.tralac.org/scripts/content.phd?id=450> [13 June 2005].

¹¹⁶ Per Article 23 of the SADC Protocol on health. This Article deals with environmental health in general.

¹¹⁷ Tobacco is another commodity whose likely ban in light of the coming into international law of the Framework Convention on Tobacco Control (FCTC) would have ripple effects on some SADC economies. The objective of the FCTC is to protect present and future generations from the devastating *health, social, environmental* (emphasis added) and economic consequences of tobacco consumption and exposure to tobacco smoke. According to Bundy Naidu and Claire Keeton, “New Law will Ban Puffing in More Public Places and Hurt Tobacco Firms” *Sunday Times*, 11 December 2005 at 1, South Africa ratified the FCTC in April 2005 and has gone a step further by drafting a bill (Tobacco Products Control Amendment Bill) that seeks to stringently regulate the marketing and sale of tobacco products in South Africa. The full text of the FCTC is available at <http://www.who.int/tobacco/framework/countrylist/en> [15 June 2005].

human health matters.¹¹⁸ The Appellate Body did mention the importance of consumers in deciding whether a particular product is suitable or not but emphasized that in a human health context, governments are given a wider regulatory discretion. This may be taken to imply that governments may take tougher action against their trading partners to protect the health of their citizens.



University of Fort Hare
Together in Excellence

¹¹⁸ See Julian Clare Cohen, op cit note 80.

CHAPTER SIX

Trade and Environment Jurisprudence: The Agreement on the Application of Sanitary and Phytosanitary Measures

6. Introduction

One of the major highlights of the Uruguay Round was the expansion of the international discipline over environmental laws that hinder the free flow of international trade. Although the enactment and enforcement of environmental laws that are aimed at the protection of national environments at the expense of unhindered international commerce have traditionally been exempt from trade agreements as matters of national autonomy, the Uruguay Round has significantly altered this position. Two main WTO Agreements are relevant in the context of national laws and the environment or public health. The two Agreements are the Agreement on Technical Barriers to trade (TBT) and the Agreement on Sanitary and Phytosanitary measures (SPS).¹

The current GATT rules are based on the long-established principle of national treatment.² National treatment implies that a nation can apply its domestic standards to imported products as long as it cannot put imported products at a disadvantage.³ In certain cases such as those involving health or natural resource conservation, Article XX of GATT provides an exception from national treatment. WTO rules based on the TBT and SPS Agreements are on the other hand based on a new principle akin to

¹ In a nutshell, the TBT Agreement deals with government regulations on products (e.g. auto emission standards) while the SPS Agreement deals with government regulations and import bans regarding food safety and disease-spreading products. To avoid duplication and may be confusion, matters covered by the SPS are excluded from the TBT. For a historical and legal overview of the two Agreements, see Gabrielle Marceau and Joel P. Trachtman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World trade Organisation Law of Domestic Regulation of Goods" (2002) 36 *Journal of World Trade* 811.

² See Chapter Two above.

³ See Steve Charnovitz, "The World Trade Organization and Environmental Supervision" (1994) *International environmental reporter* 89 at 91 (hereafter Charnovitz 1).

international treatment.⁴ These two Agreements are the major governors of international economic relations in situations where trade bans or other trade restrictions are imposed against a backdrop of protecting human health in the context of the quality of plant and animal products. In this chapter however, the specific focus is on the SPS Agreement since the TBT Agreement and its applicability in actual disputes has already been canvassed in chapter five above.

6.1 The Agreement on Sanitary and Phytosanitary Measures⁵

*Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including inter alia, end product criteria; process and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport, provisions on relevant statistical methods, sampling procedures and methods of risk assessment and labeling requirements directly related to food safety.*⁶

A WTO Member may apply trade-restrictive measures to protect human life or health and plant or animal life or health. Earlier, such action could generally be taken under Article XX of GATT 1994, but the rules were initially so vague that many countries

⁴ Charnovitz, 1 op cit note 3 at 91. Both Agreement urge member states to base their TBT or SPS regulations on existing international standards.

⁵ For a detailed discussion of the legal and theoretical aspects of the SPS Agreement and related issues, see Bhagirath Lal Das *The World Trade Organization: A Guide to the Framework for International Trade* (1999) 131-137; Steve Charnovitz 1, op cit note 3 at 94-96; Onno Kuik, "Technical Barriers to trade, Sanitary and Phytosanitary Standards and Eco-labelling" at http://www.wto.org/english/docs_legal_e/ursum_e.htm#dAgreement [19 October 2005]; Bruce Silverglade, Director of Legal Affairs, Centre for Science in the Public Interest, "The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?" at <http://www.citizen.org/documents/fdlwtfn.pdf> [17 October 2005]; Viejo Hiskanen, "The Regulatory Philosophy of International Trade Law" (2004) 38 *Journal of World Trade* 1; and Laura J. Loppacher and William A. Kerr "The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America" (2005) 39 *Journal of World Trade* 427.

⁶ Article I (d) of Annex A to the SPS Agreement.

⁷ Lal Das op cit note 5 at 131. See also in a related context, Article XX (b) of GATT 1994.

used 'health requirements' as barriers to trade having nothing to do with health protection.⁸ The Uruguay Round of multilateral trade negotiations has established a detailed discipline in the above area which is contained in the SPS Agreement.⁹

6.1.1 *A Brief Overview of the SPS Agreement*

In its preamble, the SPS Agreement highlights the following major points. First, it reaffirms the fact that members are not prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that such measures are applied in a manner that would not constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail, or a disguised discrimination on international trade.¹⁰ The Agreement further notes that sanitary and phytosanitary measures, which are often applied on the basis of bilateral agreements or protocols, need certain rules and disciplines to guide their development, adoption and enforcement in order to minimize their negative effects on trade. The preamble also highlights the Members' desire to harmonize their SPS standards against a yardstick of international standards.¹¹ Further, recognition is given to the fact that developing country members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing members and in the formulation and application of sanitary or phytosanitary measures in their own territories, hence they need assistance in this regard.¹²

⁸ Steve Charnovitz 1, op cit note 3 at 92.

⁹ The full text of the SPS Agreement is available at <http://www.jurisint.org/pub/06/en/doc/14.htm> (visited 17 October 2005).

¹⁰ The above is a *holus bolus* adoption and incorporation of the provisions of the Chapeau to Article XX of GATT 1994.

¹¹ Joane Scott, "International Trade and Environmental Governance: Relating Rules and Standards in the EU and WTO" (2004) 15 *European Journal of International Law* 307 at 324 opines that such standards are deemed to include those emanating from three specific bodies namely, The Codex Alimentarius Commission for food safety, the International Office of Epizootics for animal health and zoonoses and the Secretariat for International Plant Protection Convention for Plant Health.

¹² Developing countries' ability to respond to importing countries' Sanitary and phytosanitary (SPS) measures has been enhanced by a decision approved by WTO members meeting as the SPS Committee on 27–28 October 2004. The Details of the decision are available at http://www.wto.org/english/news_e/news04_e/sps_27_28_oct04_e.htm [17 October 2005].

The SPS Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.¹³ Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the SPS Agreement,¹⁴ and SPS measures are to be applied only to the extent necessary to protect human, animal or plant life or health and based on scientific principles.¹⁵ Sanitary and phytosanitary measures which conform to the relevant provisions of the SPS Agreement shall be presumed to be in accordance with members' obligations under GATT 1994, specifically article XX (b).¹⁶

GATT Members are enjoined to harmonize¹⁷ sanitary and phytosanitary measures on as wide a basis as possible and base them on international standards, guidelines or recommendations where they exist.¹⁸ Measures that conform to international standards, guidelines or recommendations shall be deemed to be necessary and in compliance with the GATT.¹⁹ Members are allowed to introduce sanitary and phytosanitary measures which result in a higher level of protection than measures based on international standards if there is a scientific justification for such or justification in terms of paragraphs 1 through 8 of article 5.²⁰ Otherwise all measures, which result in higher levels of sanitary protection than those based on international standards, guidelines or recommendations, shall not be inconsistent with any provision of the SPS Agreement.²¹

¹³ Per article 1 of SPS Agreement. It is also crucial to point out that nothing in the SPS Agreement shall affect the rights of members under the TBT Agreement with respect to measures not within the scope of the SPS Agreement (article 1.4 of SPS Agreement).

¹⁴ Article 2.1 of SPS Agreement.

¹⁵ Article 2.2 of SPS Agreement. Deviation from scientific principles can only be allowed in situations of adopting the precautionary principle provided for in article 5.7 of SPS Agreement.

¹⁶ Article 2.4 of SPS Agreement.

¹⁷ Harmonisation is defined in Annex A of the SPS Agreement as 'the establishment, recognition and application of common sanitary and phytosanitary measures by different members'.

¹⁸ Article 3.1 of SPS Agreement.

¹⁹ Article 3.2 of SPS Agreement.

²⁰ Article 3.3.

²¹ Ibid.

All members are urged to play their part, within the limits of their resources, in the international organizations and their subsidiaries, to promote within those organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.²² Members shall accept the sanitary or phytosanitary measures of other members as equivalent, even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection.²³ For this purpose, reasonable access shall be given, upon request, to the importing member for inspection, testing and other relevant procedures.

The assessment of risk and the determination of the appropriate level of sanitary or phytosanitary protection is covered by article 5 of the SPS Agreement. Members' sanitary or phytosanitary measures must be based on an assessment, appropriate to the circumstances of the risk to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.²⁴ In assessing the risk, members shall take into account available scientific evidence²⁵ and in determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, members shall take into account, as relevant, some specified economic factors.²⁶

In determining the appropriate level of sanitary or phytosanitary protection, members should take into account the objective of minimizing negative trade effects,²⁷ and for the sake of consistency in the application of the appropriate level of sanitary or

²² Article 3.4.

²³ Article 4.1.

²⁴ Article 5.1.

²⁵ Article 5.2.

²⁶ Article 5.3. Such factors include the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing member, and the relative cost-effectiveness of alternative approaches to limiting risks.

²⁷ Article 5.4.

phytosanitary protection, each member is urged to avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.²⁸

In cases where relevant scientific evidence is insufficient, a member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other members.²⁹

The above provisions of the SPS Agreement are the most pertinent to trade and environment matters and the application of some of them has been the subject of disputes already.³⁰ However, the following provisions of the SPS Agreement are also important and not discussing them in detail here should not be interpreted as a pointer to their insignificance, the opposite may be true if future panel and subsequent Appellate Body decisions necessitate their discussion, interpretation and application.

Article 6 of the SPS Agreement addresses the issue of adaptation to regional conditions, including pest or disease free areas and areas of low pest or disease prevalence while transparency in the application of sanitary and phytosanitary measures is dealt with in article 7. The control, inspection and approval of procedures

²⁸ Article 5.5.

²⁹ Article 5.7. This provision incorporates the famous ‘precautionary principle’ that has assumed legal status in international environmental law. For a detailed note on the origins and current legal status of the precautionary principle, see Doa Abdel Motaal, “Is the World Trade Organisation Anti-precaution?” (2005) 39 *Journal of World Trade* 487 and James Cameron “The Precautionary Principle” in Gary P. Samson and W. Bradnee Chambers (eds) *Trade, Environment and the Millennium* (2002) 287-319.

³⁰ The relevant disputes in this regard are *EC – Measures Concerning Meat And Meat Products (Hormones)* WT/DS26/AB/R/WT/DS48/AB/R, 16 January 1998 (Hereafter *EC-Hormones*), *Japan – Measures Affecting Agricultural Products* WT/DS76/R and WT/DS/AB/R, 19 March 1999, (Hereafter *Japan-Agricultural products*) *Australia – Measures Affecting the Importation of Salmon*, Report of the Panel, WT/DS18; modified by the Appellate Body, AB-1998-5, 20 October 1998 (Hereafter *Australia-Salmon*) and *Japan-Measures Affecting the Importation of Apples* WT/DS245/AB/R, November 2003 (hereafter *Japan-Apples*)

are dealt with in article 8 and article 9 is devoted to the issue of technical assistance to developing members in the application of sanitary and phytosanitary measures. In a similar vein, article 10 deals with special and differential treatment in dealing with the special needs of developing country members in particular the least-developed country members. Article 11 deals with the important theme of consultations and dispute settlement while article 12 is dedicated to administrative issues with respect to the implementation of the SPS Agreement. Implementation and final provisions of the SPS Agreement are dealt with in articles 13 and 14 of the SPS Agreement respectively. Annex A of the SPS Agreement contains definitions of key terms while Annex B deals with transparency of sanitary and phytosanitary regulations. Finally, Annex C deals with control, inspection and approval procedures.

To conclude this section of the discussion, it is appropriate to highlight the main aspects of the SPS Agreement. The SPS Agreement is a trade agreement not a health agreement, hence the implication is that exports of unsafe food by governments is not a violation of SPS provisions.³¹ SPS rules apply to sanitary and phytosanitary measures as defined in the Agreement,³² only to health standards applied to imports and the TBT Agreement does not supervise any measure covered by the SPS Agreement. The main highlights of the SPS Agreement therefore are the ones outlined below.³³

The first main highlight is the science requirement. Governments shall ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health and is based on scientific principles and shall not be maintained without sufficient scientific evidence.³⁴

³¹ Steve Charnovitz, "The Supervision of Health and Biosafety Regulation by World trade Rules" in Kevin Gallagher and Jacob Werksman (eds) *International Trade and Sustainable Development* (2002) at 265 (hereafter Charnovitz 2).

³² Per SPS Agreement, Annexure A, paragraph 1.

³³ The following brief account relies heavily on the analysis by Steve Charnovitz, op cit note 31 at 266-274.

³⁴ SPS Agreement Article 2.2 which is further strengthened by Annexure C para 1(a).

The second main highlight relates to the concept of risk assessment. The requirement enjoins governments to ensure that their SPS measures are... 'based on assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health'.³⁵

Thirdly, the SPS Agreement requires what may be termed national regulatory consistency in terms of which governments are urged to avoid arbitrary or unjustifiable distinctions in the protection levels they consider to be appropriate in different situations if such distinctions result in discrimination or a disguised restriction on international trade.³⁶

The fourth major highlight is the requirement for least trade restrictiveness which demands that governments must ensure that their SPS measures are not more trade restrictive than is required to achieve the appropriate level of protection.³⁷ To prove a violation, alternative measures must be in existence upon which the defendant state could have relied, such an alternative being less restrictive to trade.³⁸

Fifthly, the SPS Agreement prohibits governments from adopting SPS measures that arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.³⁹

The sixth highlight is that governments are required to use international standards and 'base' their SPS measures on international standards where they exist except as otherwise provided.⁴⁰

³⁵ Per SPS Agreement Article 5.1. See further, the Appellate Body report in *EC-Hormones supra* note 30 para 187.

³⁶ Article 5.5 of SPS Agreement. Steve Charnovitz, op cit note 31 at 270 submits that this provision is the most controversial SPS rule because it supervises a government's choice of the level of health protection to be pursued. We strongly concur with this incisive observation and wish to add that this is notwithstanding the fact that Article 5.7 may be relied upon to escape censure under Article 5.5.

³⁷ SPS Agreement Article 5.6.

³⁸ Charnovitz 2, op cit note 31 at 270.

³⁹ SPS Agreement Article 2.3. This provision seems to have been adapted from the Chapeau to Article XX of GATT. This requirement has not yet been the subject of a dispute in SPS related matters.

The last remaining but very important highlights of the SPS Agreement are the recognition of equivalence,⁴¹ which requires that the government of an importing country accept an SPS regulation by an exporting country as equivalent to its own, approval and inspection of procedures,⁴² and most importantly provisional measures which may be resorted to by governments where scientific evidence is insufficient but the government concerned has to take precautionary steps to obviate damage.⁴³

6.2 The relevant WTO Jurisprudence: The *EC – Hormones* Dispute⁴⁴

Preliminary Remarks

While the cases discussed in the immediately preceding chapters above dealt with trade and the environment explicitly,⁴⁵ addressing issues around the protection of human health and the conservation of exhaustible natural resources, *EC-Hormones*⁴⁶ is unique and relevant to our discussion of pertinent case law because it deals at great length with the applicability of the Agreement on the application of sanitary and phytosanitary measures (SPS Agreement). Since SPS measures⁴⁷ are imposed for the purpose of protecting human, animal and plant life or health, a discussion of a case that puts into perspective the applicability of the SPS Agreement is both relevant and appropriate. Notwithstanding the fact that *EC-Hormones* raises other issues additional to the question of the applicability of the SPS Agreement,⁴⁸ the discussion of the case

⁴⁰ Per Article 3.1 of the SPS Agreement. The implication that arises from this requirement is that countries can impose more stringent regulations than international standards.

⁴¹ SPS Agreement Article 4.1.

⁴² SPS Agreement Article 8 and Annexure C. These procedures require that such processes be undertaken and completed without undue delay [SPS Article 8 and Annexure C para 1(a)].

⁴³ SPS Agreement Article 5.7. This provision provides a qualified exception from SPS Article 2.2.

⁴⁴ *EC-Hormones* supra note 30.

⁴⁵ See Chapters Four and five above.

⁴⁶ *EC-Hormones*, supra note 30.

⁴⁷ See 6.1 above.

⁴⁸ The case deals with other additional issues such as the applicability of the GATT, especially Article XX (b), the applicability of the TBT Agreement and general procedural issues such as the panel's selection and use of experts, the panel's standard of review and the panel's terms of reference. For a detailed critical commentary on the legal issues raised in the case, the following journal articles are relevant. William A. Kerr and Jill E. Hobbs, "The North American – European Union Dispute Over Beef Produced Using Growth Hormones: A major Test For the New International trade Regime" (2002) 25 *The World Economy* 283, Trish Kelly, "The WTO, the Environment and Health and Safety

that follows is biased towards the applicability of the SPS Agreement given the fact that the dispute contributes positively to the evolution and development of WTO jurisprudence on the applicability of the SPS Agreement. *EC-Hormones* is therefore chosen for analysis and scrutiny here not because it is very recent,⁴⁹ but for the simple reason that it offers an extensive and comprehensive analysis of the pertinent provisions of the SPS Agreement.

6.2.1 The Legal and Factual Background to *EC-Hormones*

The factual background to the *EC-Hormones* dispute may be briefly summarized as follows.⁵⁰ On 20 May 1996, the Dispute Settlement Body ('DSB') established a panel in a complaint brought by the United States relating to a European Communities (EC) ban on imports of meat and meat products from cattle which had been treated with certain natural or synthetic hormones for growth promotion purposes.⁵¹ The ban came in the form of directives of the council of ministers that were enacted before 1 January 1995,⁵² the date of entry into force of the WTO Agreement, of which the SPS Agreement is an integral part.



Standards" (2003) 26 *The World Economy* 131 at 139 and Gavin Goh and Andreas R. Ziegler, "A Real World Where People Live and Work and Die – Australian SPS Measures after the WTO Appellate Body Decision in the Hormones Case" (1998) 32 *Journal of World Trade* 271.

⁴⁹ The case was decided in 1998, long before the decision in *EC-Asbestos* (2001) and *Japan-Apples* (2003).

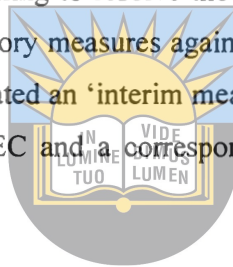
⁵⁰ The following account of the facts draws heavily from David R. Hurst, "Hormones: European Communities-Measures Affecting Meat and Meat Products" at <http://www.eji.org/journal/vol19/no1/sr1g.rtf> [20 October 2005].

⁵¹ The three natural hormones at issue were testosterone, oestradiol-17 β and progesterone. The three synthetic hormones at issue were trenbolone, which mimics the action of testosterone; zeranol, which mimics the action of oestradiol-17 β and malengestrol acetate (MGA), which mimics the action of progesterone.

⁵² The particular directives were Directive 81/602 of 31 May 1981, Directive 88/146 of 7 March 1988 and Directive 88/299 of 17 May of 1988. In July 1997, the above Directives were repealed and replaced by Council Directive 96/22/EC of April 29, 1996. This Directive prohibited the administration to farm animals of substances having a hormonal action and thyrostatic action. It also prohibited the placing on the European market of both domestically produced and imported meat and meat products derived from farm animals to which such substances had been administered including the six hormones at issue. However, the Directive allows the administration, for therapeutic and zootechnical purposes, of certain substances having a hormonal or thyrostatic action.

On October 16, 1996, the Dispute Settlement Body established a panel in a complaint brought by Canada relating to the same subject matter. On November 4, 1996, the EC and Canada agreed that the United States and Canadian panels would be composed of the same three persons (hereafter panel).

Before the proceedings under the WTO dispute settlement mechanism began, the trade conflict between the EC and the United States had gone unresolved under the GATT dispute settlement process.⁵³ In 1987, the United States invoked dispute settlement proceedings under the Tokyo Round Agreement on Technical Barriers to Trade against the EC ban.⁵⁴ The Tokyo Round Agreement on Technical Barriers to Trade however applied to production and processing methods, hence the United States complaint was not entertained.⁵⁵ Failing to resolve the dispute with the EC in 1987, the United States introduced retaliatory measures against EC imports. In early 1989, the United States and the EC negotiated an 'interim measure' designed to allow some United States beef exports to the EC and a corresponding reduction in retaliatory duties.⁵⁶



6.2.2 Establishment of the Panel: The Parties' Contentions

The complainants in this case argued that the EC measures adversely affected the importation of meat and meat products and appeared to be inconsistent with the obligations of the EC under GATT 1994, the Agreement on sanitary and phytosanitary measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Agriculture. Specifically, the complainants averred that the EC measures appeared to be inconsistent with but not limited to *inter alia*, Articles III and XI of GATT, Articles 2, 3 and 5 of the SPS

⁵³ See Sara Pardo Quintillan, "Free Trade, Public Health Protection and Consumer Information in the European and WTO Context-Hormone-treated Beef and Genetically Modified Organisms" (1999) 33 (6) *Journal of World Trade* 147 at 159.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

Agreement, Articles 2 and 5 of the TBT Agreement and Article 4 of the Agreement on Agriculture.⁵⁷

In response to the above averments, the EC argued that the analysis of the SPS or the TBT Agreement should take place only if alleged violations of GATT Articles were found.⁵⁸ With respect to the alleged violation of Article III: 4 of GATT, the EC argued that the animals to which the hormones at issue had been administered for growth promotion and the meat from those animals were not 'like' other animals and the meat from those animals respectively. The EC argued that even if there was going to be a finding of 'likeness', imported products were not given 'less favourable treatment' than domestic products.⁵⁹ Moreover, the EC argued that if the measures were found to be inconsistent with Article III: 4, they were justified by Article XX (b).⁶⁰ In the view of the EC, the measures did not violate any provisions of the SPS Agreement because they were based on scientific principles as required by Article 2.2, risk assessment had been performed and this established the scientific basis for regulatory action and the SPS Agreement recognizes members' rights to establish higher levels of protection than international standards.⁶¹ The EC further argued that its measures were based on the precautionary principle and that its standards were applied in exactly the same way to all animals treated with these hormones and meat from such animals intended for consumption in the EC market, whatever its origin hence there consequently was neither discrimination nor a disguised restriction on international trade.

⁵⁷ *EC-Measures Concerning Meat and Meat products (Hormones) Complaint by Canada*, panel report, 18 August 1997, WT/DS48/R/CAN, at paras 1.3 (a) (1) – (IV) and *EC-Measures Concerning Meat and Meat products (Hormones) Complaint by the United States*, report of the panel, 18 August 1997, WT/DS26/R/USA at paras 1.4.1 - 1.4.2.

⁵⁸ *EC-Measures Concerning Meat and Meat products (Hormones) Complaint by the United States* at para III: 4.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

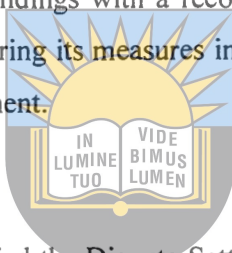
⁶¹ *EC-Measures Concerning Meat and Meat products (Hormones) Complaint by the United States*, at para III: 6.

6.2.3 Summary of the Panel Findings

The panel found as follows against the EC:⁶²

- The EC acted inconsistently with Article 5.1 of the SPS Agreement by maintaining sanitary measures which are not based on risk assessment;⁶³
- the EC acted inconsistently with Articles 5.5 of the SPS Agreement because it adopted arbitrary or unjustifiable distinctions in the levels of sanitary protection it considered to be appropriate in different situations which resulted in discrimination or a disguised restriction on international trade;⁶⁴ and
- the EC acted inconsistently with Article 3.1 of the SPS Agreement because it maintained sanitary measures which are not based on international standards without justification under Article 3.3 thereof.⁶⁵

The panel therefore concluded its findings with a recommendation that the Dispute Settlement Body request the EC to bring its measures in dispute into conformity with its obligations under the SPS Agreement.



6.2.4 Matters Raised on Appeal

On 24 December 1997, the EC notified the Dispute Settlement Body (hereafter DSB) of its decision to appeal certain issues of law raised in the panel reports and certain legal interpretations developed by the panel.⁶⁶

The specific matters raised on appeal were:

1. Whether the panel correctly allocated the burden of proof in this case;⁶⁷
2. whether the panel applied the appropriate standard of review under the SPS Agreement;⁶⁸

⁶² *EC-Measures Concerning Meat and Meat products (Hormones) Complaint by the United States*, at para 9.1.

⁶³ *Ibid.* Para 9.1 (i).

⁶⁴ *Ibid.* Para 9.1 (ii).

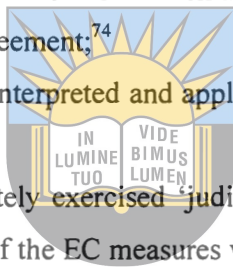
⁶⁵ *Ibid.* Para 9.1 (iii).

⁶⁶ *EC-Hormones*, Appellate Body Report, at para 7. The notification was done pursuant to paragraph 4 of Article 16 of the DSU.

⁶⁷ *EC-Hormones*, Appellate Body Report, at para 96 (a).

⁶⁸ *Ibid.* Para 96 (b).

