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Helga Marín Gestsdóttir

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1 Introduction

International business history contains many examples of corporations losing capital due to bad investment decisions, often caused by bad judgement in future directions. An example is the response of many multinational corporations to the rapid ascension of the internet in the early 1990's. Rapid improvement in computer and information technology caused such a great excitement and interest that in only a few years many business forecasters were widely predicting the decline of traditional in-store shopping, which was destined in their view to be replaced by the rise of on-line delivery services. A number of retailers invested significant sums in home deliveries that generally failed to materialize. The food shopping habits of most consumers worldwide has scarcely changed, possibly because the experience of going to a grocery store remains a deeply cultural phenomenon that is largely unaffected by technological change. There is no doubt that the internet has altered certain aspects of consumer behaviour (i.e. purchasing of travel or entertainment tickets) but the trend has not been nearly as revolutionary as some early forecasters had expected. Some well-known companies lost substantial sums after betting heavily on the internet economy.

Among the most difficult factors of forecasting on future international tendencies are presumptions and over-excitement of current favoured objects and ideas. This applies to all economical correlative fields and trends, including environmental trends within international economic law. Without a doubt the international economic regime has been configured to a greater extent by ecological considerations over the past few decades. This "greening" of the international economic system has not been without debate. To begin with most environmentally friendly products have proven to cost more in the end, due to the manufacturing and designing of such products being at its early stages.

The question whether trade helps or hurts the environment has led to over two decades of dialogue between economists and environmentalists. In the period after World War II the international economic system leaned towards policies of economic liberalisation and until the beginning of the 1990's the relationship between trade and the environment was mostly unmapped.¹ Nevertheless, trade-oriented policy-makers as well as private sector groups have been increasingly compelled to take into account environmental expenses, environmental procedure², and international contention.³ Simultaneously, the hopes for liberal trade

1 Jeffrey L. Dunoff: "Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?", p. 1407.

2 Alison Butler: "Environmental Protection and Free Trade: Are They Mutually Exclusive?", p. 3.

3 Richard B. Stewart: "International Trade and Environment: Lessons from the Federal Experience", p. 1330.

associations and sovereignty over commercial praxis must be adjusted by these changing international protocols and procedures.⁴ So one can see why the trade and environment relationship can cause debates. As environmental agreements have evolved to gain participation and/or support by a broader spectrum of fields and groups it has been inevitable that they conflict with negotiations and regulations on trade. For example the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the Convention on International Trade in Endangered Species are international environmental agreements that have included rules with consequential associations for international trade.

The environment was not always a controversial topic in the trading system and in fact The General Agreement on Tariffs and Trade (GATT) signed at the Havana Conference in 1948⁵ recognized that trade should neither harm natural resources nor endanger vulnerable species, and agreed that governments could make exceptions to the normal conduct of open trade in cases where the risk of environmental damage appeared probable.

1.1 History of environmental awareness

The world's economic situation at each time mirrors the primacy of ecological matters. During the occupation of European colonial powers, like that of Spain and England in India, Africa and South America, certain ecological principles were established. For example a German botanist, Alexander von Humboldt applied forestry projects in occupied states of Germany having deep influences on farming practices and agricultural economics. With increased development in industry at the beginning of the 20th century, environmentalists started to direct their attention on conservation and attempted to place some boundaries on the ever-increasing industrialization. Examples of these early environmental focus can be seen by early domestic land planning laws, some still in effect.⁶ The issue of pollution of water systems because of pesticides being overexploited and industrial chemical spills arose in the 1960's, causing harmful pesticides being banned and inspiring chemical companies to alternatives for increased crop yields. This led to the contribution of genetically modified organisms, which then again have led to environmental disputes.

A universal environmental campaign followed some high profile oil spills and the world's

4 Edith Brown Weiss: "Environment and Trade as Partners in Sustainable Development: A Commentary", p. 729.

5 The GATT Agreement is available at: http://wto.org/english/docs_e/legal_e/gatt47_e.pdf.

6 For example the planning of England's Lake District National Park dates back to 13th August 1951.

first programme on environmental studies was established in the University of California, Santa Barbara, followed by political awareness on environmental matters, for example with the German political party, “Die Grüne”.⁷ In the 1970’s the environmental campaign had become a general social movement, with a bid increase in the establishment of multilateral environmental agreements and intergovernmental organizations. In the 1980’s, a part of the environmental issues were taken over by politicians instead of being solely the issue of more traditional parties. Since then a number of multinational companies have also come on board, as the general consensus is that environmental matters are the issue of all of mankind and thus it is not a question on whether the international businesses need to change, it is how to achieve a better outcome and how to intertwine different aspects.