3. whether, and to what extent, the precautionary principle is relevant in the interpretation of the SPS Agreement;⁶⁹
4. whether the provisions of the SPS Agreement apply to measures enacted before the date of entry into force of the WTO Agreement;⁷⁰
5. whether the panel had made an objective assessment of the facts pursuant to Article 11 of the DSU;⁷¹
6. Whether the panel acted within the scope of its authority in its selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties;⁷²
7. whether the panel correctly interpreted Article 3.1 and 3.5 of the SPS Agreement;⁷³
8. whether the EC measures are ‘based on’ a risk assessment within the meaning of Article 5.1 of the SPS Agreement;⁷⁴
9. whether the panel correctly interpreted and applied the Article 5.5 of the SPS Agreement;⁷⁵ and
10. whether the panel appropriately exercised ‘judicial economy’ in not making findings on the consistency of the EC measures with Article 2.2 and 5.6 of the SPS Agreement.⁷⁶



University of Fort Hare
Together in Excellence

6.2.5 Summary of the Appellate Body Findings

In response to the above matters, the Appellate Body:

1. Reversed the panel’s general interpretive ruling that the SPS Agreement allocates the evidentiary burden to the Member imposing the SPS measure, it also reversed the panel’s conclusion that when a member’s measure is not based on international standards in accordance with Article 3.1, the burden is

⁶⁹ *EC-Hormones*, Appellate Body Report, para 96 (c).

⁷⁰ *Ibid.* Para 96 (d).

⁷¹ *Ibid.* Para 96 (e).

⁷² *Ibid.* Para 96 (f).

⁷³ *Ibid.* Para 96 (g).

⁷⁴ *EC-Hormones*, Appellate Body Report, para 96 (h).

⁷⁵ *Ibid.* Para 96 (i).

⁷⁶ *Ibid.* Para 96 (j).

on that Member to show that its SPS measure is consistent with Article 3.3 of the SPS Agreement;⁷⁷

2. concluded that the panel applied the appropriate standard of review under the SPS Agreement;⁷⁸
3. upheld the panel's conclusions that the precautionary principle could not override the explicit wording of Articles 5.1 and 5.2, and that the precautionary principle has been incorporated in, *inter alia*, Articles 5.7 of the SPS Agreement;⁷⁹
4. upheld the panel's conclusion that the SPS Agreement, and in particular Articles 5.1 and 5.5 thereof, applies to measures that were enacted before the entry into force of the WTO Agreement, but remain in force thereafter;⁸⁰
5. concluded that that the panel, although it sometimes misinterpreted some of the evidence before it, complied with its obligation under Article 11 of the DSU to make an objective assessment of the facts of the case;⁸¹
6. concluded that the procedures followed by the panel in both proceedings – in the selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties – were consistent with the DSU and the SPS Agreement;⁸²
7. reversed the panel's conclusion that the term 'based on' as used in Articles 3.1 and 3.3 of the SPS Agreement has the same meaning as the term 'conform to' as used in Article 3.2 of the same agreement;⁸³

⁷⁷ *EC-Hormones*, Appellate Body Report, para 253 (a).

⁷⁸ *Ibid.* Para 253 (b).

⁷⁹ *Ibid.* Para 253 (c).

⁸⁰ *EC-Hormones*, Appellate Body Report, para 253 (d).

⁸¹ *Ibid.* Para 253 (e).

⁸² *Ibid.* Para 253 (f).

⁸³ *Ibid.* Para 253 (g).

8. modified the panel's interpretation of the relationship between Articles 3.1, 3.2 and 3.3 of the SPS Agreement, and reversed the panel's conclusion that the EC by maintaining, without justification under Article 3.3, SPS measures which were not based on existing international standards, acted inconsistently with Article 3.1 of the SPS Agreement;⁸⁴
9. Upheld the panel's finding that a measure, to be consistent with the requirement of Article 3.3, must comply with, *inter alia*, the requirements contained in Article 5 of the SPS Agreement;⁸⁵
10. modified the panel's interpretation of 'risk assessment' by holding that neither Article 5.1 and 5.2 nor Annex A.4 of the SPS Agreement require a risk assessment to establish a minimum quantifiable magnitude of risk, nor do these provisions exclude *a priori*, from the scope of a risk assessment, factors which are not susceptible of quantitative analysis by empirical or experimental laboratory methods commonly associated with the physical sciences;⁸⁶
11. reversed the panel's finding that the term 'based on' as used in Article 5.1 of the SPS Agreement entails a 'minimum procedural requirement' that a Member imposing an SPS measure must submit evidence that it actually took into account a risk assessment when it enacted or maintained the measure;⁸⁷
12. upheld the panel's finding that the EC measures at issue were inconsistent with the requirements of Article 5.1 of the SPS Agreement, but modified the panel's interpretation by holding that Article 5.1, read in conjunction with Article 2.2, requires that the results of the risk assessment must sufficiently warrant the SPS measure at stake;⁸⁸

⁸⁴ *EC-Hormones*, Appellate Body Report, para 253 (h).

⁸⁵ *Ibid.* Para 253 (i).

⁸⁶ *EC-Hormones*, Appellate Body Report, para 253 (j).

⁸⁷ *Ibid.* Para 253 (k).

⁸⁸ *Ibid.* Para 253 (l).

13. reversed the panel's findings and conclusions on Article 5.5 of the SPS Agreement;⁸⁹ and

14. concluded that the panel exercised appropriate 'judicial economy' in not making findings on Article 2.2 and 5.5 of the SPS Agreement.⁹⁰

The above legal findings upheld, modified and reversed the findings and conclusions of the panel, but left intact those findings and conclusions that were not the subject of the appeal.

The Appellate Body, consistent with usual Dispute Settlement Body Practice, recommended that the Dispute Settlement Body request the EC to bring its SPS measures, found in the panel report, as modified by the Appellate Body Report, to be inconsistent with the SPS Agreement into conformity with the obligations of the EC under that Agreement.



6.3 Analysis and Conclusions

In this dispute, the Appellate Body adopted a comprehensive analysis of the application of the SPS Agreement, an analysis which laid down the groundwork for future jurisprudential guidelines in similar disputes.⁹¹ The dispute is also important because it brings clarity to the relationship between national SPS measures and international standards, clearly articulates the status and applicability of the precautionary principle in SPS related environmental disputes and clarifies the misconception around the concepts of 'risk' and 'risk assessment'.⁹² On another

⁸⁹ *EC-Hormones*, Appellate Body Report para 253 (m).

⁹⁰ *Ibid.* Para 253 (n).

⁹¹ In *Australia – Salmon*, *supra* note 30 Canada complained against an Australian ban (begun in 1975) on the importation of uncooked salmon. Australia had introduced the ban to prevent the introduction of toxic pathogens not present in Australia. The Appellate Body ruled against Australia in October 1998 and in July 2000 Australia modified its regulation to permit salmon imports. In *Japan –Agricultural Products*, the United States complained about a Japanese Phytosanitary measure (begun in 1950) that banned imports of apples, cherries, nectarines and walnuts potentially infested with codialing moth. The Appellate Body ruled against Japan in 1999 and thereafter, Japan agreed to bring its regulation into conformity with SPS rules by the end of 1999.

⁹² See Sarah Pardo Quintillan, *op cit* note 53 at 161.

level, EC-Hormones is regarded as one of the most controversial cases ever resolved by the WTO since the establishment of the organization.⁹³ The following pronouncements of the Appellate Body with regard to the precautionary principle are worth noting.

The EC requested the Appellate Body to reverse the finding of the panel relating to the precautionary principle.⁹⁴ The panel had found that the precautionary principle could not override the finding that the EC import ban on meat and meat products from animals treated with any of the five hormones at issue for growth promotion purposes, in so far as it applied to meat and meat products from animals treated with any of these hormones in accordance with good practice, was, from a substantive point of view, not based on a risk assessment.⁹⁵

The basic submission of the EC was that the precautionary principle has become ‘a general customary rule of international law’ or at least ‘a general principle of law’.⁹⁶ The Appellate Body declined to go into whether the precautionary principle has become a rule of customary international law and characterized the debate as ‘abstract’.⁹⁷ However, the Appellate Body observed that the writing of the precautionary principle into the SPS Agreement was not a justification for SPS measures that are inconsistent with the obligations of members set out in particular provisions of that Agreement; and that the precautionary principle was indeed reflected in Article 5.7 of the SPS Agreement but agreed with the panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement.

From the analysis by the Appellate Body under Article 5.7 of the SPS Agreement, it is not clear that the precautionary principle has crystallized into a general principle of

⁹³ This is at least the unsubstantiated argument advanced by Viejo Heikinen, “The Regulatory Philosophy of International Trade Law” (2004) 38 *Journal of World Trade* 1 at 23.

⁹⁴ *EC-Hormones*, Appellate Body report, para 120.

⁹⁵ *EC-Hormones*, United States panel report, paras 8.157 and 8.158; Canada panel report, paras 8.160 and 8.161.

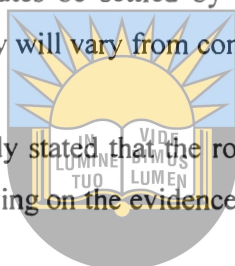
⁹⁶ *EC-Hormones*, Appellate Body report, para 121.

⁹⁷ *Ibid*, at para 123.

customary international law. This is mainly due to the fact that outside of environmental law, the precautionary principle still awaits more authoritative formulation.⁹⁸ The precautionary principle has not been written into the SPS Agreement as a ground for justifying a measure that otherwise violates SPS provisions of the WTO.⁹⁹ While the precautionary principle is indeed reflected in Article 5.7 of the SPS Agreement by incorporation, this does not mean that the relevance of the principle for SPS purposes is exhausted.¹⁰⁰

From the foregoing discussion of *EC-Hormones*, it is evident that although the SPS Agreement can serve to protect and preserve human health, its main aim is to prevent the use of unnecessary health measures that impede foreign exporters.¹⁰¹ It is recommended that food-safety disputes be settled by science-based rules although what amounts to adequate food safety will vary from context to context.¹⁰²

In *EC-Hormones*, the Appellate Body stated that the role of the panel is to make an objective assessment of the facts relying on the evidence as presented by governments and outside experts.¹⁰³



University of Fort Hare

Together in Excellence

None of the SPS disputes discussed or alluded to above has had a positive outcome for the importing country. In other words, the WTO panels and Appellate Body ruled in favour of the complaining states. While this may signal victory for the application of the SPS Agreement, resolving the legal dispute is not equivalent to resolving the

⁹⁸ See Steve Charnovitz, "Improving the Agreement on Sanitary and Phytosanitary Standards" in Gary P. Samson and W. Bradnee Chambers (eds) *Trade, Environment and the Millennium* (2002) at 210.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Steve Charnovitz, op cit note 98 at 207.

¹⁰² Ibid. See further, David A. Wirth, "The Role of Science in the Uruguay Round and NAFTA Trade Disciplines" (1994) 27 *Cornell International Law Journal* 817.

¹⁰³ *EC-Hormones*, Appellate Body report, paras 113-118. See further Joost Pauwelyn, "The WTO Agreement on Sanitary and phytosanitary (SPS) Measures as applied in the first Three SPS Disputes" (1999) 2 *Journal of International Economic Law* 641. For a contrary view however, see Vern R. Walker, "Keeping the WTO from becoming the World Trans-Science Organisation: Scientific Uncertainty, Science Policy and Fact finding in the Growth Hormones Dispute" (1998) 31 *Cornell International Law Journal* 251 at 283-286.

health dispute.¹⁰⁴ The SPS Agreement is not a public health agreement but rather a business-oriented trade agreement intended to reduce regulation and facilitate international trade.¹⁰⁵ On a related note, the application of the SPS Agreement especially Article 5.5 which requires regulatory consistency in levels of health protection being sought, may entail an examination by a panel of national policy making – which is bound to provoke public concern about the loss of the regulatory autonomy of sovereign states.¹⁰⁶

It should also be noted that the SPS Agreement, which was largely an initiative of the US government,¹⁰⁷ favours to a large extent those countries with detailed and well run administrative procedures for the implementation of SPS obligations. This therefore

¹⁰⁴ Steve Charnovitz, op cit note 98 at 274. This is due to the fact that if a country that lost the dispute goes ahead and allows the impugned imports into its territory and disease does spread consequently, the WTO will not bear the loss and the affected citizens will blame their embattled government and in the extreme regard it as anti-the people and callous.

¹⁰⁵ See Bruce Silverglade, op cit note 5 at 6. He further argues that under the SPS Agreement, it is possible for a nation to challenge another nation's food standards only for being too high since there is nothing in the Agreement that permits a nation to challenge another nation's standards for being too low. The pressure for harmonisation is built into the SPS Agreement not to raise health and safety standards but to facilitate trade. Such caustic criticism is hereby noted but we submit that since the SPS Agreement is basically a WTO ancillary Agreement, it indeed should be aimed at furthering one of the key objectives of the WTO – namely to facilitate free trade between member states [See preamble to the Agreement establishing the WTO, 1995]. While the uncritical obsession with facilitating free trade is regrettable, the reality is that no one should expect 'the leopard's offspring to be different from the leopard'. See further on the issue of the SPS Agreement being an agent of lowering food safety standards, facilitating trade and not raising consumer safety standards, Bruce Silverglade, op cit note 5 at 7.

¹⁰⁶ Steve Charnovitz, loc cit note 98. The same writer responds to this concern by opining rather arrogantly that nations do not surrender their sovereignty by joining the WTO. He argues by analogy that if the U.S loses a dispute about American environmental law, all the WTO tribunal can do is to ask the US government to revise the offending law. The WTO cannot overturn a national law [Steve Charnovitz, op cit note 3 at 91]. The implication is that notwithstanding the availability of retaliatory remedies to an aggrieved state, the defending state may choose not to comply with panel and Appellate Body recommendations. For a full account of the possible available remedies, see Bernard O' Connor, "Remedies in the WTO Dispute Settlement System – The Bananas and Hormones Cases" (2004) 38 *Journal of World Trade* 245.

¹⁰⁷ Charnovitz, loc cit note 98.

brings our discussion to an evaluation of the thematic relevance of *EC-Hormones* to the SADC in transition and what lessons it has in store for the region in its metamorphosis. As a starting point, Article 16 of the SADC Protocol on Trade provides that Member States shall base their SPS measures on international standards, guidelines and recommendations so as to harmonise SPS measures for agricultural and livestock production.¹⁰⁸ Further, Members are enjoined, upon request, to enter into consultations with the aim of achieving agreements on recognition of the equivalence of specific SPS measures, in accordance with the WTO Agreement on the Application of Sanitary and Phytosanitary measures.¹⁰⁹

Despite the above express references to the provisions of the SPS Agreement by their subsequent inclusion in the relevant Articles of the SADC Protocol on trade, SADC member states are likely to encounter problems in implementing SPS measures.¹¹⁰ To begin with, the level of scientific knowledge which is necessary for a risk assessment is disparate in member states. Perhaps with the exception of South Africa, the administrative machinery is in the main dysfunctional due to lack of financial and other resources hence toxic food stuffs may be imported into member states because the capacity to sustain a scientific risk assessment is lacking. This explains the fact that little or no progress in SPS implementation by SADC member states.¹¹¹ Despite the fact that the need for technical assistance and the peculiar disadvantaged setting of

¹⁰⁸ Article 16.1 of the SADC Protocol on Trade.

¹⁰⁹ SADC Protocol on Trade, Article 16.2.

¹¹⁰ SPS Agreement Article 10 however does require that WTO Members shall, when preparing and enforcing food safety measures, take into account the special needs of developing countries while Article 9 requires that developing countries be provided with technical assistance to assist them in complying with health and safety standards.

¹¹¹ Dr B.J Mtei “Technical Assistance and Capacity Building Activities in SADC” paper presented at a WTO Workshop on Technical cooperation and SPS Committee meeting 5 November 2002, Geneva, Switzerland, available at http://www.wto.org/english/tratop_e/sps_e/sem_nov02_e/programme_e.htm [18 October 2005] submits that mandates of the international standard setting bodies are poorly understood in the SADC hence there is a need for expert training for specific technologies and procedures for human, animal health hazards. He further argues that SADC member states need to invest in infrastructure to maintain pest and disease free zones and build capacity in other SPS related aspects. While the paper was presented in 2002, very little if any progress with respect to developing a comprehensive SPS regime in the SADC region has been made so far.

developing countries are expressly noted in the SPS Agreement,¹¹² developed countries have not lived up to their obligations in this regard.¹¹³ Developed countries must provide developing countries with technical assistance that will allow them to meet world class standards and benefit their own citizens and compete effectively in international markets.¹¹⁴ Parallel to this, there is a need at the national level to develop new regulations by SADC members, which regulations would go a long way towards protecting human, animal or plant life and health.¹¹⁵ In *EC-Hormones*, the European Communities lost the case not because the SPS measures in question were not based on international standards or the precautionary principle, but simply because the Appellate Body agreed with the panel that the measure was not based on a proper risk assessment. This was in spite of the fact that the EC has enough financial resources to conduct a proper scientific risk assessment. The lesson for the SADC therefore is that it should invest in technology that can be used in surveillance and effective prevention and inspection of actual and potential hazards to human, animal, plant life or health. The lack of scientific certainty about the risks to human and animal health cannot prevent member states from taking precautions even if the risk has not materialised. However, from the manner in which the Appellate Body analysed the precautionary principle in *EC-Hormones*, SADC member states may not successfully rely on the precautionary principle despite their lack of scientific resources to do a proper risk assessment. This is the second lesson for a SADC in transition.

As far as the SPS Agreement is concerned, the SADC as a region has a long way to go towards compliance with the provisions thereof. While beef exports prop up some

¹¹² See Article 10 of the SPS Agreement.

¹¹³ Bruce Silverglade, op cit note 5 at 6.

¹¹⁴ For a further detailed and analytical note on the ramifications of *E-C Hormones* from a developing country perspective, see Prema-Chandra Athukorala and Sisira Jayasuriya, "Food Safety Issues, Trade and WTO Rules: A developing Country Perspective" (2003) 26 *The World Economy* 1395; Yukyun Shin, "An analysis of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and its Implementation in Korea" (1998) 32 *Journal of World Trade* 85; and T.N Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (1998) at 65-80.

¹¹⁵ At the regional level, the Technical Annex to the SADC Protocol on Trade is expected to guide development, harmonisation and enforcement of SPS measures.

SADC member economies,¹¹⁶ it is unlikely, at least in the foreseeable future, that a dispute relating to hormone treated meat originating from the region will arise between SADC member states. This flows from the fact that at the moment, due to scientific incapacity in the region, the main SPS related preoccupation is preventing the spread of pests and diseases that are livestock related across the region. The spread of animal diseases such as foot and mouth, anthrax and swine fever easily come to mind. Despite caustic criticism levelled at *EC-Hormones* as a harbinger to lower health standards and invading individual nations' regulatory autonomy, the case is important to both developing and developed countries. First, it lays down in meticulous detail the jurisprudential rules relating to the interpretation of the SPS Agreement. Second, it makes important pronouncements on the applicability of the precautionary principle and its status in international law vis-à-vis the SPS Agreement. Importing countries can indeed rely on the precautionary principle and take preventive steps in the absence of conclusive scientific evidence of the existence of a risk. This could be a window that developing countries can exploit while in the process of upgrading their institutional and regulatory capacity. This observation is made conscious of the fact that the regulation in question will still have to comply with the prohibition against discrimination and disguised restrictions on international trade. For the foregoing reasons therefore, *EC-Hormones* is a welcome decision and it is hoped that its legal pronouncements will stand the test time. The case is indeed the *locus classicus* in the interpretation of the SPS Agreement.

¹¹⁶ Botswana's economy for example hinges heavily on beef exports to European and other overseas markets. See generally J.S Salkin et al (eds) *Aspects of the Botswana Economy: Selected Papers* (1998) at 119 – 165.

CHAPTER SEVEN

NAFTA is a state-of-the-art trade agreement, encompassing as it does a very broad range of issues from services to intellectual property rights, and agreements on the environment and labour standards.¹

Trade, Environment and Dispute Resolution under the North American Free Trade Agreement²

7. An Overview

The NAFTA is considered the first international trade agreement to incorporate environmental regulations.³ The NAFTA incorporates environmental provisions within its core text and most importantly, through the side agreement establishing the Commission for Environmental Cooperation.⁴ The most important express provisions on dispute settlement are Chapters eleven,⁵ nineteen⁶ and twenty⁷ of the NAFTA.

¹ Jeffrey E. Garten, "The Changing Face of North America in the Global Economy" (1995) 1 *NAFTA: Law and Business Review of the Americas* 5 at 28.

² North American Free Trade Agreement, Drafted 12 August 1992, revisited 6 September 1992, U.S.-Can-Mex., 32 I.L.M. at 605 (entered into force Jan.1, 1994, deals with the institutions which are responsible for implementing the agreement, and avoiding and settling disputes which may arise between the participating nations) [Hereinafter NAFTA]. The full text of NAFTA is available at <http://www.sice.oas.org/trade/nafta/naftatce.asp> (Visited 20 October 2005). Steven Globerman and Michael Walker (eds), *Assessing NAFTA: A Trilateral Analysis* (1993) at 92 point out that the NAFTA is the first international trade Agreement to incorporate environmental regulations.

³ Alan M. Rugman, John Kirton and Julie Soloway "NAFTA, Environmental Regulations and Canadian Competitiveness" (1997) 31 *Journal of World Trade* 129 (.hereinafter Rugman, Kirton and Soloway).

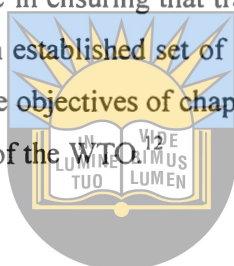
⁴ Ibid.

⁵ Under Chapter 11, investors and their investments are protected from certain types of "measures" taken by governments. The definition of measures is extensive and ranges from simple statutory instruments and regulations to statutes and Acts. The reference to measures applies retrospectively to all federal measures adopted by the parties prior to January 1994 that are not excluded from an Annex of NAFTA. See F.S Nogales, "The NAFTA Environmental Framework, chapter 11 investment provisions and the environment" (2002) *Annual Survey of International Comparative Law* at 2.

⁶ This Chapter deals with the dispute settlement regime applicable to anti-dumping and countervailing measures. For a further scholarly analysis of the provisions of this Chapter, see John Wainio, Linda M. Young and Karl Meilke, "Trade Remedy Actions in NAFTA: Agriculture and Agri-Food Industries" (2003) 26 *The World Economy* 1041 and Alan M. Rugman and Andrew D.M Anderson, "NAFTA and the dispute Settlement Mechanisms: A transaction Costs Approach" (1997) 20 *The World Economy*

The NAFTA dispute settlement regime is an adaptation of, and an improvement to, the WTO dispute settlement system.⁸ Standards-related measures⁹ and sanitary and phytosanitary measures¹⁰ are also relevant although they are not discussed in much detail here. The preamble to the NAFTA opens with an express recognition of the importance of environmental concerns and in it, the Parties resolve that trade liberalization and commercial expansion will be pursued in an environmentally sound manner.¹¹ If disputes arise, the parties undertake to resolve their differences ‘amicably’ through NAFTA’s committees and working groups or other consultations, but if no solution is found then various panels exist to provide arbitration.

Chapter twenty is regarded as a central element of the North American free trade agreement. The chapter is invaluable in ensuring that trade relations between the US, Canada and Mexico are based on an established set of rules as opposed to economic or political power and to this end, the objectives of chapter twenty are similar to those of the dispute settlement provisions of the WTO.¹²



935 and Homer E.Moyer, “Chapter 19 of the NAFTA: Binational Panels as the Courts of Last Resort” (1993) 27 *The International Lawyer* 707.

⁷ Chapter 20 makes provision for a general mechanism of settling disputes that may arise between NAFTA members with respect to interpreting the provisions of NAFTA. According to Rugman, Kirton and Soloway, op cit note 4 at 136, Chapter 20 covers what may be termed State-to-State dispute settlement. The Chapter 20 provisions are akin to those provided for in the WTO for a general dispute settlement regime under Articles XXII and XXIII of GATT 1994. At panel stage, to guard against conflict of interest, NAFTA provides for parties to agree on a roster of panellists by adopting a method called ‘reverse selection’, by which each country selects only panellists from the other [Jeffrey E.Garten, op cit note 1 at 19].

⁸ This is partly due to the fact that the NAFTA provisions on dispute settlement incorporate the WTO dispute settlement provisions and procedures (See article 20 of NAFTA); further, the NAFTA allows for private parties to take part in the dispute settlement process (see NAFTA article 11).

⁹ Chapter 9 of NAFTA.

¹⁰ See Chapter 7 of NAFTA.

¹¹ See in this regard Raymond B. Ludwizewski, “‘Green’ Language in the NAFTA: Reconciling free Trade and environmental Protection” (1993) 27 *The International Lawyer* 691 at 693 (hereafter Ludwizewski).

¹² See in this regard “Section B-Dispute settlement” of NAFTA in article 20. According to Ludwizewski, op cit note 11 at 397, the NAFTA contemplates a three-step dispute resolution process;

With a few exceptions,¹³ and as otherwise provided in the NAFTA, the chapter twenty dispute settlement provisions shall apply to the avoidance and settlement of all disputes between the parties regarding the interpretation or application of the NAFTA or wherever a party considers that an existing or proposed measure of another party is or would be inconsistent with the obligations of the NAFTA or cause nullification or impairment.¹⁴

Disputes regarding any matter arising under both the NAFTA and the WTO, any agreement negotiated thereunder, or any successor agreement, may be settled in either forum at the discretion of the complaining party.¹⁵ Before a party initiates a WTO dispute settlement proceeding against another party on grounds that are substantially equivalent to those available to the party under the NAFTA,¹⁶ the party is enjoined to notify any interested third party/s of its intention. If a third party wishes to have recourse to dispute settlement procedures under NAFTA regarding the matter, it shall promptly inform the notifying party and those parties shall consult with a view to agreement on a single forum. If they cannot agree, then the dispute shall be settled under the NAFTA.¹⁷

University of Fort Hare

If the dispute concerns environmental, health, safety or conservation standards, the defending party may force the matter into the exclusive jurisdiction of the more environmentally friendly NAFTA dispute settlement system.¹⁸ This marks a

the first step being consultations, the second being calling a meeting of the Free Trade Commission with all three parties participating and the last stage being a resort to an arbitral panel.

¹³ A good example of such an exception would be in the settlement of disputes in anti-dumping and countervailing measures, catered for in chapter 19 of the NAFTA.

¹⁴ Article 2004 of NAFTA. The sense and specific context of nullification or impairment is canvassed in detail in annex 2004 of NAFTA, which provides *inter alia* that if any party considers that any benefit it could reasonably have expected to accrue to it under any provision of trade in goods, technical barriers to trade, cross-border trade in services and intellectual property is being nullified or impaired as a result of the application of any measure that is not inconsistent with this agreement, the party may have recourse to dispute settlement under this chapter.

¹⁵ Per article 2005 (1) of the NAFTA.

¹⁶ Article 2005 (2) of the NAFTA.

¹⁷ Ibid.

¹⁸ Ibid. Article 2015.

significant departure from other U.S trade pacts such as the U.S-Canada Free Trade Agreement.¹⁹

In a nutshell, chapter 20 of NAFTA, with provisions that are substantially similar to the WTO ones, covers the following areas or issues which are discussed in the ensuing paragraphs.

The NAFTA dispute settlement emphasizes on the following crucial issues:

- Consultation before recourse to litigation;²⁰
- Cooperation among parties to the dispute;²¹
- Use of the secretariat's good offices, conciliation and mediation;²²
- Arbitral panels;²³
- A roster of panelists;²⁴
- Qualifications of panelists;²⁵

¹⁹ Ludwiszewski op cit note 11 at 698. The U.S-Canada Free Trade Agreement for example, grants the complaining nation as opposed to the defending nation unfettered discretion to select the GATT forum. Guaranteeing the party defending an environmental measure access to the more environmentally sensitive NAFTA dispute resolution provisions ensures that the burden of proof stays on the complaining nation and allows full use of scientific review boards.

²⁰ Article 2006. See also William C. Gruben, "Clean Dynamics, Dirty Dynamics, and the Economics of NAFTA" (1995) 1 *NAFTA: Law and Business Review of the Americas* 103 and Jeffrey P. Bialos and Deborah E. Siegel, "Dispute Resolution under the NAFTA: the Newer and Improved Model (1993) 27 *International Law Journal* 603 and Professor E. Snyman-Van Deventer, "Dispute Resolution in NAFTA and the WTO: A Useful Guide for SADC?" (2003) 28 *Journal for Juridical Science* 112. The aim of the NAFTA is to encourage cooperation in environmental matters between signatories and to commit signatories to effective enforcement of their environmental laws and regulations through appropriate governmental actions such as the appointment and training of health inspectors, monitoring compliance, investigating suspected violations and publicly releasing non-compliance information [Owen J. Saunders, "NAFTA and the North American Agreement on Environment Cooperation: A New Model for International Collaboration on Trade and the Environment" (1994) 5 *Columbian Journal of International Environmental Law and Policy* 273 at 284].

²¹ Article 2003.

²² Article 2007.

²³ Article 2008. This is akin to the request for the establishment of a panel in terms of article 6 of the DSU.

²⁴ Article 2009.

²⁵ Article 2010.

- Panel selection;²⁶
- Rules of procedure;²⁷
- Third party participation;²⁸
- Role of experts;²⁹
- Scientific review boards;³⁰
- Submission of an initial report and final report;³¹
- Implementation of final report;³² and
- Non-implementation-suspension of benefits.³³

The above provisions apply to dispute settlement in general and seem to be wide enough to cover more eventualities than those anticipated by the WTO dispute settlement process.

7.1 The NAFTA, Dispute Settlement and the Environment

It is heartening to point out that the NAFTA does not only anticipate conflict between trade and environmental measures but actually provides a mechanism for resolving trade and environment disputes as they arise in the specific context.³⁴

University of Fort Hare
Together in Excellence

²⁶ Article 2011.

²⁷ Article 2012.

²⁸ Article 2013.

²⁹ Article 2014.

³⁰ Article 2015. These boards are crucial in matters, which raise factual issues concerning the environment, health, safety or other scientific matters raised by a disputant in a proceeding. The board shall be selected by the panel from among highly qualified, independent experts in scientific matters, after consultations with the disputing parties and the scientific bodies set out in the model rules of procedure established pursuant to article 2012 (1). There is no provision for such boards in the WTO dispute settlement mechanism, neither is there a provision for such in the Dispute Settlement Understanding (DSU).

³¹ Articles 2016 and 2017 respectively.

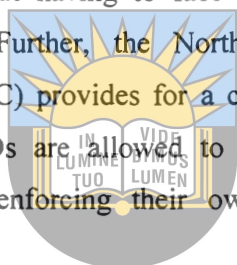
³² Article 2018.

³³ Article 2019.

³⁴ This theme is further explored in chapter eight of this study where the NAFTA provisions on trade and the environment are analyzed and compared with the sketchy SADC provisions on same and possible lessons for a future SADC free trade agreement extracted.

The most important NAFTA provision on trade and environment matters is chapter 11,³⁵ which is designed to protect the interests of foreign investors and to liberalise international investment. Article 1114 was included as an explicit reservation of the sovereign right, already implicit, to adopt laws or policies of general application controlling, regulating or restricting investments so as to preserve or protect the environment.³⁶ This broad right covers everything from environmental impact assessment requirements to pollution control requirements and to generally applicable restrictions on land use or prohibitions on the production of certain chemicals.³⁷

The NAFTA also gives firms and environmentally concerned organizations and individuals the right to initiate and pursue dispute settlement proceedings over trade-related environmental issues without having to face the barrier of first securing government support at home.³⁸ Further, the North American Agreement on environmental Cooperation (NAAEC) provides for a citizen submission process in terms of which citizens and NGOs are allowed to pursue claims that national governments are not adequately enforcing their own environmental laws and regulations.³⁹



University of Fort Hare *Together in Excellence*

³⁵ Chapter 1114, touted as one of NAFTA's 'green provisions', provides in 1114 (1) that "Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure *otherwise consistent with this chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns"[emphasis added].

³⁶ Sanford E.Gaines, "The Masked Ball of NAFTA chapter 11: Foreign investors, Local environmentalists, Governmental officials and Disguised motives" in John J. Kirton and Virginia W. Maclaren (eds) *Linking Trade, Environment and Social Cohesion: NAFTA experiences, Global challenges* (2002) at 106 (hereafter, Gaines).

³⁷ Ibid.

³⁸ John J.Kirton, "Winning together: The NAFTA trade-environment record" in John J. Kirton and Virginia W. Maclaren (eds) *Linking Trade, Environment and Social Cohesion: NAFTA experiences, Global challenges* (2002) at 87 (hereafter, Kirton).

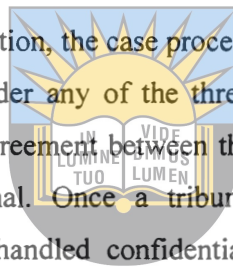
³⁹ The specific provisions are articles 14-15 of NAAEC. The article operates as an instrument available for NGOs concerned with environmental quality and related concerns [Kirton op cit note 38 at 90]. Article 14-15 has thus remained a pure instrument for environmental protection, rather than being mobilized by firms and foreign investors to forward their ultimately commercial concerns. It is also accessible to individuals, who have used it in conjunction with an NGO.

7.2 A Cursory Note on Procedural Aspects

A NAFTA investor who alleges that a host government has breached its investment obligations under chapter 11 may bring its case before an arbitration tribunal.⁴⁰ The results of the process are binding and there are very limited opportunities to appeal or review a decision.⁴¹ Each participant appoints one arbitrator, and the third one is either jointly agreed upon or is appointed by a neutral third party. Chapter 11 provides for what has been characterised as investor –state procedure.⁴²

Arbitration is initiated at the option of an investor in one of the NAFTA parties when an investor alleges that a NAFTA government has breached one of the Chapter 11 substantive rules and the investor has thereby suffered loss or damage.⁴³

Once a claim is submitted for arbitration, the case proceeds under one of three options at the choice of the investor.⁴⁴ Under any of the three possible routes for dispute settlement,⁴⁵ disputants first seek agreement between themselves on the composition of the three-person arbitral tribunal. Once a tribunal has been appointed, the representations of the parties are handled confidentially and deliberations of the



University of Fort Hare

Together in Excellence

⁴⁰ Chapter 11 applies to measures adopted or maintained by a party relating to investors or investments of another party. Article 1110 sets forth the important rule against uncompensated expropriation by prohibiting NAFTA member states from adopting ‘measures tantamount to expropriation’ against foreign firms and importers.

⁴¹ Gaines op cit note 36 at 108.

⁴² The investor-state procedures of NAFTA build on a process first established by the World Bank in 1965 and subsequently incorporated into many bilateral investment treaties of the U.S and Canada. Investor – state procedures are conspicuous by their absence in the WTO dispute settlement mechanism and litigants at that level are nation states rather than individuals or companies. The provision of such a procedure in the NAFTA model is unique and most welcome and comes against a background of private investors and NGOs who have been clamoring for an inclusion of such procedures in the WTO. See T.N Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and Beyond* (1998) 13-19.

⁴³ Gaines, op cit note 36 at 107.

⁴⁴ The options are The World Bank’s international center for the settlement of investment disputes (ICSID), the ICSID’s additional facility and the United Nations Commission on international trade law (UNCITRAL).

⁴⁵ See the foregoing discussion entitled “Dispute Settlement under NAFTA”.

tribunal take place behind closed doors. There is no requirement that the tribunals' findings be made public.⁴⁶

7.3 Examples from Case Law

A juridical analysis of Chapter 11 provisions of the NAFTA indicates that there is likely to be tension between the sovereign authority of national or local governments to set environmental rules and the agreed right of a foreign investor to be secure in its investments against expropriation⁴⁷ or discriminatory or arbitrary treatment. A foreign investor has the right to compensation in the event that a NAFTA member expropriates its property or adopts a measure 'tantamount to expropriation'.⁴⁸

The words 'tantamount to expropriation' have been the subject of debate in cases that alleged that an environmental regulation or policy constituted a measure tantamount to expropriation.⁴⁹ There is no consensus or determinacy in defining what constitutes

⁴⁶ The fact that there is no formal or public process for notification that an investor has filed a notice of intent to submit a claim, or that such a claim has been submitted has been severely criticized by private individuals and NGOs (See further Gaines op cit note 36 at 109). Trade ministers of the NAFTA parties addressed some of the secrecy and transparency issues in the free trade commission of 2001. The ministers agreed that all documents submitted to or issued by a tribunal should be made public, subject only to confidentiality limits or 'the relevant arbitral rules as applied'. They also added that national governments might share all information about an arbitral proceeding, including confidential information, with state or provincial officials.

⁴⁷ The envisaged forms of expropriation that have come under consideration as subjects of disputes are direct expropriation, which occurs when a host state takes property owned by a foreign investor located in the host state, ostensibly for a public purpose and indirect expropriation, which refers to actions, omissions or measures attributable to a government that are the functional equivalent of an expropriation. See specifically Jullie Soloway, "Environmental expropriation under NAFTA Chapter 11: The Phantom menace" in John J. Kirton and Virginia W. Maclaren (eds) *Linking Trade, Environment and Social Cohesion: NAFTA experiences, Global challenges* (2002) at 131 –142 (hereafter Soloway).

⁴⁸ Ibid at 132. NGOs are however concerned that the NAFTA provisions on expropriation are undesirable as they erode national sovereignty by limiting the capacity of governments to regulate in sensitive areas such as environmental conservation.

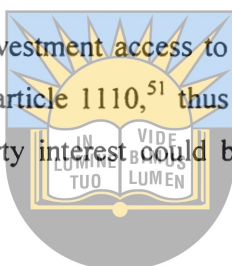
⁴⁹The cases are *Pope and Talbot v Canada* (<http://www.state.gov/documents/organisation/407.pdf>) *S.D Myers Inc v Canada, Partial award 13 November 2000*, *Ethyl Corporation v Canada* (Statement of claim at < <http://www.dfait-maecti.gc.ca/tna-nac/documents.ethyl13.pdf>>) and *Metalclad v United Mexican States*, 2000, (Available at <www.peacelaw.com/metalclad.html>).

a measure tantamount to expropriation. However, environment-related claims in which the investors have received or been awarded compensation provide some evidence as to how trade and environment tensions have been resolved under NAFTA Chapter 11.

7.3.1 *Pope and Talbot v Canada*

In this case, Pope and Talbot, an American firm with some business presence in Canada, argued that certain export restrictions by Canada resulted in a measure tantamount to expropriation since they had ‘deprived the investor of its ordinary ability to alienate its product to its traditional and natural market’.⁵⁰ Canada on its part contested the right to export lumber as a property right.

First, the tribunal ruled that ‘the investment access to the US market is a property interest subject to protection under article 1110,⁵¹ thus implying that a measure that affected the value of such a property interest could be subject to challenge under article 1110.



Second, the tribunal affirmed that for a measure to be considered expropriatory, it need not be discriminatory. In other words, the Tribunal contemplated that, in certain circumstances, government measures could be applied in a non-discriminatory manner, yet still be tantamount to expropriation. To find otherwise, the tribunal opined, would leave a ‘gaping loophole’ in international protection against expropriation.⁵²

Third, the tribunal gave a wide meaning to what measure could amount to expropriation. While stating that there was no expropriation in this case in terms of the ‘ordinary meaning’ of the term, it also stated that a taking could include interference with the carrying on of business. The tribunal was of the opinion that while the interference in the case had, according to the investor, resulted in reduced profits for the investment, it continued to export substantial quantities of softwood

⁵⁰ *Pope and Talbot v Canada*, statement of claim, paragraph 93.

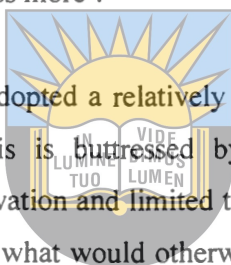
⁵¹ *Pope and Talbot v Canada*, final merits award, para 96.

⁵² *Pope and Talbot v Canada*, interim award, paras 81 – 86.

lumber to the U.S and to earn substantial profits on those sales. The tribunal added that while it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, *the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner* and that a finding of expropriation would require a ‘substantial deprivation’(emphasis added).⁵³

Fourth and finally, the tribunal narrowed the scope of the expropriation provisions by rejecting the investor’s claim that the use of the term ‘tantamount to expropriation’ means something more than an outright taking or creeping expropriation. The tribunal stated that ‘tantamount means nothing more than equivalent’ and that ‘something equivalent cannot logically encompass more’.⁵⁴

In this case therefore, the tribunal adopted a relatively conservative approach to the interpretation of expropriation. This is buttressed by the fact that the tribunal articulated a test of substantial deprivation and limited the meaning of ‘tantamount to expropriation’ to nothing more than what would otherwise be a direct expropriation. This is consistent with international jurisprudence on the subject of expropriation of alien property.⁵⁵ In the premises therefore, the tribunal found that expropriation had not taken place.



University of Fort Hare
Faculty of Education

⁵³ *Pope and Talbot v Canada*, final merits awards paras 101 –102.

⁵⁴ *Pope and Talbot v Canada*, interim award, para 104.

⁵⁵ For an exhaustive discussion of the international jurisprudence on the subject of the expropriation of alien property see, John Duggard, *Public international Law a South African perspective* (2002) at 225-233; Ian Brownlie , *Principles of Public International law* (1998) at 531-545; and A. Mouri , *The International Law of Expropriation as Reflected in the work of the Iran-U.S Claims Tribunal* (1994) at 236-374; Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (1991) at 430-445; Rebecca M.M Wallace, *International Law: A Student Introduction* (1986) at 164-174; Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (1996) at 235-240; and I.A Shearer, *Starke’s International Law* (1994) at 269-275.

7.3.2 *S.D Myers Inc v Canada*

S.D Myers Inc, a U.S company with branches in countries other than the U.S,⁵⁶ is an electrical equipment repair and maintenance company that developed, as an outgrowth of its core business, a separate business of remediation of PCB contamination through the destruction of PCBs.⁵⁷ Eastern Canada, with a considerable amount of PCB-contaminated equipment but no local disposal capacity, was another attractive opportunity for the company but such a move was thwarted by the fact that even though the terms of the bilateral agreement between the U.S and Canada allowed for cross-border movement of hazardous waste for environmentally sound disposal, regulations pursuant to the U.S Toxic substances control Act⁵⁸ virtually banned the importation of PCBs into the U.S. To overcome the above obstacle, S.D Myers Inc incorporated a branch in Canada in 1993 and began to lobby both U.S and Canadian environmental officials for a relaxation of the ban on PCBs from Canada to the U.S. This effort was supported by many East Canadian firms, which believed that the disposal of their PCBs by S.D Myers in the U.S would be cheaper than working with the only available Canadian service provider, Chem-Security in Swan Hills, Alberta.

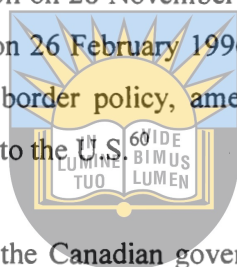
In the U.S, the environmental regulation authorities began considering S.D Myers request for a relaxation of the trading ban in early 1995. Canadian environmental officials and firms followed the developments with a keen interest. In July 1995, before the U.S environmental authorities had favourably considered the said request

⁵⁶ By the 1980s, S.D Myers Inc had branches in South Africa, Mexico and Australia and was looking to expand its business empire further afield.

⁵⁷ PCBs (Polychlorinated Biphenyls) are mixtures of synthetic organic chemicals with the same basic chemical structure and similar physical properties ranging from oily liquids to waxy solids. Due to their non-flammability, chemical stability, high boiling point and electrical insulating properties, PCBs were used in hundreds of industrial and commercial applications including electrical, heat transfer, and hydraulic equipment. More than 1.5 billion pounds of PCBs were manufactured in the United States prior to cessation of production in 1977. Concern over the toxicity and persistence in the environment of PCBs led Congress in 1976 to enact §6(e) of the *Toxic Substances Control Act* (TSCA) that included among other things, prohibitions on the manufacture, processing, and distribution in commerce of PCBs. [Source The U.S Environmental Protection Agency (EPA) at <http://www.epa.gov/opptintr/pcb/>, [25 Oct 2005]

⁵⁸ Toxic Substances Control Act 15 U.S.C S/S 2601 et seq. (1976).

of S.D Myers, the Canadian minister for the environment stated that government policy on PCB disposal was that, 'the handling of PCBs should be done in Canada by Canadians'. On 26 October 1995, U.S environmental authorities issued S.D.Myers a written notice of 'enforcement discretion' under which imports of PCBs from Canada into the U.S for disposal (by destruction) would be allowed between 15 November 1995 and 31 December 1997. Subsequent to the issue of the notice, Chem-security wrote to the Canadian minister for the environment urging a quick Canadian response to the U.S opening of the border to trade in PCBs. On 16 November 1995, a day after the border was 'opened', the minister signed an interim order that had the effect of closing the border from the Canadian side by amending Canada's PCB waste export regulations to prohibit the export of Canadian PCBs.⁵⁹ The interim order was confirmed by Canada's Privy Council on 28 November 1995, and made into an order in council of the governor general on 26 February 1996. One year later, in February 1997, Canada reversed the closed border policy, amending the PCB waste export regulations to allow PCB shipments to the U.S.



In this case, the temporary ban by the Canadian government on the export of PCB waste to the U.S was found to be primarily protective to the Canadian PCB disposal industry from U.S competition, environmentally unjustifiable but not 'tantamount to expropriation'. The Tribunal however recognized that compensating for a regulatory taking is the exception and not the rule.⁶¹

⁵⁹ The Canadian environment minister claimed that the ban was based on environmental policy, in particular the *Basel Convention on the control of transboundary movements of hazardous wastes and their disposal* (1999). That convention has two relevant provisions. Article 4 (2) (b) calls on parties to 'ensure the availability of adequate disposal facilities to the extent possible', within their own boundaries. Article 4 (2) (d) commits governments to 'ensure that the transboundary movement of hazardous and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes'. Notwithstanding the Basel convention, Canada had consistently allowed PCB exports to the U.S in terms of the two countries' bilateral agreement on the transboundary movement of hazardous waste.

⁶⁰ This window of commercial opportunity for S. D Myers was closed for a good five months later by a U.S court decision that the 1995 'enforcement discretion' from the U.S environmental authorities was contrary to the Toxic Substances Control Act.

⁶¹ The tribunal noted that the general body of precedent usually does not treat regulatory action as

The tribunal acknowledged that an expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights.⁶² However in this case, the tribunal noted that the closure of the border resulting from the regulation, during which the complainant said it lost its competitive advantage, was only temporary and thus would not be an expropriation.⁶³ The tribunal concurred with the decision in *Pope and Talbot* that the term ‘tantamount to expropriation’ in article 1110 merely meant equivalent to expropriation and the use of the word ‘tantamount’ was meant only to include the concept of creeping expropriation.⁶⁴ Thus the tribunal effectively ruled that for there to be a regulatory expropriation, it must result in a substantive deprivation, thus seeming to shut the door on the allegation that NAFTA provides a cause of action for something less, in substantive terms, than a direct expropriation.

7.3.3 *Metalclad v United Mexican States*

In this case, the refusal of local government authorities to issue a permit for the operation of a hazardous waste facility that had already been constructed was the subject of the dispute. The Mexican federal environmental agency repeatedly and consistently approved of Metalclad’s project. The state and local political officials, who, with equal persistence, disagreed with and tried to counteract the federal environmental determinations, did so without directly contradicting the federal permitting decisions. The state governor’s declaration of an ecological zone to protect some rare species of cactus in a large region bore only a tangential relationship to environmental hazards resulting from hazardous land filling.

amounting to expropriation. Regulatory conduct by public authorities is unlikely to be subject to legitimate complaints under article 1110 of the NAFTA, although the tribunal did not rule out that possibility [*S.D. Myers v Canada*, final award on merits, para 69].

⁶² The tribunal however noted that in some circumstances even a temporary removal of such rights might qualify as an expropriation.

⁶³ Such a ruling appears to leave the door wide open to a future finding of an expropriation for a measure that is only temporary.

⁶⁴ *S.D. Myers v Canada*, final award on merits, paras 285 –286. However, the tribunal then added that the term ‘tantamount’ meant that the tribunal should look at the substance of what has occurred and not just form. In other words, a tribunal ‘must look at the real interests involved and the purpose and effect of the government measure’ [*S.D. Myers v Canada*, final award on merits, para 285].

The tribunal in *Metalclad* found that the making of the municipal decision denying the local construction permit – in a hastily convened meeting without notice to the applicant or opportunity to appear – was deficient in terms of international law notions of due process implicit in fair and equitable treatment. The tribunal therefore found that expropriation had taken place.⁶⁵

The tribunal adopted a relatively expansive interpretation of expropriation.⁶⁶ It held that the inequitable treatment of *Metalclad* by local Mexican authorities, with the tolerance of the federal government, as well as the disregard of representations made and the lack of basis in refusing a permit that would bar the use of the landfill permanently, amounted to an indirect expropriation.⁶⁷

In contrast to *S.D. Myers*, the tribunal ruled that the government need not acquire a benefit for an expropriation to occur. Moreover, the tribunal ruled that the fact that a government did not intend to effect an expropriation was not relevant to the determination of whether an expropriation took place.⁶⁸

At the same time however, the tribunal narrowed the substantive scope of an indirect expropriation, by viewing as functionally equivalent the concepts of ‘indirect expropriation’ and acts or measures ‘tantamount to expropriation.’ This finding should help put to rest claims that NAFTA chapter 11 somehow expands the customary international law definition of expropriation.⁶⁹

⁶⁵ *Metalclad v United Mexican States*, para 103.

⁶⁶ It stated that expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host state, but also incidental interference with the use of the property which has the effects of depriving the owner, in whole or in significant part, of the use or reasonably- to- be- expected economic benefit of property even if not necessarily to the obvious benefit of the host state (*Metalclad v United Mexican States*, para 109).

⁶⁷ Nevertheless, footnote 66 above shows the tribunal adopting a more expansive approach to expropriation, which could see a future tribunal finding an expropriation even where an incidental interference occurred that deprived the owner of a ‘reasonably-to-be-expected’ benefit.

⁶⁸ Soloway op cit note 47 at 141.

⁶⁹ T.J Weiler ‘Metalclad v Mexico: A play in three parts’, (2001) 2 *Journal of World Investment* 60 cited by Soloway op cit note 47 at 141.

The cases discussed above are important in as far as they show how disputes under NAFTA article eleven have been handled thus far. They are also central in that they show that environmental standards and regulations may be used to protect local industries from international competition thus violating the fundamental principles of national treatment and the most favoured nation treatment. The NAFTA tribunals so far have handled the disputes quite well despite some controversies associated with the interpretation of expropriatory provisions. It is submitted that Chapter 11 provisions are likely to be influential in the determination of a future trade-environment model for the SADC.⁷⁰ This is of course cognizant of the fact that a wholesale adoption of the Chapter 11 provisions by the SADC is discouraged because of the controversy associated with the erosion of territorial sovereignty as shown by the application of Chapter 11 in practice. These and other concerns are dealt with in the next and subsequent sections.



There are several issues of grave concern raised by this case.⁷¹ Firstly, the tribunal held that by tolerating the actions of the municipality and by tolerating the actions of state and federal officials who failed to sufficiently clarify the situation for Metalclad, Mexico failed in its duty to provide a transparent, clear and predictable framework for foreign investors. The implication here is an onerous duty placed on the Mexican government to take the company (Metalclad) through the complexities of Mexican municipal, state and federal law. Further, the implication of the decision is that the Mexican government was required to ensure that the officials at the various levels of federal, state and local government never gave contradictory advice.⁷² On a related note, the decision in *Metalclad* does to some extent undermine local control because the definition of expropriation given by the tribunal was sufficiently broad to include legitimate re-zoning by a municipality or other zoning authority. Permit requirements and environmental land use controls at the local level are the preserve of local

⁷⁰ The proposed SADC trade and environment model is briefly discussed with its ramifications in chapter eight below.

⁷¹ See generally International Institute for Sustainable Development (IISD), "A Backgrounder on the Controversial Case under NAFTA's Chapter 11, and on IISD's Involvement" at http://www.iisd.org/investment/methanex_background.asp (visited 27 October 2005).

⁷² IISD, *op cit* note 67.

governments which should not have their judgments second-guessed by NAFTA tribunals.

The case also has some major implications for the status of domestic law vis-à-vis the NAFTA tribunal determinations. The panel felt competent to decide complicated issues of Mexican domestic law – whether a municipal permit was required.⁷³ In addition to ruling that the municipality’s actions amounted to expropriation, the panel went further and found that the municipality acted outside its authority in denying Metalclad the construction permit based on environmental concerns.⁷⁴

While the NAFTA tribunal purported to resort to preamble provisions to support its reasoning in the case, it is noteworthy that it completely ignored other language in the preamble supporting sustainable development and environmental protection.⁷⁵ Further disregard for environmental considerations is evidenced by the fact that despite a finding by the panel that the Ecological Decree constituted further grounds for a finding of expropriation, the panel decided that it need not consider the motivation or intent for the adoption of the Decree.⁷⁶



The panel may be commended for its expansive and broad definition of ‘takings’. The tribunal defined expropriation as not only “open, deliberate and acknowledged takings” of property such as outright seizure, but also “covert or incidental interference” with the use of property.⁷⁷

⁷³ IISD, *Ibid.*

⁷⁴ *Ibid.* By so ruling, the panel pronounced on the substance of Mexican domestic law declaring that the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government.

⁷⁵ IISD, *op cit* note 67. The panel also ignored Article 1114 of Chapter 11, which purports to protect NAFTA nations from a race-to-the-bottom in environmental standards.

⁷⁶ *Ibid.* The motivation for the adoption of the Decree was obviously environmental hence the panel should have emphasized such motivation supported by the preamble and pertinent provisions of Chapter 11 of NAFTA.

⁷⁷ *Ibid.* It is submitted that this definition of takings clearly is much broader than what is allowed by U.S Courts and could have a crippling effect on the ability of NAFTA nations to carry out traditional governmental regulatory functions.

From all the cases discussed above, two major lessons emerge. Firstly, the cases illustrate that governments are at peril if they adopt measures having the effect of expropriating foreign-owned assets, directly or indirectly. Secondly, the disputes show that using trade instruments to achieve public policy goals must be meticulously thought out and supported with impeccable scientific backstopping. Even then, there must be no hint of discrimination in the proposed measure.

7.4 Documented Positive Aspects of NAFTA

The NAFTA is expected to generate considerable investment throughout North America by removing many existing investment barriers.⁷⁸ On the environmental front, the agreement contains a special section that deals with the relationship between investment and environmental requirements.⁷⁹ Second, the NAFTA text expressly refers to an agreement that will not encourage investment by relaxing domestic health, safety or environmental standards.⁸⁰ Consistent with this understanding on encouraging investment that is sensitive to environmental concerns, the NAFTA parties further undertake not to entice investment by waiving or otherwise derogating existing environmental laws and standards.⁸¹

University of Fort Hare

Although a violation of Article 1114 does not trigger formal dispute resolution procedures under the NAFTA, the inclusion of environmentally sensitive language in the investment Chapter of a trade agreement is unprecedented.⁸² This puts the NAFTA environmentally ahead of other trade agreements including the WTO.⁸³

⁷⁸ Ludwiszewski, op cit note 11 at 699.

⁷⁹ NAFTA Chapter 11. Generally in that article, NAFTA takes several steps to encourage environmentally sensitive investment and discourage the relaxation of environmental standards as a means of attracting investment.

⁸⁰ Article 1114(2) of the NAFTA.

⁸¹ Article 1114(2) of the NAFTA. As a means of enforcing this commitment against the creation of 'pollution havens', the NAFTA partners pledge to consult if any party feels a prohibited environmental subsidy has been granted or offered.

⁸² Ludwiszewski, op cit note 11 at 700.

⁸³ For a contrary view, see Pierre Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects" (1993) 27 *Journal of World Trade* 5 at 7 arguing that the GATT dispute settlement mechanism is still superior because of the following aspects which are not part and parcel of the NAFTA: Automatic adoption of panel reports, composition of the panels and presence of the

Another positive aspect of the NAFTA, often touted by writers and commentators as novel and an eye opener for other regional trade groupings is a provision for ‘forum shopping’.⁸⁴ A right is recognized in the NAFTA for the parties to the Agreement to resort, at the choice of the complaining party, to one or other dispute settlement mechanism when the dispute involves issues covered by both the WTO and NAFTA.⁸⁵ This is good for the politically weaker party as it enables it to benefit from the superiority of the multilateral dispute settlement mechanism.⁸⁶

On a related note, the investor-to-state provisions of the NAFTA dispute resolution mechanism diverges from dispute resolution systems in previous economic agreements in two ways: First, previous agreements allow only national governments to bring suits;⁸⁷ second, these agreements do not allow for monetary compensation.⁸⁸ The provision for monetary compensation in the NAFTA text is again novel and should be welcomed as a possible deterrent to the flouting of environmental norms by nation states. The SADC may pluck a leaf from such a provision and incorporate it in its emerging dispute settlement regime.



University of Fort Hare
Together in Excellence

Dispute settlement Body (DSB) which makes it advantageous to weak states which cannot be victims of political interference by stronger states, the appeal procedure enforces the rule of law and reduces the interference of the political factor in the dispute settlement process and finally the provisions for retaliatory action constitute a more credible threat of sanction.

⁸⁴ See specifically in this regard Vilaysoun Loungnarath and Celine Stehly, “The General Dispute Settlement Mechanism in the North American Free Trade Agreement and the World Trade Organisation System: Is North America Regionalism Really Preferable to Multilateralism?” (2000) 34 *Journal of World Trade* 39 at 40.

⁸⁵ See Article 2005 of the NAFTA.

⁸⁶ Vilaysoun Loungnarath and Celine Stehly, loc cit note 85.

⁸⁷ This is the current situation obtaining in the WTO; the same sentiment applies to the SADC in transition.

⁸⁸ In the WTO, the complaining country that gets a ruling in its favour may depending on some circumstances be authorised by the Dispute Settlement Body (DSB) to suspend concessions that it hitherto extended to the defending country or take retaliatory measures against the defendant state; in the extreme, sanctions may be imposed against the offending WTO member by the complaining state.

The GATT *Tuna-Dolphin*⁸⁹ dispute involved the U.S and Mexico, both of which are now members of the NAFTA. Had the dispute been brought in terms of the NAFTA dispute settlement procedures, the result was likely to have been different from what the GATT panel found. The GATT panel decision in the matter essentially determined that unilateral trade sanctions against foreign goods produced by environmentally harmful practices were ‘GATT illegal’⁹⁰. Despite the fact that the panel report was not adopted, should a similar dispute arise in the context of NAFTA, environmentalists are likely to seek to ensure that the matter be settled on the basis that NAFTA members are allowed to act unilaterally to adopt quotas, tariffs, trade sanctions or other punitive measures to advance environmental goals. This would be trite as long as such punitive measures do not become measures ‘tantamount to expropriation’ as explained in the NAFTA case law discussed above.

From a perusal of the NAFTA text, one is inclined to conclude that the many groundbreaking ‘green’ provisions thereof are likely to serve as a model for the intelligent integration of environmental and commercial concerns in the next century.⁹¹ The SADC in transition should therefore tap from such novel NAFTA provisions and incorporate some in its protocol on trade. This is motivated by the fact that SADC member states are at disparate levels of economic and other development hence there is need to set the minimum standard for the allowable derogation from environmental obligations in the context of intraregional trade. This would of course be done taking into account each individual state’s sovereign right to legislate in the environmental and general interest of its citizens. If the NAFTA provisions are used as a tool for intelligent integration of environmental and commercial concerns into the next century, and if indeed such integration does occur, the NAFTA may mark not only a significant step forward in international commerce, but also remarkable progress in the innovative integration and reconciliation of conflicting environmental and trade interests.⁹²

⁸⁹ See Chapter Four above. The dispute was initiated in 1991, almost four years before the advent of the NAFTA.

⁹⁰ See Ralf Buckley, “Trade and Environment: Will NAFTA Improve on GATT?” (1992) 22 *Environmental Policy and Law* 327.

⁹¹ Ludwiszewski, op cit note 11 at 706.

⁹² Ibid.

7.5 General Criticism of the NAFTA Dispute Settlement Regime

Despite some noteworthy positive aspects of the NAFTA as pointed out above, there has been criticism against the environmental provisions of the agreement especially the way in which disputes pertaining to investor-to-state procedures have been handled. The most vocal critics have been environmental NGOs such as Friends of the Earth and academic institutions and research groups such as the International Institute for Sustainable Development (IISD).

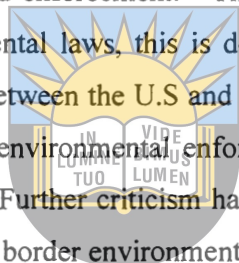
Many of the concerns over NAFTA have been directed at the provisions of Chapter eleven. It has been argued that the corporate investment rights and protections it provides are unprecedented in scope and power and that Transnational Corporations can use these to challenge public regulation in all three NAFTA countries and overturn measures designed to protect human welfare and the natural environment.⁹³ The tribunals that rule on these issues bypass national governments in confidential deliberations that take place with only limited public access to written documents produced for each case, and no public access to the actual proceedings unless all participants agree to open them up.⁹⁴

University of Fort Hare

⁹³ For example in the *Ethyl Corporation* case in July 1998, Ottawa withdrew its ban on the gasoline additive MMT and paid \$13 million in damages to the U.S-based Ethyl Corporation, which had brought a NAFTA chapter 11 challenge against the prohibition.

⁹⁴ There is a glimmer of hope in this regard however if one considers developments in the *Methanex v The United States of America* dispute available at http://www.iisd.org/investment/methanex_background.asp [29 October 2005]. In this dispute, Methanex, a major producer of methanol, a key component in MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline, launched an international arbitration against the United States in response to the March 1999 order by the State of California to ban the use of MTBE by the end of 2002. The State of California argued that the banning of MTBE was necessary because the additive was contaminating drinking water supplies, and was therefore posing a significant risk to human health and safety, and the environment. In its original submission, Methanex argued that the ineffective regulation and non-enforcement of domestic environmental laws, including the U.S Clean water Act (Clean Water Act, 33 U.S.C. 1251 et seq.) was responsible for the presence of MTBE in California water supplies. Methanex therefore argued that the planned ban was tantamount to an expropriation of the company's investment; a violation of NAFTA's Article 1110, and was enacted in breach of the national treatment (Article 1102) and minimal international standards of treatment (Article 1105) provisions. Methanex therefore sought financial compensation from the U.S in the amount of over \$ 900 million. On January 30 2004,

Raymond B. Ludwiszewski has argued that the NAFTA provisions are indeed ‘green’ but are not ‘green’ enough.⁹⁵ His argument is based on two salient points. First, according to him, despite the many ‘green’ provisions, the NAFTA response to the environmental risks posed by liberalized U.S trade with Canada and Mexico has been inadequate. The first aspect of the criticism is based on the failure to ensure strong environmental enforcement in Mexico. In early 1991, the U.S Environmental Protection Agency’s expert legal analysis concluded that Mexico’s environmental laws, regulations and standards were in many respects similar to those in the U.S and could readily provide ‘an effective framework for meaningful environmental protection programs in Mexico’.⁹⁶ However, the report also acknowledged on the contrary that U.S and Mexico government practices differ most significantly in the areas of compliance, monitoring and enforcement.⁹⁷ The NAFTA text does not deal with the enforcement of environmental laws, this is dealt with instead through the instrumentality of bilateral efforts between the U.S and Mexico. Critics think that the NAFTA should directly deal with environmental enforcement issues and not leave them to the politics of bilateralism. Further criticism has been leveled at the fact that there is inadequate protection of the border environment between the U.S and Mexico due to lax Mexican environmental laws. Firms established on the Mexican side of the border pay scant regard to environmental issues and human settlements that have been



University of Port Harcourt
Together in Excellence

international investment law history was made when the Methanex tribunal issued a press release allowing NGOs and other interested parties to make submissions. The International Institute for Sustainable Development and Earth Justice were notable *amici* to submit *amicus curiae* briefs to the tribunal. By June 2004, the hearings were held openly and on the 9th of August 2005, the tribunal released the final award, dismissing all the claims. The tribunal ordered Methanex to bear the U.S legal costs and arbitral expenses in the amount of approximately \$ 4 million. This was indeed a victory for public participation in NAFTA investment dispute resolution which basically lays to pasture the criticism on the secrecy of the NAFTA tribunal deliberations. For a further note on the criticism of NAFTA proceedings as non-transparent, see Defence of Canadian Liberty Committee, “MMT and Ethyl case-Trade Lawyer expresses concern” at <http://www.canadianliberty.bc.ca/relatedinfo/ethylconcern.html> [29 October 2005], SUNS-South-North Development Monitor (hereafter SUNS), “Ethyl v Canada or Investor v State” at <http://www.sunsonline.org/trade/areas/enviro/nm/06030297.htm> [29 October 2005], Gaines op cit note 37 at 107 and Ludwiszewski op cit note 11 at 705.

⁹⁵ Ludwiszewski op cit note 11 at 700-704.

⁹⁶ Ludwiszewski op cit note 11 at 701.

⁹⁷ Ibid.

built adjacent to the border in response to industrialization spurred by the conclusion of NAFTA are an environmental eye sore. Environmentalists correctly point out that the NAFTA text as such does not contain provisions designed to remedy the environmental ills of the border region.⁹⁸

To obtain a standing for Chapter 11 dispute settlement, the aggrieved company must have an investment⁹⁹ affected by an environmental standard in the country whose regulations it seeks to challenge.¹⁰⁰ This shows deference towards investors in the form of companies and not individuals who are private citizens. The legal costs associated with NAFTA challenges to governmental acts that infringe upon environmental rights are exorbitant and this is likely to discourage private citizens from challenging governmental acts in their individual capacities.

Chapter 20 of the NAFTA has also not been spared from caustic criticism. Most critics argue that with the advent of the implementation of the WTO system, Chapter 20 has lost its technical superiority.¹⁰¹ This is due to the fact that Chapter 20 provisions are more diplomatic rather than legal hence they bring good results for the politically strong litigants, usually the U.S and Canada.¹⁰² Despite the fact that NAFTA Chapter 20 and WTO mechanisms share some important procedural similarities, their differences are well documented.¹⁰³

⁹⁸ Ludwiszewski op cit note 11 at 703.

⁹⁹ The term 'investment' has been widely defined in case law to include market share in a sector and access to markets in the host state whether or not the investor has a corporate presence [*S.D Myers Inc v Canada*, July 22 1988].

¹⁰⁰ See Rugman, Kirton and Soloway op cit note 4 at 137.

¹⁰¹ Vilaysoun Loungnarath and Celine Stehly op cit note 85 at 39.

¹⁰² Ibid at 40.

¹⁰³ for a comprehensive note on the highlights of the procedural similarities and differences between NAFTA Chapter 20 provisions and the WTO regimes, see Gabrielle Marceau, "NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison" (1997) 31 *Journal of World Trade* 2 at 25. The WTO and NAFTA provisions cover similar areas of substantive law such as the most favoured nation principle and alternative recourse to the dispute settlement mechanism such as consultation, arbitration appeal to good offices etc.

To sum up the criticisms against the NAFTA dispute settlement provisions from an environmental standpoint, the submissions by Alan M. Rugman, John Kirton and Julie Soloway¹⁰⁴ and the International Institute for Sustainable Development¹⁰⁵ are informative.

From the Chapter 11 cases discussed above, it emerges that foreign investors are granted greater rights than domestic corporations or citizens. Also the rules enable foreign investors to be compensated in U.S money¹⁰⁶ because the investor-to-state tribunals provide a way for foreign litigants to seek government compensation for damages ordered by U.S Courts.¹⁰⁷

Another aspect of the NAFTA dispute settlement system that has often been criticized is the fact that despite the disputes being public (in the sense that they deal with matters of great public significance), the tribunal proceedings are private. This is motivated by the fact that the NAFTA relies upon two already existing dispute settlement systems – one operating under the auspices of the World Bank and the other operating under the auspices of the United Nations (UN).¹⁰⁸ These bodies initially dealt with private law matters between parties in contractual disputes that could be deliberated upon in secret; under the NAFTA where deliberations deal with matters of great public interest and significance, the veil of secrecy should be lifted.¹⁰⁹ Further and on a related note, critics note quite correctly that NAFTA challenges chill public interest policies.¹¹⁰ In the Ethyl Corporation case, Ethyl brought a NAFTA

¹⁰⁴ Op cit note 4 at 130-131.

¹⁰⁵ IISD op cit note 95.

¹⁰⁶ IISD, *ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ See Defence of Canadian Liberty Committee op cit note 95 and SUNS op cit note 95.

¹⁰⁹ On the question of secrecy and how this has been jettisoned in favour of transparent dispute settlement, see our discussion of the *Methanex* case above at note 95.

¹¹⁰ For example in the *Ethyl Corporation v Canada* case, Ethyl company claimed that the Canadian ban on MMT violated various provisions of NAFTA and sought restitution of \$251 million to cover losses resulting from the ‘expropriation’ of both its MMT production plant and its ‘good reputation’. In such instances, damage claims can be very high and in addition, multiple investors can consolidate their suits, thereby multiplying a government’s potential liability. With specific reference to the exorbitant suits brought under NAFTA, some commentators have characterised the NAFTA dispute settlement

challenge against a ban that was still the subject matter of debate in the Canadian parliament.¹¹¹ This is regarded as a serious challenge to the countries' ability to legislate in the public interest without undue influence from affected parties and sympathetic NGOs.¹¹²

It has also been argued that the NAFTA Chapter 11 dispute settlement mechanism is an affront to the principle of sovereign immunity.¹¹³ This attack on the principle of sovereign immunity has grave implications such as the unfortunate result that foreign corporations from outside the U.S for example will be granted rights and privileges which are not allowed to domestic Corporations in the US.¹¹⁴ Allied to the above criticism is the fact that state and local governments are not safe from NAFTA tribunals' reach.¹¹⁵

Conclusion

From our discussion of the NAFTA and the critique thereof in the preceding paragraphs, the following issues emerge. Firstly, the institutional fabric of NAFTA and the Commission for environmental Cooperation (CEC) in particular is of great interest to researchers since it provides an on-going platform to examine propositions from the newly emerging field of trade and the environment.¹¹⁶ The NAFTA is the

mechanism as a fishing expedition for government compensation by foreign corporations which seek government compensation in the instant without any tangible evidence of investment.

¹¹¹ The NAFTA rules require Corporations to wait for six months after the events which give rise to the claim before requiring an attempt to resolve the situation through negotiations before pursuing a NAFTA case.

¹¹² On a contrary note, far from worrying about the implications of such actions, U.S trade official have argued that the ability of investors to use legal threats to influence legislative debate is a healthy innovation that will prevent governments from passing laws that violate international agreements (SUNS op cit note 95 at 3).

¹¹³ According to the principle of sovereign immunity, governments cannot be sued unless the lawsuit is expressly allowed by the law.

¹¹⁴ SUNS loc cit note 95.

¹¹⁵ Ibid. Federal laws such as the U.S 'Buy America' procurement law and a variety of measures taken by state, provincial and municipal governments have been challenged under NAFTA chapter 11.

¹¹⁶ Alan Rugman, John Kirton and Julie Soloway op cit note 4 at 129. This is notwithstanding the criticism levelled at the CEC and other institutions of the NAFTA as severely compromised by political considerations. See a note on the weaknesses of some NAFTA institutions above at 169-173.

only regional agreement which specifically acknowledges that disputes of an environmental nature may arise between member states. Chapter 11 provides for a framework for the settlement of disputes between states and investors belonging to another state. Should the criticisms laid against the application of Chapter 11 provisions as discussed above be addressed, the NAFTA is likely to be the torch bearer in trade and environment dispute resolution in the context of a free trade area.

The permanent impact of the NAFTA on international trade law and policy appears beyond question.¹¹⁷ Encouraged and emboldened by the limited success of the NAFTA in protecting environmental interests so far, ecological activists and environmentalists in other regional groupings in transition, such as the SADC, may press their governments to include similar provisions.¹¹⁸ The many ground breaking “green” provisions of the NAFTA are likely “to serve as a model for the intelligent integration of environmental and commercial concerns into the next century”.¹¹⁹ If this integration does indeed occur, in addition to making a significant step forward in international commerce, the NAFTA may make a remarkable contribution towards the sustainable reconciliation of environmental and trade interests.¹²⁰

University of Fort Hare

In order to sell the NAFTA as a model for the reconciliation of trade and environment concerns to other regional groupings, two issues need to be addressed. The first is whether Chapter 11 is effective in reconciling investment and environmental interests. The second issue is whether NAFTA Chapter 11 is an appropriate model for adoption by other multilateral trade and investment forums.

¹¹⁷ Ludwiszewski, op cit note 11 at 706.

¹¹⁸ As to the question of whether SADC can learn anything from the NAFTA, see generally, Professor Snyman - van Deventer, op cit note 20 at 125-126 and Chapter eight below.

¹¹⁹ Ludwiszewski, loc cit note 11. It is however submitted that such unqualified optimism has no basis hence our reservations about the one-size-fits all solution of the NAFTA as an ideal trade and environment regime adaptable to all international contexts. While the NAFTA has some novel and admirable provisions on trade and the environment, such provisions, despite an almost smooth start, do not seem to have worked smoothly even for the North American context in which their negotiation was conceived and executed (see our criticism of the NAFTA through the cases above and our evaluation of NAFTA in the next section).

¹²⁰ Ludwiszewski, *ibid.*

On the first issue, it is submitted that a great deal of latitude is provided to the parties to take measures to protect human, animal or plant life or health, and conserve living and non-living exhaustible natural resources.¹²¹ However, these provisions lack the coercive language necessary to ensure positive action in achieving environmental protection. Secondly, even if the language was more mandatory the operation of article 1110¹²² clogs the potential for necessary environmental policy measures given government fears of costly litigation for infringement on corporate profits or property rights, as the cases discussed above clearly show. On another level, governmental action taken under the guise of environmental protection may be motivated more by politics or protectionism, than by environmental concerns. From the above therefore, Chapter 11 emerges as ineffective in securing environmental interests. As may be inferred from the foregoing discussion, the chapter was not designed from the perspective of the environmental conservationist. Furthermore, the provision for environmental protection was designed to deal with competition for foreign direct investments (FDI) through employment of lax environmental regulations.¹²³ The efficacy of the exceptions that would harness environmental degradation by foreign investors¹²⁴ is curtailed by the broad protections in article 1110. In response to the issue of whether chapter 11 is effective in reconciling investment and environmental interests, one is tempted to conclude that it is not. Being concerned with the adverse environmental effects of their activities is part and parcel of the corporate social responsibility¹²⁵ (hereinafter CSR) of companies. However, when companies take action against governments in terms of article 11 provisions, CSR has not been the

¹²¹ The NAFTA article 1106 (6) and 1114.

¹²² Article 1110 deals with the protection against nationalisation, direct or indirect and expropriation, even regulatory expropriation. Article 1110 litigation has risen due to the expanded government responsibility for compensation beyond takings. This has enabled foreign corporations doing business in the territories of the parties to seek exorbitant reimbursements for any governmental law, rule or regulation that impinges upon the company's profits.

¹²³ See article 1114 of the NAFTA.

¹²⁴ See article 11006 (6) of the NAFTA.

¹²⁵ Corporate social responsibility (CSR) has been defined as a branch of the broader concept of business ethics. It has also been defined as 'an organisational commitment to behave in an economically and environmentally sustainable manner while honouring the interests of direct stake holders' (see Vasin, Heyn & Company, Accounting and Public management consultants at <http://www.vhcoaudit.com/SRAarticles/WhatIsCSR.htm> [02 Nov 2005])

main motivation but rather the urge to make profits. On this point therefore, the NAFTA is not a good example of how companies should pursue CSR in the context of environmental protection.

On the second point of whether the NAFTA Chapter 11 is a proper model for adoption by other multilateral trade and investment forums,¹²⁶ our submission is in the affirmative although qualified by the following reservations. The NAFTA is a complete investment bundle with protections, exceptions, environmental provisions (mild as these may be) and a dispute settlement procedure.¹²⁷ This should, in theory, make it portable to the greater WTO framework (after the harmonization of its dispute settlement procedure) considering the parallels.

However the absence of developmental provisions and positive integration make NAFTA a difficult proposal to sell. In addition, the ominous absence of *environmentally correct* clauses and CSR measures in Chapter 11 would be a frightful prospect to wary developing countries interested in sustainable development and the preservation of natural resources.¹²⁸ On account of the above deficiencies, NAFTA chapter 11 would not be transferable without fundamental reconstruction.

University of Port Harcourt
Together in Excellence

¹²⁶ As for the question of whether the NAFTA Chapter 11 provisions may be adopted by SADC or not, we reserve such a discussion for chapter eight below.

¹²⁷ This in conformity with the general Doha proposals for the multilateral framework for investment (MFI) which should take into account the following: proper scope and definitions, core principles: non-discrimination and transparency, positive integration, development provisions, national policy space, consultations and dispute settlement and recognition of other bilateral and regional investment arrangements (see WTO, "Trade and Investment: Negotiate or continue to study?" at http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief12_e.htm [02 Nov 2005].

¹²⁸ On the concept of sustainable development and how it affects developing countries, see generally David Reid, *Sustainable Development: An Introductory Guide* (1995) at 179-221; Adil Najam and Nick Robins, "Seizing the Future: The South, Sustainable Development and International Trade" in Kevin P. Gallagher and Jacob Werksman (eds) *International Trade and Sustainable Development* (2002) at 164-185; and Andrew Hurrell, "Brazil and the International Politics of Amazonian Deforestation" in Andrew Hurrell and Benedict Kingsbury (eds) *The International Politics of the Environment* (1991) at 398-429.

It is therefore concluded that the NAFTA investment package does not effectively reconcile investment and environmental interests. It further compromises the states' ability to legislate in the interests of their citizens where there is a danger of being misunderstood by foreign companies suspicious of expropriations. However, being the first attempt at a multilateral investment framework, it provides framers of the proposed MFI a rare opportunity to reconsider several of the provisions that have led to environmental degradation and denied locals the benefits of corporate social responsibility.



University of Fort Hare
Together in Excellence

CHAPTER EIGHT

Trade and Environment are two poles in a dialectical thesis, where the resulting synthesis should conciliate the two ends. Unlike many would like to believe, linking trade to environment does not come as something natural. To reconcile these two ends necessitates tremendous efforts – and not without sacrifices – where environment should not be treated as a late consideration or an afterthought.¹

Summary, conclusions and Recommendations

8. Introduction

What has been examined in the preceding chapters engages the nature of international trade regulation and environmental governance in the context of the World Trade Organisation (WTO) and the North American Free Trade Agreement (NAFTA) against a Southern African Development Community (SADC) backdrop. This is achieved by engaging the trade and environment debate through the cases while at the same time extracting some relevant thematic lessons for SADC in transition. The ultimate objective was to propose credible solutions to the trade and environment debate in general and extract positive thematic lessons for the transforming SADC in particular. However, what is recapitulated in this chapter is a broad overview of international trade regulation and environmental governance in the WTO and the NAFTA with a view of aligning future SADC trade policies to reflect the general global environmental concern. Four objectives are intended to be accomplished by this concluding chapter.

First, the chapter begins with an overview of the research aims and objectives and a summary and discussion of the principal findings of the study. Second, the chapter lays bare the conclusions that can be drawn from the findings of the study in the context of international trade regulation in the WTO and NAFTA together with lessons for a SADC in metamorphosis. Third, the chapter seeks to explain specific shortcomings in WTO and NAFTA law pertaining to trade and the environment and propose recommendations for law reform that will benefit not only the WTO community in general but the SADC in transition in particular. Finally, the chapter presents a tentative agenda for future research. The chapter is organised under the

¹ Magda Shahin, “Trade and the Environment: How Real is the Debate?” citing Rubens Ricuperro, former Secretary General of UNCTAD in Garry P. Sampson and W. Bradnee Chambers (eds) *Trade, Environment and the Millennium* (2002) at 74.

following headings: (8.1) a brief overview of the research problem and objectives; (8.2) chapter summaries and principal findings; (8.3) overall conclusion of the study; (8.4) recommendations; (8.5) agenda for Future Research; and (8.6) chapter summary.

8.1 A Brief Overview of the Research Problem, Aims and Objectives

From an informed reading of the first Chapter, the overall aim of the study was to show that there is a conflict between international trade regulation and environmental protection which conflict manifests itself in a variety of ways. The conflict may manifest itself through the imposition of trade bans, environmental taxes, technical requirements which exporters have to comply with in order to access international markets and certain health requirements designed to protect human, animal or plant life and health. The other ancillary aim of this study has been to suggest possible solutions to the trade and environment conflict in general and in as far as it relates to the SADC in transition. The study's recommendations² directly address this subsidiary aim. Through an examination of WTO and the NAFTA case law in Chapters four to seven above, the above aims were realised.

This study's aims may be succinctly summarised by the thesis that trade liberalisation may lead to environmental degradation due to a laxity in environmental standards on the one hand while on the other, the obsession with environmental protection may be motivated by protectionism and result in autarchy. Such problems do arise in the main when trade is liberalised such as in the context of a multilateral agreement exemplified by the WTO or in the context of a free trade area like the NAFTA or the soon-to-be-established SADC free trade area.³ By comparing the WTO and NAFTA

² See para 8.4 below.

³ Article XXIV (5) (b) of the GATT makes provision for the establishment of free trade areas between contracting parties. According to the *Dictionary of Marketing terms* at <http://www.marketingpower.com/mg-dictionary-view4047.php> [13 Nov 2005], a free trade area is an area of jurisdiction encompassing a group of countries that have agreed to abolish all internal barriers to trade between member countries. Examples of free trade areas are the North American Free Trade Area (NAFTA) and the European Free Trade Association (EFTA). With respect to the SADC, the free trade area is envisaged to be in existence by 2008, which is eight years after the launch of the SADC Free Trade Area. The then acting executive secretary of the SADC, Prega Ramsamy, gave a keynote address on the occasion of the launch of the SADC free trade area on 1 September 2000. On the 25th of January the same year, the SADC protocol on trade had officially come into force after the necessary

provisions on trade and the environment, some thematic lessons were extracted for the transforming SADC.⁴ The two central questions that the study sought to answer were:

- I. How do we resolve the conflict between trade and the environment in a global context and in a regional context such as the SADC and NAFTA? and
- II. Does the SADC in transition anticipate the conflict between trade and the environment, and if it does, what measures (policy, legal or otherwise), if any has it put in place to resolve the conflict?

To a large extent, the first question was answered in our survey of the pertinent literature and a critical discussion of the case law. One of the most frequently suggested solutions to resolving the conflict has been the abandonment of unilateralism by adopting multilateralism. This makes it possible for consultations between WTO members and obviates the occurrence of acrimonious disputes such as those witnessed in *US-Tuna* (Mexico), *US-Shrimp* and *US-Gasoline* discussed in chapter four above. A further attempt to answer the first and second question is made in our recommendations below. In the Final analysis, it is hoped that research questions have been satisfactorily answered.

University of Fort Hare

In order to realise the above aims the study pursued the following pertinent objectives: First, to expose and explore the extent of the conflict between trade and the environment in its proper theoretical and historical context. That objective was achieved through a review of the appropriate literature in Chapter one and an examination of the historical and theoretical debates around the theme of trade and the environment in Chapter two.

The second objective was to outline the dispute settlement measures provided for in the WTO before examining how environmentally related trade disputes were dealt with in practice. The narrative on the subject in Chapter three and a critical appraisal

ratification by SADC member states. The full text of Mr Ramsamy's speech is available at <http://www.sadc.net/editorial/sadctoday/v4-1-09-2000-1.htm> [09 September 2005].

⁴ See the discussion of the relevant case law and a critical commentary thereon on the thematic relevance of the cases to a SADC in transition in Chapters Four to Seven above. See further elaborate commentary on the subject of thematic relevance in para 8.4 below under the general head of recommendations.

thereof made it possible to achieve the objective. The paucity of literature on dispute settlement in the SADC regime and this renders the achievement of this objective partial. Such a dearth of literature on the SADC perspective is not considered a serious handicap because possible thematic lessons for SADC have been identified from a discussion of the dispute settlement regimes of the WTO and NAFTA. Recommendations on the way forward with respect to transforming the SADC trade and environment regime are also made.

The third objective was to identify and critique measures often deployed to enforce compliance with environmental regulations of an importing state. This was achieved through a critical evaluation of the leading WTO and NAFTA case law in Chapters Four to Seven. It however has to be pointed out that the achievement of the above objective has been slightly blurred by the fact that once again, there are no disputes as yet that have been resolved under the SADC regime. Suggestions on the way forward that is SADC-context specific are however made in the recommendations section below.



Fourthly, the study set out to critically analyse some salient NAFTA provisions on the settlement of trade and environment disputes and extract some thematic lessons for SADC in transition. A cursory reading of Chapter Seven above and critical reflection on our recommendations indicates that the fourth objective was indeed achieved.

The fifth and final objective was to propose possible legal and policy reform in the WTO and the SADC and identify possible areas for further research. It is submitted once again that such a noble objective was achieved and such an achievement is reflected in the remarks in the conclusions section below. The recommendations also point out quite clearly the areas of current international trade regulation that scream for legal and policy attention.

On the question of the research methodology adopted for this research, it was largely literature based.⁵ The forms of literature surveyed were generally textbook and journal

⁵ This study was not based on fieldwork as such because such methodology would be inappropriate. The kind of 'fieldwork' engaged in was travelling to libraries and documentary centres in the country

8.2 Chapter Summaries and Principal findings

8.2.1 *Historical and Theoretical foundations*

In the process of conducting this research, it transpired that in attempting to answer questions raised in Chapter One, it was necessary to look at the trade and environment debate in its theoretical³ and historical contexts. Chapter two therefore focussed on the historical foundations of the trade and environment debate. The main historical highlights of the debate started off in the 1970s with the advent of an initiative by the Organisation for Economic Cooperation and Development (OECD) which resulted in a set of guidelines and the evolution of the polluter pays principle. The historical developments took the debate through the composition of a group on environmental measures and international trade (EMIT Group) in 1971 to the Stockholm conference on the human environment in 1972. In 1991, the *US-Tuna* (Mexico) case put the trade and environment debate in the spotlight when the panel ruled in favour of Mexico in a controversial decision.⁴ In 1992, the Earth Summit in Rio de Janeiro drew the world's attention to the role of international trade in poverty alleviation and in combating environmental degradation and in April 1994 the WTO ministerial decision on trade and the environment was signed stating that there should be no policy contradiction between maintaining a multilateral trade system and promoting sustainable development. The same year also saw the coming into existence of the Marrakesh Agreement establishing the WTO, which in its preamble, placed environmental protection, the conservation of scarce resources and sustainable development firmly among the WTO objectives.

From a discussion of the historical epochs in chapter two, it emerged that some of the solutions to the debate may be extracted from the discussions that were held during

³ 'Theoretical context' in this study does not refer or allude to the theoretical framework that is common in all conventional research, but rather focuses on some basic aspects of international trade law and how such aspects relate to the trade and environment debate. The specific aspects are the prohibition of discrimination, canvassed by our detailed discussion of the National treatment concept and the Most favoured Nation concept [MFN], identification of the main WTO provisions relating to trade and the environment [articles XX (b) and XX (g)] and a discussion of the trade and environment debate in the context of multilateral environmental agreements [MEAS].

⁴ See Chapter Four above for a discussion of the dispute.

some of the debates that are now regarded as significant historical landmarks. Secondly, the preoccupation with the protection of the environment was more pronounced in developed states than in developing ones. Such a pattern has persisted up to today. By attempting to make the SADC environmentally conscious and sensitive, the study seeks to reverse this trend and make developing countries more environmentally conscious in the hope of placing the theme of environmental concern firmly on top of their development agendas.

8.2.2 *Dispute Settlement Issues*

Chapter three looked at the WTO dispute settlement mechanism and offered a critical appraisal of its strengths and weaknesses. The aim of the chapter was to show how WTO trade disputes are resolved in general before proceeding to show the specific application of the law in trade and environments disputes.

The main highlights of the WTO dispute settlement are the availability of fixed timetables, a system of a single set of procedures for disputes raised under any of the covered agreements, emphasis on bilateral consultations, greater automaticity in decisions on establishment, terms of reference and composition of panels, the availability of an appeal process and the presence of a Dispute settlement Body (DSB) which has the sole authority to establish panels of experts and accept or reject panel findings or results of an appeal. The DSB further monitors the implementation of rulings and compliance therewith; it also has the power to authorise retaliation when a country cannot comply with a ruling.

Despite the above positive developments about the WTO dispute settlement system, it is submitted that it definitely is not the best possible as there is plenty of room for improvement. Unlike the NAFTA, the WTO does not make provision for financial compensation to the aggrieved WTO member in the event of obtaining a ruling in its favour. The system instead puts a lot of emphasis on retaliation and suspension of concessions. This is not effective since smaller and financially weaker states are unlikely to retaliate against stronger states with a big financial and economic muscle. It is noted with regret that to participate in the WTO dispute settlement system requires exorbitant financial resources which developing member states cannot afford.

This however should be capitalised upon by the same developing countries if the dispute is in a regional context by making use of the dispute settlement regime provided for in the relevant regional trade agreement such as SADC. The WTO dispute settlement system is also criticised as not being transparent enough and biased towards national governments at the expense of individual investors.⁵

8.2.3 *The Conservation of exhaustible Natural Resources*

Having stated the substantive law and how it applies in trade and environment disputes in Chapter three, Chapter Four focussed on selected disputes and critically appraised them in light of the international concern for resolving the conflict between trade and the environment. The broad theme of this chapter is the conservation of exhaustible natural resources such as dolphins, sea turtles and clean air. The disputes discussed in this chapter illustrate how the provisions of Article XX (b), (g) and the Chapeau apply in the practice of trade and environment dispute resolution. In the *US-Tuna* (Mexico) case, the panel found that on the basis of the drafting history, Article XX (b) did not extend to measures protecting human, animal or plant life outside the jurisdiction of the country taking the measure.⁶ The panel further reasoned that if this extra-jurisdictional approach were adopted, each contracting party would unilaterally determine the life or health protection policies from which other contracting parties would not deviate.⁷ In the final analysis, the United States measure was considered unnecessary within Article XX (b) since the U.S had failed to demonstrate that it had exhausted all options reasonably available to pursue its dolphin protection objectives.

In the critique of the *US-Tuna* (Mexico) dispute, it is noted with regret that the panel's pronouncements on the extra-jurisdictional application of environmental measures were legally reasoned in terms of international law norms but devoid of any practical considerations. Environmental problems do transcend international borders and it is indeed logical for a country to try to influence environmental regulation in its neighbour's territory. This should not be conceived as unbridled interference bordering on an invasion of territorial sovereignty but rather an attempt to curb the

⁵ See recommendations in para 8.4 below.

⁶ See *US-Tuna* (Mexico) panel report para 5.26.

⁷ *US-Tuna* (Mexico) *ibid.*

negative effects of free trade on the environment. Such reality was given judicial notice in *US-Shrimp* and can be realised in a less contentious manner when affected countries enter into fruitful negotiations prior to invoking dispute settlement procedures.

The *US-Gasoline* dispute was concerned with the conservation of clean air, which was acknowledged by both the panel and Appellate Body as an exhaustible natural resource. In the dispute, the application of the Chapeau to Article XX of the GATT was examined. The panel had found that the measure at issue (baseline establishment rules), was primarily aimed at and related to the conservation of exhaustible natural resources, clean air being one of them. When the matter went on appeal, it was held that since in terms of the Chapeau provisions baseline establishment rules affected both imported and domestic gasoline, the measure was made effective in conjunction with restrictions on domestic production or consumption. In the final analysis however, the Appellate Body ruled against the U.S on the basis of the Chapeau provisions and reasoned that the application of the U.S regulation amounted to unjustifiable discrimination on international trade due to two omissions. The first being the failure of the U.S to explore alternatives to the baseline establishment rules and the second was the fact that the U.S disregarded the cost implications of the rule for foreign exporters.

In the *US-Shrimp* dispute, the legal issues were similar to those raised in *US-Tuna* (Mexico) but it is heartening to note that the Appellate Body ruled against some of the panel's legal findings especially the mistaken view, initiated by the panel in *US-Tuna* (Mexico), that national environmental regulation should not transcend borders.⁸ However, the Appellate Body ruled against the U.S, not because it sought to enforce environmental regulation across international boundaries but because of the discriminatory application of the ban and the U.S's inability to consult with other affected exporting nations before imposing the ban.

⁸ See *US-Shrimp*, panel report para 7.51. The panel had found that the U.S ban on imports of shrimp and shrimp products from specified countries could not be justified under Article XX and constituted unjustifiable discrimination where the same conditions prevail. The panel further held that allowing the ban would undermine members' autonomy to decide their own policies.

On thematic lessons for the SADC in transition, the disputes bring the following issues to the fore. First, for the SADC as a region in transition towards a free trade area, the importance of consultations and the avoidance of unilateralism and non-discriminatory application of environmental regulations are highlighted. It is important to seek diplomatic rather than unilateral political solutions to environmental problems. The exhaustible natural resources that were subject matters of disputes in the cases discussed are also relevant to the SADC with member states at different levels of economic development. In order for each SADC member to continue to exploit its exhaustible natural resource in an environmentally friendly manner, it has to be allowed to pursue its comparative advantage to the full without too much extra-territorial influence from its neighbours. The way in which the disputes were adjudicated upon gives the SADC a very relevant and timely lesson on how not to environmentally regulate in the sphere of international trade.

8.2.4 Human Health Issues

Chapter five deals with the theme of trade and environmental governance in the context of the protection of human health. It analyses the *EC-Asbestos* case in which the French government imposed a blanket ban on the importation and use of certain asbestos and asbestos-containing products. Canada challenged the ban before a WTO panel which found in favour of the French government⁹ and ruled that despite the ban not being justifiable under Article XX (b), there was no other alternative available to the French government; the suggestion by Canada that controlled use of asbestos was a possible alternative was dismissed. The panel further noted that the application of the Decree banning the use of asbestos did not constitute arbitrary or unjustifiable discrimination in terms of the Chapeau provisions of Article XX. On appeal by Canada, the Appellate Body upheld the panel's finding that the Decree was necessary for the protection of human health.

⁹ Despite the fact that the ban was imposed by the French government and Canada sought to challenge a French government regulatory measure, the case was brought under the auspices of the European Communities (EC) hence the EC was the complainant in the panel case and the respondent in the Appellate case.

The decision is important for SADC in as far as it shows how the necessity test is applied and how countries should apply their regulations while taking into account their effects on exporters. The decision is also thematically relevant because the asbestos ban has triggered worldwide interest in the harmful effects of asbestos. Such interest has sent cold chills along the economic spines of some governments whose economies heavily depend on the exportation of asbestos and asbestos products. Zimbabwe in the SADC region is a good example of a country that exports large quantities of asbestos. *EC-Asbestos* has significant thematic relevance to the SADC in that regard.

8.2.5 Sanitary and Phytosanitary Measures

Chapter six of the research dealt with the theme of the protection of plant or animal life or health in the context of sanitary and phytosanitary measures (SPS). The chapter gave an overview of the key provisions of the SPS Agreement and how they impact on the key issue of international trade and environmental governance. A handful of cases decided under the SPS Agreement were discussed and specifically, the leading case in the application of SPS measures (*EC-Hormones*) was discussed in significant detail. In the *EC-Hormones* case, the bone of contention was the EC ban on imports of meat and meat products from cattle which had been treated with certain natural or synthetic hormones for growth promotion purposes which ban the United States and Canada contested. The panel ruled against the EC and held that the ban was arbitrary in its application, was not based on international standards and was also not based on a proper risk assessment. On appeal, the Appellate Body disagreed with the panel on some of its legal interpretations but overall ruled that the EC measures were inconsistent with the SPS Agreement as they were not based on a proper risk assessment.

The study reiterated the importance of *EC-Hormones* to the SADC by pointing out that it places a lot of emphasis on the role of science in international trade regulation and environmental governance. Science plays a big role in a bid to carry out a proper risk assessment. The SADC member countries should therefore invest in science and technology in order to detect disease-causing risks such as pests and contaminated food imports. This would reduce the incidence of their environmental measures based

on the SPS Agreement being challenged on the basis that they are not scientifically justified. The subject matter of the dispute is also thematically relevant as some SADC member states such as Botswana rely on beef exports to the European Union. The case is also important in that it gives legal clarity to the precautionary principle and whether it has become a rule of customary international law. From the way the precautionary principle was jettisoned in the case, it is quite clear that a purported reliance on it would not be allowed to persist without a challenge. Therefore, SADC member states cannot escape WTO sanction if they do not base their SPS measures on a risk assessment backed by proper scientific enquiry and purport to rely on the precautionary principle.

8.2.6 *The NAFTA and the Trade and Environment Debate*

Chapter seven took the discussion of international trade law and environmental governance to greater heights by bringing in an examination of the NAFTA provisions on trade and the environment. This comparative perspective is most welcome here because it lays bare some thematic lessons for both the WTO and the SADC. The important dispute settlement provisions of the NAFTA that are an eye opener for both the WTO and SADC are the Chapter II investor-state procedures which provide a forum for private investors to take up their cases against governments before NAFTA tribunals. This provision allows private citizens to make submissions as interested parties and the fact that companies have a *locus standi* in these disputes actually means that the procedures are an improvement upon those of the WTO. Positive aspects of the NAFTA dispute settlement procedures such as the possibility of forum shopping and the provision on payment of compensation among others were identified and noted as more than welcome. The study did not lose sight of the weaknesses in the NAFTA dispute settlement regime and such weaknesses were identified and critically commented upon.

From NAFTA cases discussed in chapter seven,¹⁰ certain important thematic lessons emerge for SADC in transition. First, the cases illustrate the positive role that Non Governmental Organisations may play in initiating environmental law reform. In most

¹⁰ The cases that are discussed or alluded to in chapter seven are: *Metalclad v United Mexican States*, *Pope and Talbot v Canada*, *S.D Myers Inc v Canada* and *Methanex v The United States of America*.

of the cases discussed, the contributions of NGOs were positively acknowledged. Secondly, the NAFTA makes a positive contribution on the aspect of allowing companies to participate directly in the dispute settlement process. The SADC is therefore urged to pluck a leaf from this unique provision and incorporate it in its dispute settlement process.

8.2.7 *Matters Arising*

From the above summary, it is submitted that the coverage in each of the preceding seven chapters is in line with the study's aims and objectives that were identified in chapter one. It is hoped that the quest to tackle the trade and environment debate from the perspective of a transforming SADC has to a large extent been fulfilled. The contribution of this study to the trade and environment debate is likely to bring positive results since the relevant case law is critically analysed and a commentary on relevant lessons learned is provided. It is inappropriate at this stage to provide a summary of the contents of this present chapter (Chapter eight). The contents of this chapter easily appear from a cursory reading thereof. Our conclusions in section 8.3 below are largely informed by the findings of the study as highlighted in 8.1 above in the form of chapter summaries.

University of Fort Hare
Together in Excellence

8.3 Overall Conclusion of the Study

From the findings and comparative analysis above, the following conclusions emerge. The trade and environment debate is indeed alive in the WTO¹¹ and different views/positions on the subject have been adopted. The developing country perspective is that the obsession with environmental protection in the context of international trade is motivated by protectionism while the developed country perspective on the other hand is that priority should be given to investing in environmental protection so as to ensure stricter environmental standards; such investments will place developed

¹¹ See generally Werner Scholtz, "The Relationship Between the Environment and Trade in the WTO: Prolonging the Conflict between North and South?" (2004) 18 *Speculum Juris* 250 (hereafter, Scholtz 1).

countries at a competitive disadvantage relative to developing countries which do not make the same investments.¹²

In a nutshell, the tension between trade and the environment can be summarised as follows: First, treaties liberalising trade can harm the environment. In this context, trade and the environment may conflict in at least four ways:¹³

- more trade and economic activity may result in more environmental degradation;¹⁴
- the competition brought about by free trade may put pressure on governments to lower environmental standards (also referred to as ‘race to the bottom’);¹⁵
- trade agreements may prevent governments from enacting certain environmental regulations,¹⁶ and



¹² Scholtz 1, op cit note 18 at 263-264. The trade and environment debate has been tackled from the perspective of developed and developing country paradigms under the auspices of the North-South dialogue. For a comprehensive discussion of the debate from this perspective, see Scholtz 1, op cit note 18; Kofi Oteng Kufour, “From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes” (1997) 31 *Journal of World Trade* 117; Frank Biermann, “The Rising Tide of Green Unilateralism in World Trade Law – Options for Reconciling the Emerging North – South Conflict” (2001) 35 *Journal of World Trade* 421; and Wen-Chen Shih, “Multilateralism and the Case of Taiwan in the Trade Environment Nexus – The Potential Conflict Between CITES and the GATT/WTO” (1996) 30 *Journal of World Trade* 109.

¹³ The following account draws heavily from Joost Pauwelyn, “Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO” (2004) 15 *EJIL* 575 (hereafter, Pauwelyn).

¹⁴ Pauwelyn, op cit note 20 at 578. At least this is the argument often raised by both developed and developing countries. By promoting economic growth, trade may damage the environment through the unsustainable use of natural resources and pollution emissions that threaten the earth’s assimilative capacity. See Mathew A. Cole, “Examining the Environmental Case against Free Trade” (1999) 33 *Journal of World Trade* 183.

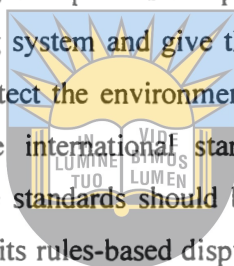
¹⁵ This is one aspect on which the NAFTA Chapter 11 provisions have been caustically criticised. See the discussion of this and other weaknesses of the NAFTA dispute settlement regime in chapter seven above. Countries with low environmental standards may have a competitive advantage over those with higher standards. See Mathew A. Cole, op cit note 21 at 183.

¹⁶ See the discussion of the weaknesses in the NAFTA trade and environment dispute settlement regime in chapter seven above.

- trade law may restrict the use of trade sanctions or preferences, be it as sticks or as carrots, to ensure the signing up to, or compliance with international environmental standards.¹⁷

The above overview, as well as the diversity of approaches found in a pile of sources consulted in the course of this study, demonstrate the multifaceted nature of the trade and environment debate.¹⁸

On the subject of multilateral environmental agreements (MEAs) and the trade and environment debate,¹⁹ it is concluded that some MEAs may contain trade measures which are WTO illegal²⁰ but may however be enforceable between the signatories to the specific MEAs. It is submitted that having resort to MEAs to resolve the trade and environment debate is addressing one part of the problem. What is required is to strengthen the multilateral trading system and give the Dispute settlement Body the power to enforce rulings that protect the environment. The long term solution is to negotiate adequate and effective international standards for subjects previously considered to be domestic. These standards should be set at the level of the WTO since it has shown that it can use its rules-based dispute settlement system to resolve trade and environment disputes. In order to resolve the trade and environment debate



University of Port Harcourt
Together in Excellence

¹⁷ In the study's recommendations in para 8.4 below, the writer proposes WTO law reform in this regard and proffers some viable legal alternatives. For an exhaustive discussion of WTO law remedies and whether they are effective, see Edwini Kessie, "Enhancing Security and Predictability for Private Business operators Under the Dispute Settlement System of the WTO" (2000) 34 *Journal of World Trade* 1; Duane W. Layton and George Miranda, "Advocacy before WTO Dispute Settlement Panels in Trade remedy Cases" (2003) 37 *Journal of World Trade* 69; Debra P. Steger, "Appellate Body Jurisprudence Relating to Trade Remedies" (2001) 35 *Journal of World Trade* 799; and Holger Spamann, "Standard of Review for World Trade Organisation Panels in Trade Remedy cases: A critical analysis" (2004) 38 *Journal of World Trade* 509. Although the articles deal with trade remedies in the context of anti-dumping duties, countervailing measures and safeguard measures, the critical analysis is applicable to remedies available in environment-related trade disputes because trade bans and other protectionist instruments may assume the form of duties such as environmental taxes.

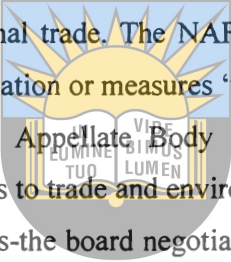
¹⁸ Pauwelyn, op cit note 20 at 578. The multi-faceted nature of the debate comes about due to the fact that different opinions emerge if the debate is attacked from a legal, policy, political, economic or technological standpoint.

¹⁹ See the brief discussion of the subject in chapter two above.

²⁰ Examples of MEAs with trade provisions that are restrictive are the Montreal Protocol and CITES.

in the WTO, there is need to address the source of the problem which implies that inequalities between the North and South receive immediate attention.²¹

From the NAFTA and WTO cases discussed in the preceding chapters, it emerges that the rulings do not seem able to stop the tide of a proliferation of trade and environment disputes. The solution therefore does not seem to be in legal rules but rather in solutions based on diplomacy and other alternative dispute resolution routes. This does not mean that the cases do not add value to the quest for resolving the trade and environment debate; they do indeed improve the WTO jurisprudence on the subject. The WTO disputes such as *US-Shrimp* do imply that Members are allowed to legislate or take any action in the name of environmental protection as long as the implementation of such action does not amount to unjustifiable discrimination or a disguised restriction on international trade. The NAFTA goes further to protect the interests of investors from expropriation or measures ‘tantamount to expropriation’. In its analysis of the Chapeau, the Appellate Body in *US-Shrimp* emphasized the importance of multilateral solutions to trade and environment disputes and the need to involve affected countries in across-the-board negotiations.²² This study proposes the bias towards multilateralism as opposed to unilateralism as one of the solutions to the trade and environment debate.



University of Fort Hare
Together in Excellence

The trade and environment debate in the context of the SADC in transition is as good as dead because while several SADC protocols are environmentally relevant,²³ the region does not seem to give the debate much attention. This study therefore had to be content with extracting thematic lessons which will be helpful when the region becomes a fully-fledged free trade area. However, the SADC should indeed operationalise its dispute settlement mechanism so that it is ready to tackle disputes as they are inevitably going to arise.²⁴

²¹ Scholtz 1, op cit note 18 at 264.

²² Scholtz 1, op cit note 18 at 263.

²³ Examples of such protocols could be the protocols on shared water sources, health, fisheries, forestry and energy among others.

²⁴ On a related note, see E. Snyman Van Deventer, “Dispute Resolution in NAFTA and the WTO: a useful guide for SADC?” (2003) 28 *Journal for Juridical Science* 112 at125.

The analysis of dispute settlement under NAFTA elicits positive conclusions that are relevant to both SADC and the WTO. From a WTO perspective,²⁵ the major trade remedies that are available to a Member who gets a ruling in her favour are withdrawal of WTO-inconsistent measures, compensation²⁶ and suspension of concessions.²⁷ It is submitted that the NAFTA provisions on compensation should be preferred over their WTO counterparts. It is further submitted that the SADC should incorporate compensation provisions in its dispute settlement mechanism that are substantially similar to or identical to those of the NAFTA. This will give the SADC dispute settlement mechanism the legal teeth to fashion suitable remedies. The study therefore on this point proposes WTO law reform of the remedies that are available to aggrieved parties.

In conclusion, it may be pointed out that the context in which the trade and environment debate is engaged by the developing and developed countries mirrors the divisions between North and South. The general solution to the debate though lies in cooperation and consultation within a multilateral framework. The emerging jurisprudence on the NAFTA chapter 11 provisions is indeed an eye opener for both the WTO and the SADC. The jurisprudence, despite noted criticisms, is a positive development towards linking the theme of international trade, environment and investment in the context of private party participation in international trade disputes. The NAFTA provisions also impose on companies some form of coerced corporate social responsibility which may yield positive results for the environment. There is a need, now than ever before, to take the business needs of private commercial entities seriously so that their business activities are not overtaken by 'green' protectionism. This can be done by giving these entities *locus standi* in trade and investment disputes

²⁵ Edwini Kessie op cit note 24 at 6.

²⁶ Ibid. Compensation in this context entails reducing tariffs on a product of export interest to the complaining party or offering concessions in either services or intellectual property in equal value to the level of nullification or impairment of benefits. This form of compensation does not offer predictability since instead of compensating the industry that has suffered damage, WTO compensation can inadvertently benefit an industry which did not have anything to do with the dispute [Edwini Kessie. op cit note 24 at 6]. The most important point to take note of is that this form of compensation does not envisage monetary compensation as provided for in the NAFTA.

²⁷ See also Steve Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 95 *American Journal of International Law* 792-832.

be they environmental or otherwise. Hence the recommendations below duly take cognisance of the fact that there is need to reform WTO law especially around remedies, developing countries, the participation by private individuals in the dispute settlement process, sympathetic treatment of developing countries and emphasis on the trade and development agenda. The study further take note of the need to prepare SADC for the future hence our proposed reform agenda for SADC.

8.4 Recommendations

In the context of the foregoing, the following recommendations arising from the above analysis are specially notable, and therefore are emphasised in conclusion. The structural outline of the recommendations is as follows: 8.4.1, reiterates solutions to the trade and environment debate in general as gathered from the literature perused; in 8.4.2 the study makes recommendations with respect to WTO law reform in the interest of the trade and environment debate and finally in 8.4.3, the study makes known its intentions for SADC structural reform in anticipation of trade and environment disputes once the region attains free trade area status.

8.4.1 *The Trade and environment debate in General*²⁸

8.4.1.1 *Preliminary remarks*

Before one proposes recommendations for the resolution of the trade and environment debate in general, there is a need to point out some demystifying dimensions and common misconceptions about the debate. On this aspect, guidance may be obtained from the 1996 Singapore Ministerial Report on Trade and the Environment,²⁹ which stressed the following.³⁰

²⁸ For a comprehensive list of possible solutions to the trade and environment debate from a WTO perspective, see specifically Veena Jha and Rene Vossenaar, "Key Trade and Environment Issues: Problems and Possible Solutions" in Gary P. Sampson and W. Bradnee Chambers (eds) *Trade, Environment, and the Millennium* (2002) at 405-422. Their problem-solution approach tackles the debate from the perspectives of the trade and environment agenda, market access issues, Multilateral environmental agreements, environmentally sound technologies, trips and biodiversity, export of domestically prohibited goods and environmental impacts of trade policies and agreements. See further, David Hughes et al, *Environmental Law* (2002) at 72-79.

²⁹ The Ministerial report was adopted on 13 December 1996. The full text of the Ministerial report is available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm [15 Nov 2005]. The report is comprehensive and wide and in addition to trade and environment issues, it makes

- it is assumed that the WTO itself does not provide an answer to environmental problems since it is not an environmental protection agency;³¹
- Environmental problems require environmental solutions not trade ones;³²
- trade liberalisation is not the primary cause of environmental degradation, nor are trade instruments the first-best policy for addressing environmental problems;³³
- WTO Agreements already provide significant scope for members to adopt national environmental policies, provided they are non-discriminatory;³⁴
- Secure market access opportunities are essential to help developing countries work towards sustainable development;³⁵ and
- increased national coordination as well as multilateral cooperation are necessary to address trade-related environmental concerns adequately.³⁶

From the above noted points, it is evident that the Singapore Ministerial report does suggest possible solutions to the trade and environment debate in general. In the remarks that follow, the study reiterates and elaborates on some of the suggested

important pronouncements on other issues as well. Notable among other issues are: trade and economic growth, integration of economies, core labour standards, the role of the WTO in the realisation of the objective of growth and development, regional agreements, expedition of accession to the WTO, dispute settlement, implementation of the WTO Agreement, developing countries, least-developed countries, trade in information technology and pharmaceuticals and investment and competition among others.

³⁰ To a large extent, what follows draws heavily from Magda Shahin, op cit note 1 at 52-53.

³¹ Ibid. The implication therefore is that the solution to the trade and environment debate lies elsewhere outside the tentacles of the WTO.

³² Ibid. This study submits that this is not entirely true as the WTO and NAFTA jurisprudence on the subject of trade and the environment prove that trade solutions to environmental problems may be relied upon as long as they are not discriminatory or as long as they are not expropriatory or 'tantamount to expropriation'.

³³ Ibid. This study entirely agrees with the second part of the statement but it submitted that more research from a legal policy perspective is required in order to firmly establish that trade liberalisation is not the primary cause of environmental degradation.

³⁴ Magda Shahin, op cit note 1 at 53. See also the Appellate Body Decision in *US-Shrimp*, discussed in detail in chapter four above.

³⁵ Magda Shabin, *ibid*.

³⁶ Magda Shahin, *ibid*.

solutions deducible from the report in addition to suggesting solutions emanating from the analysis of WTO and NAFTA jurisprudence.

8.4.1.2 *The Establishment of a World Environment Organisation*³⁷

Recent academic debate on the trade and environment theme has often touted the establishment of a Global Environment Organisation (GEO) to tackle transboundary environmental problems as a possible solution since the WTO has been labelled unsuitable for dealing with environmental matters.³⁸ Growing ecological interconnections motivated the need for global environmental rules and resulted in calls for a GEO in the early 1990s.³⁹ The GEO would have a dispute settlement mechanism to resolve environmental disputes.

³⁷ While this idea is being introduced for the first time in this study, it will not be discussed in detail here due to the fact that it does not form the thrust of the trade and environment issues attempted to be researched in this study. The GEO idea features more prominently in international environmental law and should be regarded in that context even here.

³⁸ See in this regard Werner Scholtz, "Cooperative approaches to Environmental Governance" at http://www.fu-berlin.de/ffu/akt/welt/bc2004/download/scholtz_f.pdf [15 Nov 2005] (hereafter, Scholtz 2); Daniel C. Esty and Maria H. Ivanova, "Making International Environmental Efforts work: The Case for a Global Environmental Organisation" at <http://www.earthscape.org/r1/hdg01/ivm01.pdf> [15 Nov 2005] (hereafter, Esty and Ivanova); C.F Runge, "A Global Environmental Organisation (GEO) and the World Trading System" (1999) 35 *Journal of World Trade* 400 (hereafter, Runge); and Fiona MacMillan, *WTO and the Environment* (2001) at 272. Fiona Macmillan advocates the creation of a new World Environment Organisation that unites and transcends the WTO system and the public international environmental system. This GEO would be an umbrella body that policies issues pertaining to global environmental law enforcement just like the WTO regulates the application and interpretation of trade law rules among member states. The main reason for advocating the establishment of the GEO is that there are hundreds of MEAs which cannot be managed effectively in the absence of an international umbrella Organisation [Scholtz 2, op cit note 43 at 11]. For a detailed note on some notable MEAs and their estimated number to date, see Gabrielle Marceau, "The Relationship Between the WTO Agreement and MEAs and other Treaties" (2001) 35 *Journal of World Trade* 1100, D.A Motaal; "Multilateral Environmental Agreements (MEAs) and the WTO: Why the Burden of Accommodation Should Shift to MEAs" (2000) 35 *Journal of World Trade* 1215; and Duncan Brack; "Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System" in Gary P. Sampson and W. Bradnee Chambers (eds) *Trade, Environment, and the Millennium* (2002) at 321-352.

³⁹ Scholtz 2, op cit note 43 at 11.

The main argument advanced against the creation of such an organisation is the perception of developing and Least-Developed countries that Northern rather than Southern interests would be given prominence.⁴⁰ On another level, it has been argued that the WTO, with its strong and enforceable dispute settlement mechanism, is an appealing instrument for policy makers in the field of environment.⁴¹ Despite the fact that the GEO is a pragmatic and a likely workable option in light of the difficulties encountered so far,⁴² this study strongly resists the use of pure environmental law to adjudicate trade issues.⁴³ Further, it is submitted that the WTO needs to strengthen its dispute settlement mechanism so that unilateralism is avoided at all costs. This then necessitates the next recommendation.



University of Fort Hare
Together in Excellence

⁴⁰ Scholtz 2, op cit note 43 at 12, Runge, op cit note 43 at 413 and Magda Shahin, op cit note 1 at 73.

⁴¹ Magda Shahin, op cit note 1 at 73.

⁴² Such difficulties are mirrored in the manner in which trade and environment disputes were decided and some of the notable controversies highlighted in our critique of the case law in Chapters four to seven above.

⁴³ Although in their conclusion, Esty and Ivanova, op cit note 43 at 27-28 reiterate that the logic of a Global Environment Organisation is motivated by the fact that globalisation requires thoughtful ways to manage global interdependence and the need to create an institutional mechanism that is up to the task, it is still submitted that the WTO is indeed up to the task notwithstanding some minor reservations with regard to its dispute settlement regime.

8.4.1.3 *The Ugly Face of Unilateralism*⁴⁴

The second recommendation on the aspect of resolving the trade and environment dilemma in general is that WTO members should at all costs avoid unilateral trade measures intended to protect the environment. The main reason why most of the trade and environment disputes thus far have ever arisen has been the irresistible temptation on the part of developed countries to adopt unilateral measures such as trade bans and other restrictions without adequate consultation with the affected members. Before a member adopts a unilateral trade restrictive measure under the guise of environmental protection, it needs to consult with members that are likely to be adversely affected by the measure. It is submitted that such consultation should take place at different fora other than the WTO dispute settlement regime. It is submitted that such consultation and an exploration of alternative dispute settlement routes could be rewarded by incorporating a provision in the WTO dispute settlement system for mandatory financial compensation to the plaintiff country should the defendant country unreasonably refuse or ignore the call to consult.



The above proposal is motivated by the fact that unilateralism in the imposition of higher environmental standards than its counterparts is self-defeatist and invites retaliation against the respondent state; this is additional to the fact that such unilateralism is WTO-illegal.

⁴⁴ For a general note on the subject of unilateralism in international trade in the context of the trade and environment debate, see I. Cheyne, "Environmental Unilateralism and the WTO/GATT System" (1995) 24 *Georgia Journal of International and Comparative Law* 433; B. Grosko, "Just When is it that a Unilateral Ban Satisfies the GATT?: The WTO Shrimp and Shrimp Products Case" (1999) 5 *Environmental Law* 17; K. Kennedy, "The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes" (1998) 22 *William and Mary Environmental Law and Policy Review* 375; P. Sands, "Unilateralism, Values and International Law" (2000) 11 *European Journal of International Law* 507; R.M. Wisthoff-Ito, "The United States and Shrimp Import Prohibitions: Refusing to Surrender the American Goliath Role in Conservation" (1999) 23 *Maryland Journal of International Law and Trade* 247; and Lorand Bartels, "Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The case of Trade Measures for the Protection of Human Rights" (2002) 36 *Journal of World Trade* 353. In this article, the author criticises unilateralism in the enforcement of trade and environment measures and attempts to link Article XX exceptions to issues of the right to life, right to a clean environment, the right to food and health, the right to self determination over the use of natural resources and the right to development.

8.4.1.4 *Government Anger v Consumer Anger*

With specific reference to cases that are based on the imposition of standards for the protection of human health, another possible solution would be to allow market forces and consumer choices and behaviour to decide whether to accept or reject the product in question. This takes us briefly to the case of *EC-Hormones* discussed in Chapter six. It is trite WTO law that in trade and environment disputes and indeed in other international trade disputes, governments get ‘angry’ or aggrieved on behalf of their citizens.⁴⁵ With specific reference to cases based on the SPS and TBT Agreements, it is submitted that the solution can be to leave the matter with consumers to decide whether to consume beef with hormones or not. Public authorities would only be allowed to intervene through labelling requirements other than a public ban especially where there is no scientific basis for the ban. Should authorities seek to rely on the precautionary principle, it is submitted that it is the consumers themselves who should invoke the principle and exercise due individual caution. The regulator should only impose the ban if it is motivated by genuine and pre-existing consumer concerns.⁴⁶ The concerns may be non-existent from the point of view of consumers but be triggered or created only after and because the government had intervened.⁴⁷ A useful guide can be obtained from answering the following questions:

- (1) Is the government really intervening to protect the environment (if not, then the measure does not stand)?⁴⁸ or
- (2) is the government intervening rather to protect domestic producers (if not then the measure stands)?⁴⁹

⁴⁵ In WTO law and practice, individuals have no *locus standi* before either panels or the Appellate Body. They can however submit *amicus curiae* briefs through NGOs. See Koffi Oteng Kufour, op cit note 19 at 144 and Gabrielle Marceau and Peter N. Pedersen, “Is the WTO Open and Transparent? A Discussion of the WTO with Non Governmental Organisations and Civil Society’s Claims for More Transparency and Public Participation” (1999) 33 *Journal of World Trade* 5. We deal with this deficient aspect of WTO law under our recommendations for WTO law reform in 8.4.2 below.

⁴⁶ See generally on the merits and demerits of such a consumer-biased proposal, Pauwelyn, op cit note 20 at 578-579.

⁴⁷ Pauwelyn, op cit note 20 at 579.

⁴⁸ Pauwelyn, *ibid.*

⁴⁹ Pauwelyn, *ibid.*

To sum up our recommendations under the head of trade and environment in general, the study first of all explored the possibility of taking environmental trade measures away from the WTO to a Global Environment organisation akin to the WTO but with exclusive jurisdiction over environmental disputes. It is argued that such a proposal is not necessary given the current record of the WTO in resolving environment-related trade disputes. The record of course is not without blemish. Second it is proposed that unilateralism should be nipped in the bud and instead more energy redirected to multilateralism. Thirdly it is recommended that governments should listen to consumer demands and not be 'angry' on their behalf unnecessarily as this breeds more protectionism. However, to fully realise the above recommended action, there is a serious need for WTO law reform in favour of developing countries. In that vein therefore, the next section's recommendations are biased towards reforming WTO law especially the dispute settlement mechanisms.

8.4.2 Proposals for WTO Law Reform

8.4.2.1 Preliminary Remarks

On the aspect of the need for reform of WTO law to suit the trade and environment debate, the study identifies four areas that cry out for immediate attention. First, it is argued that the WTO dispute settlement system as it stands is not transparent enough to give good results for the environment. It is submitted that individuals and companies should be given the *locus standi* in WTO proceedings. Secondly, it is submitted that to resolve the trade and environment debate in the context of trade and environment disputes at the WTO, new remedies compliance with which is mandatory must be fashioned so that violators of WTO rules are compelled to comply. This will ensure that WTO rulings are enforceable. Thirdly, this study argues that, notwithstanding the recommendations in 8.4.1 above, developing countries need legal and other technical assistance in order to successfully litigate trade and environment disputes at the WTO. Fourthly and finally, this study attends to the matter calling for the renegotiation of Article XX and submits that this is not necessary at this stage. In a nutshell, the study makes three recommendations for WTO law reform in the context of the trade and environment debate.



University of Fort Hare
Together in Excellence

8.4.2.2 *Making the WTO More Transparent*⁵⁰

Access under the WTO Dispute settlement framework is available only to members of the WTO; private parties cannot be directly involved in instigating proceedings at the WTO⁵¹ and they have to do so through their governments. Individuals are left with no option but to bring their disputes before domestic tribunals which will interpret law differently from WTO tribunals.⁵² The traditional notion that international law regulates only relationships between states is gradually being eroded.⁵³

If private parties have direct access to the WTO dispute settlement system, this would go a long way towards addressing the trade and environment debate. Individuals and companies that may feel that a trade measure adversely affects the environment will not be reluctant to proceed against the state concerned because they would not be motivated by political or other considerations.⁵⁴ The trade and environment dilemma

⁵⁰ For a general note on arguments for and against making the WTO more accessible to private citizens and general transparency, see Kofi Oteng Kufour, *op cit* note 19 at 144; Petros C. Mavroidis, "Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?" (1998) 32 *Journal of World Trade* 147; Ernesto Hernandez-Lopez, "Recent Trends and Perspectives" for Non-State Actor participation in WTO Disputes" (2001) 35 *Journal of World Trade* 469; and Edwini Kessie *op cit* note 24 at 1-6.

⁵¹ Asif H. Quareshi, *International Economic Law* (1999) at 290 (hereafter, Quareshi).

⁵² *Ibid.*

⁵³ For example, Article 55 of the African Charter on Human and Peoples Rights provides for the submission of communications to the African Commission on Human and Peoples Rights other than those of the state parties to the Charter [See African Charter on Human and Peoples Rights, OAU Doc.CAB/LEG/67/3/Rev.5, adopted on 17 June 1981 and entered into force on 21 October 1986. It is reprinted in XXI International Legal Materials, Jan 1982 at 59]. Under NAFTA Chapter 11 investor-to-state provisions, investors (who can be large corporations or individuals with the necessary capital) can take legal action against state parties whose conduct amount to an expropriation or is 'tantamount to expropriation'. The idea of idea of private party participation in international law proceedings is therefore neither new nor inconsistent with current trends in international law. See Kofi Oteng Kufour, *op cit* note 19 at 145.

⁵⁴ There are several reasons why a government may not proceed against another even if the trade measure it wishes to challenge is environmentally detrimental. It may consider it not in its general interest to bring proceedings in light of existing or about-to-be-established diplomatic relations with the offending state, the government may on the extreme side not want a clear ruling because it may be engaging in similar conduct in a different context or the private interest may not have sufficient leverage over governmental discretion [Quareshi, *op cit* note 62 at 290-291]. Some Transnational

does not affect governments only but private individuals as well. It is therefore submitted that the WTO should accommodate direct private party participation in disputes.⁵⁵

8.4.2.3 *The Case for the Provision of Legal Assistance to Developing WTO Members*

On this point, this study argues for legal assistance to developing WTO country members in the context of preparing for environmentally related trade disputes against their developed counterparts. Despite the fact that in most environment-related trade disputes discussed, developed nations lost their cases,⁵⁶ it is submitted that developed countries are not bringing as many disputes to the WTO as they could. It is often argued that developing countries do not have the financial resources to pursue litigation at the WTO level from start to finality.⁵⁷ The implication is that many trade

corporations (TNCs) may not even have a good relationship with the host government for political rather economic reasons hence they may petition such governments about adverse environmental effects of a trade measure and the government may turn a blind eye to such a request despite the 'politically incorrect' TNC.

⁵⁵ The main motivation for this is that a number of Uruguay Round Agreements are concerned with private rights (e.g. intellectual property rights) and also, given the fact that the doctrine of the exhaustion of local remedies is a rule of customary international law, the doctrine does have a bearing on the interpretation of the WTO Code. For a detailed note on the exhaustion of local remedies and how it became a rule of customary international law, see Abhishek Dubey, "The Rule of Exhaustion of Local Remedies in International Law" at <http://www.indlaw.com/publicdata/articles/article89.pdf> [16 Nov 2005] at 1-5. This recommendation may be qualified by pointing out that there should be strict procedural requirements to avoid the abuse of the right of private parties to participate in WTO dispute settlement proceedings.

⁵⁶ In the *US-Shrimp*, *US-Tuna (Mexico) and US-Gasoline*, the United States, a developed country lost each case to developing nations such as Mexico, Chile, Venezuela and India. The asbestos dispute involved two developed nations (Canada and France) and Canada lost its case. The *EC-Asbestos* dispute as discussed earlier affected developing countries such as Zimbabwe directly (Zimbabwe was not a party to the dispute although she participated as an interested third party) but they did not lodge any dispute with the WTO. In *EC-Hormones*, the EC, a gathering of European States lost its case against the United States and Canada.

⁵⁷ See generally, March L. Busch and Eric Reinhardt, "Developing Countries and General Agreement on Tariffs and Trade/World Organisation Dispute Settlement" (2003) 37 *Journal of World Trade* 719; Pretty Elizabeth Kuruvilla, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism" (1997) 31 *Journal of World Trade* 171; Asoke Mukerji, "Developing Countries and the WTO – Issues of Implementation" (2000)34 *Journal of World Trade* 33; Gustavo Olivares, "The Case

measures with adverse effects on the environment are likely to go unchallenged by developing countries due to lack of capacity. In addition to financial constraints, developing countries have limited personnel to deal with complex WTO law matters.⁵⁸ The Dispute settlement Understanding (DSU) makes provision for legal advice and assistance⁵⁹ in respect of dispute settlement in general (and by implication in respect to trade and environment disputes) to developing countries.⁶⁰ This provision will need to be operationalised for the dispute settlement system to benefit all especially the developing countries. This study emphasizes here on WTO law reform in the context of dispute settlement because there can be no logical separation between general dispute settlement procedures and the settlement of trade and environment disputes. It is submitted that if the dispute settlement mechanism is reformed in the interest of developing countries, this would go a long way towards resolving the trade and environment debate. The present writer is of the opinion that all WTO members should be confident to invoke the WTO dispute settlement mechanism in the interest of promoting sustainable international trade without fear or favour. The study also notes that the WTO dispute settlement mechanism is important for the trade and environment debate because up to now, there has been no case in which the debate has been resolved through negotiations.⁶¹

University of Fort Hare
Together in Excellence

for Giving effectiveness to GATT/WTO Rules on Developing Countries and LDCs” (2001) 35 *Journal of World Trade* 545; Stephano Inama, “Markert Access for LDCs – Issues to be Addressed” (2002) 36 *Journal of World Trade* 85; and Mary E. Footer, “Developing Country Practice in the WTO Dispute Settlement” (2001) 35 *Journal of World Trade* 55.

⁵⁸ Kofi Oteng Kufour, op cit note 19 at 119.

⁵⁹ Per Article 27 (2) of the DSU.

⁶⁰ Scholtz 1, op cit note 18 at 254. This however is problematic to developing countries of the South because most competent and experienced trade lawyers are located in the rich Northern capitals of Brussels, Washington D.C, Ottawa and Geneva. See also Scholtz 1. Quareshi, op cit note 62 at 311-312 further catalogues challenges offered by the dispute settlement system to developing members. He opines that first, a significant number of provisions in relation to developing countries are hortatory in character and difficult to enforce. Second, he points out that the general consensual character of the process of adjudication allows for power-based solutions which could harm the interests of developing countries.

⁶¹ See on a related note, Scholtz 1, op cit note 18 at 254-255.

8.4.2.4 *The Case of Ineffectual WTO Remedies*

The remedies available to an aggrieved member that wins a trade and environment dispute against its adversary consist of a recommendation or a ruling for the withdrawal of the offending trade policy measure, the authorisation to suspend trade concessions and compensation.⁶² However, a close scrutiny of the actual implementation of the above remedies by the Dispute Settlement Body (DSB) reveals that success thereof depends to a large extent on the consent and willingness of the parties.⁶³ It is important to note that the above remedies are not mutually exclusive and there is no provision for interim measures or for compensation for loss during the proceedings.⁶⁴

It is submitted that the above regime for remedies is ineffective in practice and should be robustly reformed. The payment of compensation should be mandatory and not dependent on the consent of the parties. An order for compensation should be accompanied by an obligation to pay restitution and make good the financial loss suffered by the injured party. This would give the WTO remedies the legal teeth necessary to stop members from adopting protectionist trade measures under the guise of environmental protection.

University of Fort Hare
Together in Excellence

This study also makes a separate note on retaliation as a remedy with specific reference to developing countries. Firstly, instead of retaliating, developing countries may be forced to agree to, or readily accept voluntary export restraints⁶⁵ in lieu of developed country compliance with panel or Appellate Body rulings.⁶⁶ This would not be good news for the resolution of the trade and environment debate as the offending environmental measure will remain in place and the remedy authorised by the DSB

⁶² Quareshi, *op cit* note 63 at 305.

⁶³ Quareshi, *op cit* note 63 at 293.

⁶⁴ Quareshi, *loc cit* note 74.

⁶⁵ According to Virtual Zambia, a website that has a glossary of international economic law terms, at <http://www.bized.ac.uk/virtual/dc/resource/glos6.htm> [16 Nov 2005], a voluntary export restraint (VER) is either an agreement between a producer and the government to limit the export of a good that is required for the home market, or, more usually, an agreement between one country and another to limit their exports to each other of certain goods.

⁶⁶ Kofi Oteng Kufour, *op cit* note 19 at 120.

would just be an academic exercise. Secondly, developing countries would not be able to effectively retaliate against developed countries after a favourable determination of a complaint if the developed loser refused to comply with the terms of the outcome.⁶⁷

The above submissions with respect to remedies may be summed up as follows: On the aspect of compensation, in order for the remedies regime to be predictable, compensation must be directed at the industry that has suffered damage since the current WTO compensation provisions as they stand can inadvertently benefit an industry which did not have anything to do with the underlying dispute.⁶⁸ This study is in agreement with Quareshi,⁶⁹ when he suggests overall changes like introducing a right of action by any member in the event of a breach; introducing a right of retaliatory action by third parties; introducing the right to transfer retaliatory action to another member; or compulsory compensation where developing members are concerned. WTO law reform with respect to available remedies is therefore proposed so that countries that flout WTO provisions on trade and the environment do not feel encouraged to persist in that behaviour because of ineffectual remedies based on party consensus.



University of Fort Hare

8.4.2.5 *The case for the renegotiation of Article XX*

Some commentators have argued that since Article XX does not explicitly refer to the environment, it should be renegotiated with a view to inserting an explicit reference to the environment.⁷⁰ An alternative to the renegotiation has been the proposal for more judicial activism by both panels and the Appellate Body which activism will see an expansion of the list of GATT Article XX exceptions to include issues like environment, human rights or cultural diversity.⁷¹ This study does not subscribe to this form of activism because to do so would be tantamount to being disappointed that a bakery does not sell meat – let the WTO panels and Appellate Body focus on their core business of interpretation and application of the WTO provisions while WTO

⁶⁷ Kofi Oteng Kessie, op cit note 19 at 120. The author argues that the only viable option for the developing country would be to ask for debt relief from its developed counterpart in lieu of retaliation.

⁶⁸ Edwini Kessie, op cit note 24 at 6.

⁶⁹ Quareshi, op cit note 63 at 313.

⁷⁰ See specifically Pauwelyn, op cit note 20 at 581-582 and the authorities cited therein.

⁷¹ Pauwelyn, op cit note 20 at 581.

members focus on negotiating and renegotiating WTO rules. It is further submitted that to renegotiate Article XX would be a frivolous and vexatious exercise because current WTO jurisprudence on trade and the environment is more than adequate to deal with environment-related trade disputes as they arise. The present writer is therefore inclined to agree with Pauwelyn that because of the wide diversity between WTO members and the consensus requirement for any change to occur (other than through case law), WTO members cannot and do not want to open the Pandora's box of renegotiating GATT exceptions.⁷²

To conclude this section of the study therefore, it is submitted that on the aspect of reforming WTO law, the trade and environment dilemma can be resolved by making the WTO dispute settlement more transparent and open to private parties other than governments, giving the remedies more legal teeth by providing for mandatory financial compensation and assisting developing members with their litigation costs and related resources. Article XX exceptions should remain as they are since their negotiation is out of question.



8.4.3 *Towards a Positive Transformation of the SADC*⁷³

The SADC as a region is indeed concerned with environmental issues as depicted by the number of protocols that refer directly or indirectly to environmental matters.⁷⁴ However, the SADC does not have a dispute settlement procedure that is specific to

⁷² Pauwelyn, op cit note 20 at 582.

⁷³ For detailed discussion of the SADC institutional history and its gradual evolution into a free trade area, see P.C Osode, "The Southern African Development Community in Legal Historical Perspective" (2003) 28 *Journal for Juridical Science* 1; SADC Secretariat, *The Official SADC trade Industry and Investment Review* (1997) at 5-9, Chinyamata Chipeta and Ibbo Mandaza "The future of the SADC" (1998) 11 *Southern African Political and Economic Monthly* 35; Richard Kamidza "Is SADC ready For Free Trade?" (2000) 14 *Southern African Political and Economic Monthly* 23; Sam Moyo, Phil O' Keefe and Michael Sill, *The Southern African Environment* (1993) at 28 -36; Carol Jenkins, Jonathan Leape and Lynne Thomas (eds) *Gaining from Trade in Southern Africa: Complementary Policies to Underpin the SADC free Trade Area* (2000) at 1-20; and Rosalind H. Thomas "The World Trade Organisation and Southern African Trade Relations" (1999) 3 *Law, Democracy and Development* 105 at 105-106.

⁷⁴ The notable protocols in this regard are Protocols on Shared Water Courses, Health, Forestry and Energy among others.

trade and environment disputes.⁷⁵ This study does not consider this absence of a trade and environment-specific dispute settlement procedure a serious handicap because trade and environment disputes can still be effectively handled in terms of a general dispute settlement mechanism as the WTO experience has proved.

The SADC has two main provisions on dispute settlement relevant to the trade and environment debate. Disputes relating to the interpretation and application of the SADC Treaty⁷⁶ and the SADC protocol⁷⁷ on trade are dealt with under different regimes. The heartening aspect of the SADC trade and environment regime is that the region does anticipate the proliferation of trade disputes hence its adoption of the dispute settlement procedures outlined below.

The SADC Dispute settlement mechanism is an ad hoc one. The Sector Coordinating unit is the SADC equivalent of the WTO's Dispute settlement Body (DSB).⁷⁸ Many of the provisions of the SADC dispute settlement mechanism (DSM) have been



⁷⁵ The NAFTA Chapter 11 dispute settlement regime on the other hand does have provisions for the settlement of international trade disputes in the context of the environment.

⁷⁶ The full text of the SADC Treaty is available at <http://www.sadc.int/index.php> [14 Nov 2005]. Article 16 of the Treaty deals with the settlement of disputes pertaining to the interpretation thereof. The Treaty makes provision for the establishment of a tribunal to adjudicate disputes.

⁷⁷ The full text of the SADC Protocol on trade and related documents are available at <http://www.sadcstan.co.za/Secure/downloads/protocol.pdf> [13 Nov 2005]. The Protocol on Trade for the Southern African Development Community (SADC) (the 'Trade Protocol') was concluded in August 1996 and entered into force on 25 January 2000. The implementation phase of the Protocol began on 1 September 2000. Article 32 of the Protocol deals with the settlement of international trade disputes. See Paul Kalenga, "Implementation of the SADC Trade Protocol" at <http://tralac.org/scripts/content.php?id=3045> [12 Nov 2005] in Mr Kalenga critically examines the SADC Trade Protocol and points out that both the design and the implementation of the SADC Trade Protocol suffers from critical weaknesses. The dispute settlement regime under the Protocol on trade is embodied in Annex VI which provides for a relatively rigorous dispute settlement mechanism (DSM) modelled after the WTO's Dispute Settlement Understanding (DSU). Annex VI is likely to become one of the crucial documents for SADC integration efforts because it adopts a rules-based dispute resolution system – rather than a 'soft' negotiation approach to solving trade disputes between members. See Jan Bohanes, "A Few Reflections on Annex VI to the SADC Trade Protocol" at <http://www.tralac.org/scripts/content.php?id=3781> [14 Nov 2005] (hereafter Bohanes).

⁷⁸ Snyman-Van Deventer, op cit note 31 at 125.

copied from the WTO Dispute Settlement Understanding (DSU).⁷⁹ This is not very positive because many of the provisions of the DSU may be capturing WTO realities that may not apply in the SADC context.⁸⁰ The SADC Dispute Settlement Mechanism (DSM) also copies WTO remedies such as suspension of concessions, retaliation and compensation as they are applied in WTO law.⁸¹ This again is not good enough for the region because it amounts to grafting ineffectual remedies onto the SADC DSM. This makes the SADC DSM as impotent as the WTO as far as remedies are concerned.⁸² On a positive note, the SADC DSM makes provision for forum shopping such that either of the disputants can opt to have its case heard by the WTO or a SADC panel.

So far, however, the implementation of Annex VI by SADC member states has been slow to get off the ground. No disputes have been filed yet. This state of affairs is most likely a result of the limited internal resources and experience of the SADC member countries in this respect.⁸³

In light of the foregoing, this study proposes the following. The SADC should start using its dispute settlement mechanism so that members have confidence in it. The fact that no dispute as yet has been brought before SADC panels does not mean that there are no disputes.⁸⁴ The SADC SDM should be modelled in such a manner that it

⁷⁹ Bohanes op cit note 83 at 4.

⁸⁰ Ibid. The GATT was formed in 1947 and the WTO established in 1995. The WTO is therefore quite an established institution which has evolved over negotiations and renegotiations of its rules. WTO rules also regulate nation states, at very varied stages of economic development spread over a greater geographical area. The SADC on the other hand is a grouping of developing states whose economies apart from that of South Africa are unsophisticated. We submit therefore that the copying of WTO DSU provisions as they are is not the best attempt at resolving international trade disputes especially environmentally related ones. The SADC DSM should be SADC-context specific.

⁸¹ Compensation and suspension of concessions are dealt with in Article 18 (1) of Annexure VI.

⁸² See the discussion of ineffectual WTO remedies and critical commentary thereon in paragraph 8.4.2.3 above.

⁸³ Bohanes, op cit note 83 at 1.

⁸⁴ See for example, T.C Gandidze, "Trade dispute between Zambia and Zimbabwe" at <http://www.tralac.org/scripts/content.php?id=649&print=1> [12 Nov 2005]. This dispute concerned an import ban imposed by Zambia on certain agricultural and building products from Zimbabwe in July

capitalises of the weaknesses of the WTO DSU and makes an improvement that is suitable for the region. It is suggested that it should have strong mandatory provisions on the payment of compensation to the injured party in the form of damages akin to those obtainable under the law of delict. Retaliation as a possible remedy should be done away with since it is unlikely that any of the least developed SADC members⁸⁵ would want to retaliate against their developed counterparts especially South Africa. It is also proposed that the SADC DSM should take a cue from NAFTA and give companies and individuals (through NGOs) the right to confront any government that seems to be violating its obligations in terms of the protocol. This would help to ensure that countries do not engage in trade activities with deleterious effects on the environment with impunity. It is presumed that this would contribute to resolving the trade and environment debate. This study also takes note of the presence of trade Law advisory centres like Tralac⁸⁶ and submits that their activities should be supported by SADC formally by giving them legal advisory status at the level of the sector coordinating unit.



8.5 Agenda for Future Research

In addition to the above proposals for the reform of WTO law in sympathy with the trade and environment debate in the context of an evolving SADC, this study recognises the need for a long-term research project (in the form of either a program or a flagship) on trade and the environment with particular reference to developing countries. It is therefore recommended that any meaningful research agenda on trade regulation and environmental governance in developing countries including the SADC should include the following pertinent issues: (1) The trade and environment debate and trade-related aspects of intellectual property rights; (2) The trade and environment debate in the context of eco-labelling; The trade and environment debate and genetically modified organisms (GMOs) in developing countries; (4) Market

2003. The ban followed complaints by Zambian manufacturers to their government that cheap imports from members of the Common Market for Eastern and Southern Africa (COMESA) especially Zimbabwe, were flooding the Zambian market and threatening the survival of Zambian local industry.

⁸⁵ According to Bohanes, op cit 89 at 2, the least developed SADC members are Angola, Lesotho, Malawi, Mozambique, Swaziland, Tanzania and Zambia.

⁸⁶ Tralac is an acronym for Trade Law Centre for Southern Africa. For a full note on Tralac activities and current research in progress, visit their website at <http://www.tralac.org> [10 Oct 2005].

access and competitive aspects of the trade and environment debate; and (5) Trade in services and its impact on the trade and environment debate.

8.6 Chapter Summary

It is appropriate to conclude this chapter with a summary of its highlights. This chapter concluded that the trade and environment debate is very much alive in the WTO and has spread its tentacles to regional trade groupings such as the NAFTA and SADC. The debate's salient aspects are also mirrored in the division of the globe into North and South.

With respect to recommendations, in an attempt to resolve the trade and environment debate in general, the study recommended that a Global Organisation dealing purely with international environmental measures be established. It discussed the merits and demerits of such a proposal. Secondly it was recommended that unilateralism in trade and environment matters manifesting itself as trade bans and other sanctions against imports from WTO member states on the part of developed countries should be replaced by multilateralism. Thirdly and finally, it was recommended that consumer choices and preferences be used to judge whether the import of a particular commodity should be banned on the basis of protecting human health.

On WTO law and whether it needs to be reformed in the interest of the trade and environment debate, the study first recommended that the WTO dispute settlement regime should be made more transparent to accommodate the participation and needs of private parties other than governments. This should be done in tandem with giving legal assistance to developing countries as litigation costs at the WTO level can be exorbitant. It was also recommended that the WTO remedies be realigned to give them the legal teeth that will make them not just remedies but real remedies that can give appropriate relief to aggrieved WTO member states. The recommendations on the reform of WTO law were brought to an end with a commentary in the form of a cautionary statement on the usually touted proposition that Article XX exceptions be renegotiated. The study vehemently resists such moves since the general feeling is that the WTO panels and Appellate Body are doing a great trade and environment job under the prevailing regime notwithstanding documented weaknesses of the system.

Finally, with respect to the SADC, the study first recommended that the dispute settlement regime should be a critical and intelligent copying from the WTO provisions rather than a mere verbatim copying for copying's sake. It was proposed that a dispute settlement regime that reflects the peculiar geographical, social, political and economic realities of Southern Africa be established. Second, it was recommended that SADC learn from NAFTA Chapter 11 theory and practice and make the dispute settlement regime available to citizens and companies. Finally, on the aspect of remedies, the study proposed that remedies be refashioned in such a manner that mandatory compensation be provided for.



University of Fort Hare
Together in Excellence

BIBLIOGRAPHY OF WORKS CITED

Adhikari R. and Athukorala P.C “Developing Countries in The World Trading System: An overview” in Adhikari R. and Athukorala P.C (Eds) *Developing Countries in the World Trading System: The Uruguay round and beyond* (2002), Cheltenham: Edward Elgar Publishing Limited.

Ahn D, “Environmental Disputes in the GATT/WTO: Before and after US-Shrimp Case” (1999) 20 *Michigan Journal of International Law* 819.

Appleton A.E, “Shrimp/turtle: Untangling the Nets” (1999) 2 *Journal of International Economic Law* 477.

Athukorala P.C and Jayasuriya S, “Food Safety Issues, Trade and WTO Rules: A developing Country Perspective” (2003) 26 *The World Economy* 1395.

Bartels L, “Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The case of Trade Measures for the Protection of Human Rights” (2002) 36 *Journal of World Trade* 353.

Bastiat F, *Economic Sophisms* (1996), New York: Foundation for Economic Education.

Berger J.R, “Unilateral Measures to Conserve the World’s Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case” (1999) 24 *Columbia Journal of Environmental Law* 355.

Bermann G.A and Mavroidis P.C (eds) *Trade and Health in the World Trade Organisation*, forthcoming in January 2006, Cambridge: Cambridge University Press.

Bernazani J.A, “The Eagle, the Turtle, the Shrimp and the WTO: Implications for the Future of Environmental Trade Measures” (2000) *Connecticut Journal of International Law* 207.

Bghin J and Potier M, "The Effects of Trade Liberalisation on the Environment in the Manufacturing Sector" (1997) 20 *The World Economy* 435.

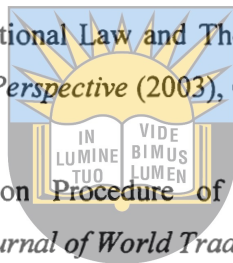
Bhagwati J.N, *Free Trade Today* (2002), Princeton: Princeton University Press

Bialos J.P and Siegel D.E, "Dispute Resolution under the NAFTA: the Newer and Improved Model (1993) 27 *International Law Journal* 603.

Biermann F, "The Rising Tide of Green Unilateralism in World Trade Law – Options for Reconciling the Emerging North – South Conflict" (2001) 35 *Journal of World Trade* 421.

Birnie P.W and Boyle A.E "International Law and The Environment" in Dugard J, *International Law: A South African Perspective* (2003), Cape Town: Juta.

Bogdandy A.V, "The Non-violation Procedure of Article XXIII, GATT: Its Operational Rationale" (1992) 26 *Journal of World Trade* 95.



University of Fort Hare

Bohanes J, "A Few Reflections on Annex VI to the SADC Trade Protocol" at <http://www.tralac.org/scripts/content.php?id=3781>.

Brack D., "Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System" in Chambers W.B (ed) *Trade, Environment, and the Millennium* (2002), Tokyo: United Nations University Press.

Brownlie I, *Principles of Public International law* (1998), Oxford: Oxford University Press.

Buckley R, "Trade and Environment: Will NAFTA Improve on GATT?" (1992) 22 *Environmental Policy and Law* 327.

Busch M.L and Howse R. "A (genetically modified) Food Fight: Canada's WTO Challenge to Europe's Ban on Genetically Modified Products" (2003) 186 *C.D Howe Institute Commentary* 1.

Busch M.L and Reinhardt E, “Developing countries and General Agreement on Tariffs and Trade/World Trade Organisation Dispute Settlement” (2003) 37 *Journal of World Trade* 719.

Castleman B, ScD “The WTO Asbestos Case and Its Health and Trade Implications” at http://www.btinternet.com/~ibas/bc_wto_seattle.htm .

Charnovitz S, “Improving the Agreement on Sanitary and Phytosanitary Standards” in Samson G.P and Chambers W.B (eds) *Trade, Environment and the Millennium* (2002), Tokyo: United Nations University Press.

Charnovitz S, “Rethinking WTO Trade Sanctions” (2001) 95 *American Journal of International Law* 792.

Charnovitz S, “The Supervision of Health and Biosafety Regulation by World Trade Rules” in Gallagher K and Werksman J (eds) *International Trade and Sustainable Development* (2002), London: Earthscan Publications Limited.

Charnovitz S, “The World Trade Organisation and Environmental Supervision” (1994) *International Environment Reporter* 89.

Cheyne I, “Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles” (2000) 12 *Journal of Environmental Law* 293.

Chipeta C and Mandaza I “The future of the SADC” (1998) 11 *Southern African Political and Economic Monthly* 35.

Cohen J.C, “Commentary on EC-Asbestos” at www.utoronto.ca/ai/canada-korea/papers/JillianCohenpaper12.doc .

Cole M.A and Elliot R.J.R, “Do Environmental Regulations Influence Trade Patterns? Testing Old and New Trade Theories” (2003) 26 *The World Economy* 1163.

Cole M.A, "Examining the Environmental Case against Free Trade" (1999) 33 *Journal of World Trade* 183.

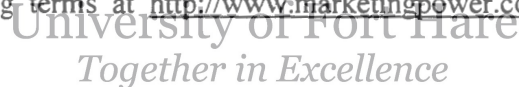
Cone S.M, "The *Asbestos* Case and Dispute Settlement in the World Trade Organisation: The Uneasy Relationship between Panels and Appellate Body" (2001) 23 *Michigan Journal of International Law* 103.

Davey W.J, "Dispute Settlement in GATT" (1987) 11 *Fordham International Law Journal* 51.

Dean J.M, "Testing the impact of trade liberalization on the environment: Theory and evidence" in G. Fredriksson (ed) *Trade, Global policy and the environment* World Bank discussion paper no.402 ((1999), Washington D.C: World Bank Publications.

Deere C.L, and Esty D.C, (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (2002), Cambridge: MIT Press.

Dictionary of Marketing terms at <http://www.marketingpower.com/mg-dictionary-view4047.php> .



Dixon M and McCorquodale R, *Cases and Materials on International Law* (1991), London: Blackstone Press.

Dubey A, "The Rule of Exhaustion of Local Remedies in International Law" at <http://www.indlaw.com/publicdata/articles/article89.pdf> .

Dugard J, *International Law: A South African Perspective* (2003), Cape Town: Juta

Editorial, *Washington Post* newspaper, 'Sabotage! of America's health, food safety and environmental laws' December 14 1992 at A20.

Esty D.C and Ivanova M.H, "Making International Environmental Efforts work: The Case for a Global Environmental Organisation" at <http://www.earthscape.org/r1/hdg01/ivm01.pdf> .

Evans P. and Walsh J, *The EIU Guide to World Trade under the WTO* (1995), London: The Economist Intelligence Unit Limited.

Ferrantino M.J, “International Trade, Environment Quality and Public Policy” (1997) 20 *The World Economy* 43.

Footer M.E, “Developing Country Practice in the WTO Dispute Settlement” (2001) 35 *Journal of World Trade* 55.

Fredrickson G (ed) *Trade, Global policy and the environment, World Bank discussion paper no.402* (1999), Washington D.C: World Bank Publications.

Gandidze T.C, “Trade dispute between Zambia and Zimbabwe” at <http://www.tralac.org/scripts/content.php?id=649&print=1> .

Garten J.E, “The Changing Face of North America in the Global Economy” (1995) 1 *NAFTA: Law and Business Review of the Americas* 5 at 28.

University of Fort Hare

Global Policy Forum, “The WTO’s Fifth Ministerial Conference, Cancun, Mexico, September 10 to 14, 2003” at <http://www.globalpolicy.org/soecon/bwi-wto/idxcancun.htm> .

Globerman S and Walker M (eds), *Assessing NAFTA: A Trinational Analysis* (1993), Vancouver: Fraser Institute.

Goh G and Ziegler A.R, “A Real World Where People Live and Work and Die – Australian SPS Measures after the WTO Appellate Body Decision in the Hormones Case” (1998) 32 *Journal of World Trade* 271.

Gruben W.C, “Clean Dynamics, Dirty Dynamics, and the Economics of NAFTA” (1995) 1 *NAFTA: Law and Business Review of the Americas* 103.

Gutto S.B “Environmental law rights”, in Chaskalson et al *Constitutional Law of South Africa* (1996), Kenwyn: Juta.

Hernandez-Lopez E, “Recent Trends and Perspectives for Non-State Actor participation in WTO Disputes” (2001) 35 *Journal of World Trade* 469.

Hiskanen V, “The Regulatory Philosophy of International Trade Law” (2004) 38 *Journal of World Trade* 1.

Hoekman B.M, *Trade Laws and Institutions: Good Practices and the World Trade Organisation, World Bank Discussion Paper number 282* (1995) Washington D.C: World Bank Publications.

Howse R, “Human Rights in the WTO: What Rights, what humanity? Comment on Petersmann” (2002) 13 *European Journal of International Law* 1.

Howse R, “The Appellate Body Rulings in the *Shrimp-Turtle* Case: A new Legal Baseline for the Trade and Environment Debate” (2002) 27 *Columbia Journal of Environmental Law* 489.



Howse R. and Elizabeth Turk “WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute” in de Búrca G. and Scott J. (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001), London: Hart Publishing.

Howse R. and Trebilcock M.J, “The Free Trade – Fair Trade Debate: Trade, Labour and the Environment” in Bhandari J.S and Sykes A.O, *Economic Dimensions in International Law* (1997), Cambridge: Cambridge University Press.

Howse R. and Turk E, “The WTO Impact on International Regulations – a case study of the Canada *EC-Asbestos* dispute” forthcoming in Bermann G.A and Mavroidis P.C (eds) *Trade and Health in the World Trade Organisation* (2006) Cambridge: Cambridge University Press.

Howse R., “The Turtles Panel-Another Environmental Disaster in Geneva” (1998) 32 (5) *Journal of World Trade* 73.

Hughes D. et al, *Environmental Law* (2002), London: Butterworths Lexis Nexis.

Hurrell A, "Brazil and the International Politics of Amazonian Deforestation" in Hurrell A and Kingsbury B (eds) *The International Politics of the Environment* (1991), Oxford: Clarendon Press.

Inama S, "Markert Access for LDCs – Issues to be Addressed" (2002) 36 *Journal of World Trade* 85.

International Institute for Sustainable Development (IISD), "A Backgrounder on the Controversial Case under NAFTA's Chapter 11, and on IISD's Involvement" at http://www.iisd.org/investment/methanex_bacground.asp .

Irwin D.A, "A Brief History of International Trade Policy" at <http://www.econlib.org/library/Columns/Irwintrade.html> .

Jackson J.H, "Comments on Shrimp/Turtle and the Product/Process Distinction" (2000) 11 *European Journal of International Law* 303.

Jaura R, "Mixed Feelings about the Debacle" at <http://www.globalpolicy.org/socecon/bwi-wto/wto/2003/0915mixedfeelings.htm> .

Jenkins C, Leape J and Thomas L (eds) *Gaining from Trade in Southern Africa: Complementary Policies to Underpin the SADC free Trade Area* (2000), Basingstoke: Macmillan.

Jha V and Vossenaar R, "Breaking the Deadlock: A Positive Agenda on Trade, Environment, and Development?" in Sampson G.P and Chambers W.D (eds) *Trade, Environment and the Millennium* (2002), Tokyo: United Nations University Press.

Jha V and Vossenaar R, "Key Trade and Environment Issues: Problems and Possible Solutions" in Sampson G.P and W. Chambers W.B (eds) *Trade, Environment, and the Millennium* (2002), Tokyo: United Nations University Press.

Kalenga P, "Implementation of the SADC Trade Protocol" at <http://tralac.org/scripts/content.php?id=3045>

Kennedy K, "The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes" (1998) 22 *William and Mary Environmental Law and Policy Review* 375.

Kessie E, "Enhancing Security and Predictability for Business Operators under the Dispute Settlement System of the WTO" (2000) 34 *Journal of World Trade* 1.

Kidd M, *Environmental Law: A South African Guide* (1997), Cape Town: Juta.

Kirton J.J "Trade, global policy and the environment" in Kirton J.J and McLaren V.W (eds) *Linking trade, environment and social cohesion: NAFTA experiences, global challenges* (2002), Burlington: Ashgate Publishing Limited.

Kirton J.J and McLaren V.W (eds) *forging the trade-environment-social cohesion link: Global challenges NAFTA experiences* (2002, Burlington: Ashgate Publishing Limited.

Kirton J.J and McLaren V.W, "Forging the trade-environment-social cohesion link: Global challenges NAFTA experiences" in Kirton J.J and McLaren V.W (eds) *Linking Trade, Environment and Social Cohesion* (2002), Burlington: Ashgate Publishing Limited.

Kirton J.J, "Winning together: The NAFTA trade-environment record" in Kirton J.J and Virginia McLaren V.W (eds) *Linking Trade, Environment and Social Cohesion: NAFTA experiences, Global challenges* (2002), Burlington: Ashgate Publishing Limited.

Kufour K.O, "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes" (1997) 31 *Journal of World Trade* 117.

Kuruvilla P.E, “Developing Countries and the GATT/WTO Dispute Settlement Mechanism” (1997) 31 *Journal of World Trade* 171.

Lal Das B, *The World Trade Organisation: A Guide to the Framework for International trade* (1999), London: Zed Books.

Lang T and Hines C, *The New Protectionism: Protecting the Future Against Free Trade* (1993), London: Earthscan Publications.

Layton D.W and Miranda G, “Advocacy before WTO Dispute Settlement Panels in Trade remedy Cases” (2003) 37 *Journal of World Trade* 69.

Lipsey R. and Harbury C, *First Principles of Economics* (1992), London: Weidenfeld and Nicolson.



Locknie H, “Non-violation Complaints: World Trade Organisation Issues and Recent Trade Agreements” (2005) 39 *Journal of World Trade* 205-237.

University of Fort Hare
Together in Excellence

Loppacher L.J and Kerr W.A “The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America” (2005) 39 *Journal of World Trade* 427.

Lottier T. and Schefer K.N, “Non-Violation in WTO/GATT Dispute Settlement: Past, Present and Future” in Lottier T and Schefer K.N (eds) *International Trade Law and The GATT/WTO Dispute Settlement System* (1997), Boston: Kluwer Law International.

Ludwiseski R.B, “‘Green’ Language in the NAFTA: Reconciling Free Trade and Environmental Protection” (1993) 27 *The International Lawyer* 691.

Macmillan F, *WTO and the Environment* (2001), London: Sweet and Maxwell

Malanczuk P, *Akehurst's Modern Introduction to International Law* (1996), London: Routledge.

Mansoob-Murshed S, "The Environment and the North-South interaction" in Mansoob-Murshed S and Raffer K, *Trade, transfers and Development: Problems and Prospects for the Twenty-First Century* (1993), Aldershot: Elgar.

Marceau G and Trachtman J.P, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World trade Organisation Law of Domestic Regulation of Goods" (2002) 36 *Journal of World Trade* 811.

Marceau G, "NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison" (1997) 31 *Journal of World Trade* 2.

Marceau G, "The Relationship Between the WTO Agreement and MEAs and other Treaties" (2001) 35 *Journal of World Trade* 1100.

Marceau G. and Pedersen P.N, "Is the WTO Open and Transparent? A Discussion of the WTO with Non Governmental Organisations and Civil Society's Claims for More Transparency and Public Participation" (1999) 33 *Journal of World Trade* 5.



Mattoo A and Mavroidis P.C, "Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT" in Petersmann E.U (ed) *International trade Law and the GATT/WTO Dispute Settlement System* (1997), Boston: Kluwer Law International.

Mavroidis P.C, "Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?" (1998) 32 *Journal of World Trade* 147.

Mavroidis P.C, "Trade and the environment after the *Shrimps-Turtles* litigation" (2000) 34 (1) *Journal of World Trade* 73.

Michaels P, "An introduction to trade and the environment" at www.greenature.com/article447 .

Mota S.A, "The World Trade Organisation: An Analysis of Disputes" (1999) 25 *North Carolina Journal of International Law and Commercial Regulation* 75.

Motaal D.A, "Is the World Trade Organisation Anti-precaution?" (2005) 39 *Journal of World Trade* 487 .

Motaal D.A, "Multilateral Environmental Agreements (MEAs) and the WTO: Why the Burden of Accommodation Should Shift to MEAs" (2000) 35 *Journal of World Trade* 1215.

Moyer H.E, "Chapter 19 of the NAFTA: Binational Panels as the Courts of Last Resort" (1993) 27 *The International Lawyer* 707.

Moyo S, O' Keefe P and Sill M, *The Southern African Environment: Profiles of the SADC Countries* (1993), London: Earthscan Publications.



Mukerji A, "Developing Countries and the WTO – Issues of Implementation" (2000) 34 *Journal of World Trade* 33.

University of Fort Hare
Together in Excellence

Mutizwa R, "Asbestos Industry: 10 000 Jobs on the Line" *The Financial Gazette* online at www.fingaz.co.zw/story.aspx?stid=238 .

Naidu B. and Keeton C, "New Law will Ban Puffing in More Public Places and Hurt Tobacco Firms" *Sunday Times*, 11 December 2005 at 1.

Neumann J, "Necessity Revisited – Proportionality in WTO law after Korea Beef, EC-Asbestos and EC-Sardines (2003) 37 *Journal of World Trade* 199.

Neumayer E, "Does Trade Openness Promote Multilateral Environmental Cooperation?" (2002) 25 *The World Economy* 815.

Nogales F.S, "The NAFTA Environmental Framework, chapter 11 investment provisions and the environment" (2002) *Annual Survey of International Comparative Law* at 2.

Nogueira G, "The first WTO Appellate Body Review: United States-Standards for Reformulated and Conventional Gasoline" (1996) 30 (6) *Journal of World Trade* 5.

Okonmah P.D, "The right to a clean environment: The case for the People of Oil-Producing Communities in the Nigerian Delta" (1997) 41 *Journal of African Law* 43 at 60.

Olivares G, "The Case for Giving effectiveness to GATT/WTO Rules on Developing Countries and LDCs" (2001) 35 *Journal of World Trade* 545.

Ortino F, "From Non-Discrimination to 'Reasonableness': A Paradigm Shift in International Economic Law" at <http://www.jeanmonnetprogram.org/papers/05/050101.pdf>.

Osode P.C, "The Southern African Development Community in Legal Historical Perspective" (2003) 28 *Journal for Juridical Science* 1.

Pauwelyn J, "Cross Agreement Complaints before the Appellate Body: A Case Study of the *EC-Asbestos* Dispute" (2002) 1 *World Trade Review* 63.

Pauwelyn J, "Recent Books on Trade and the Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *European Journal of International Law* 575.

Pauwelyn J, "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as applied in the first Three SPS Disputes" (1999) 2 *Journal of International Economic Law* 641.

Pescatore P, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects" (1993) 27 *Journal of World Trade* 5.

Petersmann E.U, *The GATT WTO Dispute Settlement System: International Law, International Organisations, and Dispute Settlement* (1995), London: Kluwer Law International.

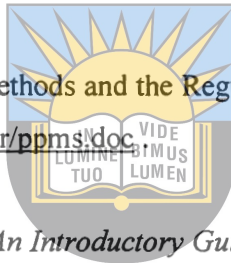
Petersmann E.U, *WTO (1995) Guide to GATT Law and Practice*, London: Kluwer Law International.

Puls B, "The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy" (1999) 8 *Minnesota Journal of Global Trade* 343.

Quareshi A.H, *International Economic Law* (1999), London: Sweet and Maxwell.

Quintillan S.P, "Free Trade, Public Health Protection and Consumer Information in the European and WTO Context-Hormone-treated Beef and Genetically Modified Organisms" (1999) 33 (6) *Journal of World Trade* 147.

Read R, "Process and Production Methods and the Regulation of International Trade" at <http://www.lancs.ac.uk/staff/ecarar/ppms.doc>



Reid D, *Sustainable Development: An Introductory Guide* (1995), London: Earthscan Publications Ltd.

University of Fort Hare
Together in Excellence

Rugman A.M, Kirton J. and Soloway J, "NAFTA, Environmental Regulations and Canadian Competitiveness" (1997) 31 *Journal of World Trade* 129.

Runge C.F, "A Global Environmental Organisation (GEO) and the World Trading System" (1999) 35 *Journal of World Trade* 400.

Runge C.F, "Economic Trade and Environment Protection", paper prepared for the conference on environmental policy with economic and political integration: The European community and The United States, September 30-1 October 1993, University of Illinois at Urbana-Champaign.

SABC News, "Controversial Pesticide DDT under the Spotlight", 17 March 2004 at http://www.sabcnews.com/south_africa/general/0,2172,76041,00.html .

SABC News, "WTO Under Pressure to Include Fair Trade Deal", 12 December 2005 at <http://www.sabcnews.com/world/asia1pacific/0.2172,117899,00.html> .

SADC Secretariat, *The Official SADC Trade Industry and Investment Review* (1997) Gaborone: Southern African Marketing Company (Pty) Ltd.

Salkin J.S, Mpabanga D, Cowan D and Selwe J (eds) *Aspects of the Botswana Economy: Selected Papers* (1998), Oxford: James Currey Publishers.

Sands P, "Unilateralism, Values and International Law" (2000) 11 *European Journal of International Law* 507.

Sands P, *Principles of International Environmental Law* (2004), Cambridge: Cambridge University Press.

Saunders O.J, "NAFTA and the North American Agreement on Environment Cooperation: A New Model for International Collaboration on Trade and the Environment" (1994) 5 *Columbian Journal of International Environmental Law and Policy* 273.



University of Fort Hare
Together in Excellence

Schoenbaum T.J, "Free International Trade and Protection of the Environment: Irreconcilable Conflict?" (1992) 86 *American Journal of International Law* 700-727.

Schoenbaum T.J, "International Trade and the Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91 *American Journal of International Law* 268.

Scholtz W, "Cooperative approaches to Environmental Governance" at http://www.fu-berlin.de.ffu.akumwelt/bc2004/download/scholtz_f.pdf .

Scholtz W, "The Relationship Between the Environment and Trade in the WTO: Prolonging the Conflict Between North and South?" (2004) 18 *Speculum Juris* 250.

Scott J, "International Trade and Environmental Governance: Relating Rules and Standards in the EU and WTO" (2004) 15 *European Journal of International Law* 307.

Shahin M, "Trade and the Environment: How Real is the Debate?" in Sampson G.P and Chambers W.B (eds) *Trade, Environment and the Millennium* (2002), Tokyo: United Nations University Press.

Shearer I.A, *Starke's International Law* (1994), London: Butterworths.

Shin Y, "An analysis of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and its Implementation in Korea" (1998) 32 *Journal of World Trade* 85.

Simmons B, "In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report" (1999) *Columbia Journal of Environmental Law* 413.

Smith et al *Economics: A South African Perspective* (1996), Kenwyn : Juta.

Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1952), Chicago: Encyclopaedia Britannica.

Snyman-Van Deventer E, "Dispute Resolution in NAFTA and the WTO: A Useful Guide for SADC?" (2003) 28 *Journal for Juridical Science* 112.

Soloway J, "Environmental expropriation under NAFTA Chapter 11: The Phantom menace" in Kirton J.J and Maclaren V.W (eds) *Linking Trade, Environment and Social Cohesion: NAFTA experiences, Global challenges* (2002), Burlington: Ashgate Publishing Limited.

Sonjela A.M "Developing countries' perceptions of environmental protection and economic development (1984) 24 *Indian Journal of International law* 489 at 493.

Spamann H., "Standard of Review for World Trade Organisation Panels in Trade Remedy cases: A critical analysis" (2004) 38 *Journal of World Trade* 509.

Srinivasan T.N, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (1998), Oxford: Westview Press.

Steger D.P, "Appellate Body Jurisprudence Relating to Trade Remedies" (2001) 35 *Journal of World Trade* 799.

Stewart R.B "The NAFTA: Trade Competition and environmental protection" (1993) 27 *The International Lawyer* 751.

SUNS-South-North Development Monitor, "Ethyl v Canada or Investor v State" at <http://www.sunsonline.org/trade/areas/environm/06030297.htm> .

The Herald online, "ZCTU Campaigns for a World Wide Ban on Asbestos Use" at <http://www.zimbabweherald.com/index.php?id=44139&pubdate=2005-06-08> .

University of Fort Hare
Together in Excellence

Thomas R.H "The World Trade Organisation and Southern African Trade Relations" (1999) 3 *Law, Democracy and Development* 105 at 105.

Timoshenko A (ed), *Dispute Avoidance and Dispute Settlement in International Environmental Law* (2001), Nairobi: United Nations Environment Programme.

Trachtman J.P "United States-Import prohibition of certain shrimp and shrimp products" at <http://www.ejil.org/journal/VOL10/NO1/sr4.html> .

Trachtman J.P, "European Communities-Measures Affecting Asbestos and Asbestos-Containing Products" at <http://www.ejil.org/journal/curdevs/sr13.html>.

Trachtman J.P, "The Domain of WTO Dispute Resolution" (1999) 40 *Harvard International Law Journal* 333.

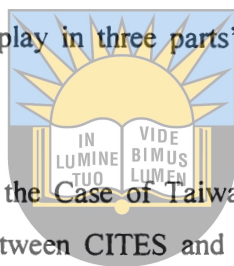
Unteroberdoerster O, "Trade Policy and Environmental Regulation in the Asia – Pacific: A Simulation" (2003) 26 *The World Economy* 73.

Virtual Zambia, a website that has a glossary of international economic law terms, at <http://www.bized.ac.uk/virtual/dc/resource/glos6.htm> .

Wainio J, Young L.M and Meilke K, "Trade Remedy Actions in NAFTA: Agriculture and Agri-Food Industries" (2003) 26 *The World Economy* 1041.

Wallace R.M.M, *International Law: A Student Introduction* (1986), London: Sweet & Maxwell.

Weiler J, 'Metalclad v Mexico: A play in three parts', (2001) 2 *Journal of World Investment* 60.



Wen-Chen S, "Multilateralism and the Case of Taiwan in the Trade Environment Nexus – The Potential Conflict Between CITES and the GATT/WTO" (1996) 30 *Journal of World Trade* 109.

University of Fort Hare
Together in Excellence

Wirth D.A, "The Role of Science in the Uruguay Round and NAFTA Trade Disciplines" (1994) 27 *Cornell International Law Journal* 817.

Wisthoff-Ito R.M, "The United States and Shrimp Import Prohibitions: Refusing to Surrender the American Goliath Role in Conservation" (1999) 23 *Maryland Journal of International Law and Trade* 247.

WTO Geneva, *Guide to WTO Law and Practice Vol 1 Articles I-XXI* (1995), Geneva: WTO Publications.

WTO, 'India etc versus U.S: Shrimp-Turtle' at http://www.wto.org/english/tratop/e/edis08_e.htm .

WTO, "Dispute Settlement Commentary: Appellate Body Report European Communities – Measures Affecting Asbestos and Asbestos Containing Products" at [http://www.worldtradelaw.net/dscsamples/ec-asbestos\(dsc\)\(ab\)\(sample\).pdf](http://www.worldtradelaw.net/dscsamples/ec-asbestos(dsc)(ab)(sample).pdf) .

WTO, "GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) and (g) WT/CTE/W/203 8 March 2002" at <http://www.docsonline.wto.org/ddfdocuments/t/wt/ict/w203.doc>.

WTO, "Trade and environment Backgrounder-Brief History-GATT 1994" at http://www.wto.org/english/tratop_e/envir_e/envir_background_e/c7s3_e.htm .

WTO, "Trade and Investment: Negotiate or continue to study?" at http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief12_e.htm .

WTO, "Understanding the WTO Settling Disputes", at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#understandin .

WTO, ENVIRONMENT HISTORY 1 AND 2, WTO website at www.wto.org/English/tratop_e/envir_e/hist1_e.htm

WTO, Environment: History 1 at http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm

WTO, United States-Shrimp' at <http://www.docsonline.wto.org/ddfdocuments/t/wt/cte/w203.doc> .

Table of Cases

GATT and WTO Case Law

Australia – Measures Affecting the Importation of Salmon, Report of the Panel, WT/DS18; modified by the Appellate Body, AB-1998-5, 20 October 1998.

Canada – Certain Measures Concerning Periodicals, Appellate Body and Panel Report, adopted 30 July 1997, WTDS31/AB/R.

Canada-Measures affecting exports of unprocessed Herring and Salmon adopted 22 March 1988, BISD 35S/98.

Canada-Measures affecting exports of unprocessed herring and salmon, L/6268 - 35S/98, report of the panel adopted 22 March 1988.



Chile-Measures affecting the transit and importation of swordfish, Request for the establishment of a panel by the European Communities WTO documents WT/DS193/2 (Nov 2000).

EC-Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R/WT/DS48/AB/R, 16 January 1998.

EC-Banana case (1996 to 2000), www.ejil.org/journal/Vol9/No1/sr1e.rtf .

EC-Measures Concerning Meat and Meat products (Hormones) Complaint by Canada, panel report, 18 August 1997, WT/DS48/R/CAN.

EC-Measures Concerning Meat and Meat products (Hormones) Complaint by the United States, report of the panel, 18 August 1997, WT/DS26/R/USA .

EEC-Refunds on Exports of Sugar BISD 26S/290,291.

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body and Panel report, adopted on 5 April 2001, WT/DS135.

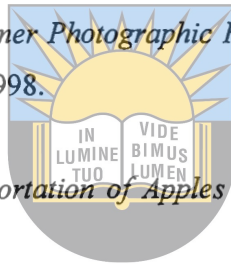
European Communities- Trade Description of Sardines, WT/DS231/AB/R, panel and Appellate Body report, adopted 26 September 2002.

European Communities-Measures Affecting Asbestos and Asbestos containing Products Appellate Body and panel report, adopted on 5 April 2001, WT/DS135).

Japan – Measures Affecting Agricultural Products WT/DS76/R and WT/DS/AB/R, 19 March 1999.

Japan – Measures Affecting Consumer Photographic Film and Paper, Panel Report, WT/DS44/R, circulated 20 March 1998.

Japan-Measures Affecting the Importation of Apples WT/DS245/AB/R, November 2003.



University of Fort Hare

Korea – Measures Affecting Government Procurement, Panel Report, Circulated on 1 May 2000, WT/DS163/R.

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, AB-2000-8 WT/DS161, 169/AB/R (00-5347).

Panel on EEC-Payment and Subsidies Paid to Processors and Producers of Oil Seeds BISS 37S/86,130.

Panel on the Treatment by Germany of Imports of Sardines BISS 1S/53, 58

Panel on US -Taxes on Petroleum and Certain Imported Substances [BISS 345/157,158.

Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISS 37S/200.

United States — Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996 available at <http://www.ejil.org/journal/Vol9/No1/sr1a.html> [11 November 2004].

United States – Taxes on Automobiles, circulated on 11 October 1994, not adopted, DS31/R.

United States- Prohibition of Imports of Tuna and Tuna Products from Canada, adopted 22 February 1982, BISD 29S/91.

United States- Restrictions on Imports of Tuna circulated on 3 September 1991, unadopted, DS 21.

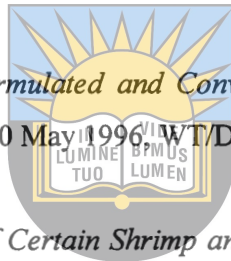
United States- Standards for Reformulated and Conventional Gasoline, Appellate Body and panel report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

United States-Import Prohibition of Certain Shrimp and Shrimp products, Appellate Body and panel report, adopted on 6 November 1998, WT/DS58.

United States-Prohibition of imports of Tuna and Tuna Products from Canada adopted on 22 February 1982, BISD 29S/91.

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

United States-Restrictions on Imports of Tuna, circulated on 3 September 1991, not adopted, DS 21/R.



University of Fort Hare
Together in Excellence

NAFTA Case Law

Ethyl Corporation v Canada Statement of claim at <http://www.dfait-maeci.gc.ca/tna-nac/documents.ethy13.pdf>

Metalclad v United Mexican States, 2000 at www.peacelaw.com/metalclad.html

Methanex v The United States of America at http://www.iisd.org/investment/methanex_background.asp

Pope and Talbot v Canada at <http://www.state.gov/documents/organisation/407.pdf> .

S.D Myers Inc v Canada, *Partial award* 13 November 2000 at <http://www.state.gov/s/l/c3746.htm> .



University of Fort Hare
Together in Excellence

Table of Statutes

Statutes: Southern Africa

Environment Protection Act No. 19, 2002 of Mauritius.

Environmental Management Act 13, 2002 of Zimbabwe.

Environmental Management Act No. 5, 2002 of Swaziland.

National Environment Act 2001 of Lesotho.

National Environment Management Act No. 107, 1998 of South Africa.

Tobacco Products Control Amendment Bill, South Africa at
<http://www.doh.gov.za/docs/bills/tpcab.pdf>.



Statutes: United States

University of Fort Hare
Together in Excellence

Appropriations Act of 1990, Pub.L.101-162 § 609, 103 Stat. 988, 1037-38 (Codified as Endangered Species Act), 16 U.S.C § 1537 (1994)

Clean Air Amendment Act of 1990, 42 U.S.C, 7545 9 (k) (1994).

Dolphin Protection Consumer Information Act 16 U.S.C. 1361 – 1370,

Marine Mammal Protection Act of 1972

Pelly Amendment Act 22 USC §§ 1971-1979.

Public Law 101-627, November 28, 1990 (104 Stat. 4465)

List of Conventions and International Instruments

African Charter on Human and Peoples Rights, OAU Doc.CAB/LEG/67/3/Rev.5, adopted on 17 June 1981, at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> .

Agreement on Technical Barriers to Trade at <http://www.wto.org/english/ressc/analyticindexe/tbt01e.htm#articleB1> .

Agreement on the Application of Sanitary and Phytosanitary Measures at <http://www.jurisint.org/pub/06/en/doc/14.htm>

Basel Convention on the control of Transboundary Movements of Hazardous Wastes and their Disposal (1999), at <http://www.basel.int/text/con-e.htm> .

Convention on Biological Diversity (1992), <http://www.biodiv.org/default.shtml> .

Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish stocks (1995), 34 ILM 1542, at http://www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm .

Convention on the Law of the Non-Navigational Uses of international watercourses, (1997) 36 ILM 700, at <http://www.un.org/law/ilc/texts/nonnav.htm> .

Declaration of The United Nations Conference on the Human Environment, ('972) at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503> .

Framework Convention on Tobacco Control (2005) at <http://www.who.int/tobacco/framework/en/> .

General Agreement on Tariffs and Trade (1947 and 1994) at www.wto.org/english/docs_e/legal_e/legal_e.htm - 82k .

Helsinki Rules on the Uses of the Waters of International Rivers (1966), at http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm .

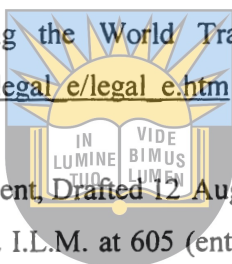
International Convention for the Regulation of Whaling, (1956) at <http://sedac.ciesin.org/entri/texts/intl.regulation.of.whaling.1946.html> .

International Tropical Timber Agreement (1994) at <http://sedac.ciesin.columbia.edu/entri/texts/ITTA.1994.txt.html> .

Kyoto Protocol to the United Nations Framework Convention on climate change at <http://unfccc.int/resource/docs/convkp/kpeng.html> .

Marrakesh Agreement Establishing the World Trade Organization (1994), at http://www.wto.org/english/docs_e/legal_e/legal_e.htm .

North American Free Trade Agreement, Drafted 12 August 1992, revisited 6 September 1992, U.S-Can-Mex., 32 I.L.M. at 605 (entered into force Jan.1, 1994, at <http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp>



University of Fort Hare
Together in Excellence

Rotterdam Convention on The Prior Formed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) at <http://www.pic.int/en/ViewPage.asp?id=104> .

SADC Protocol on Energy is at <http://www.tralac.org/scripts/content.php?id=448> .

SADC Protocol on Fisheries at <http://www.tralac.org/scripts/content.php?id=449> .

SADC Protocol on Health at <http://www.tralac.org/scripts/content.php?id=450> .

SADC Protocol on Shared Watercourses, at <http://www.tralac.org/scripts/content.php?id=456> .

SADC Protocol on Trade (1996), at http://www.sdn.org.mw/mra/customs_sadc.html

SADC Protocol on Wildlife Conservation and Law Enforcement at <http://www.tralac.org/scripts/content.php?id=460> .

SADC Protocol on Wildlife Conservation and Law Enforcement at <http://www.tralac.org/scripts/content.php?id=460> .

The Convention on Persistent Organic Pollutants (2001) <http://www.pops.int/> .

The Declaration and Treaty of the SADC at www.ucnrosa.org.zw/elisa/SADC-protocols/declaration%20-treaty.html .

The Montreal Protocol on Substances that Deplete the Ozone Layer (1987), <http://hq.unep.org/ozone/Montreal-Protocol/Montreal-Protocol2000.shtml> .

United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1, reprinted in 31 ILM 874, 878 (1992), <http://www.un.org/geninfo/bp/enviro.html> .

United Nations Framework Convention on Climate change (1992), at <http://unfccc.int/2860.php> .

Vienna Convention on the Law of Treaties, 1969 Concluded on May 23, 1969, entering into force on January 27, 1980, U.N. DOC.A/CONF.39/27,8 I.L.M 679 (1969), at <http://www.un.org/law/ilc/texts/treaties.htm> .

Vienna Convention on the Ozone Layer (1985), at <http://www.unep.ch/ozone/pdfs/viennaconvention2002.pdf> .