Free trade and trade liberalization has been argued to bring increased welfare to developing countries, whereas trade is used as a mechanism to transfer products of developed countries to the less developed. Environmentalists criticize this view-point by declaring that the environment is being overtaken by trade-driven policies of international economy regimes. On the international level, trade disputes are mainly dealt with within the World Trade Organization (WTO) under the provisions of the GATT Agreement.

This dissertation revolves around the interactive relationship between trade and the environment. Both of which are a part of larger and separate fields within public international law, that of international economic law and international environmental law. The key question to be answered from this dissertation is how the WTO and the GATT Agreement organize and administer trade related environmental disputes. To get a clearer picture of the complications involved and to reach a possible conclusion I begin with a general discussion of the field of international economic law and its sub-sections, those being trade, monetary and investment along with the general justifications and basic principles of international trade. In a more detailed manner I turn to the GATT Agreement, which is a multilateral agreement from 1948, adopted as a response to the hardships and depression of World War II. The Agreement followed a failed attempt to establish an International Trade Organization, to stand beside the International Monetary Fund and the World Bank, but it was not until 1995, with the establishment of the WTO, that a permanent trade organ became operative. The major principles and obligations of the GATT members have the mutual purpose of liberalizing trade

⁷ One of the oil spills occurred in the Santa Barbara Channel in 1969, often remembered as the time of birth of modern day environmental movement.

and getting rid of discrimination between members. In principle the member states are to grant unlimited access to each others markets, whereas quantitative restrictions are prohibited. Members must not discriminate among its trading partners and once a product has crossed the borders of importing states, it must be treated in a similar manner as the domestic products.

There is no special mentioning of the environment in the GATT Agreement. However the member states realize that there can be overriding reasons that justify deviations from the major principles and obligations of the Agreement. For the discussion on trade-related environmental disputes there are three exceptions of most importance within the GATT Agreement. Under these provisions the member states can take trade-related measures for environmentally protective reasons. These general exceptions under the GATT Agreement are under its article XX, i.e. paragraphs (b), (d) and (g). After discussing the WTO system's organizational structure, I will consider the affects of the environment within trade negotiations. Trade negotiations under the GATT Agreement were mostly silent on environmental matters for the first decades of its existence, as trade policies dealt almost exclusively with the way manufactured goods were treated at state borders. However consistent with the development of environmental awareness as mentioned earlier, the GATT members started to consider the connection between trade and the environment. The WTO set the focus on domestic actions, the effect of non-tariff barriers on trade, including environmental measures on trade. Hence, the WTO affects the environmental character of trade and trade-related environmental issues through its Agreements. Not only international trade instruments cover the discussion of trade and environment. This relationship is also dealt with at regional and domestic levels, for example within the North American Free Trade Agreement (NAFTA) and the European Union (EU).

For the discussion of this relationship between the two matters, one must consider the principles and mechanisms of the field of international environmental law. The global environmental legal system is the initiative of governments and other organizations, most easily detected in multilateral environmental agreements. To determine the governing principles of international environmental law I look at common trends that have developed in national, public international and transnational environmental regulatory instruments.

As the environment is not mentioned within the GATT Agreement the WTO Dispute Settlement Body has played a large role in the interpretation of article XX's exceptions. For concluding on the extent to which the WTO member states can consider it acceptable to

deviate from general trade principles for the protection of the environment, I make an analysis of the exceptions through established case law. Finally a general discussion is given on the possibility of an analogous institution of the WTO, that would serve as a World Environmental Organization. Many have raised this question before, most of whom arguing that the WTO is inadequate to handle environmental issues, with its focus set on free trade rather than environmental considerations.

2 International Economic Law

International economic law is a sub-section of public international law, dealing with the legal framework of international trade, investment and capital. Dating back to early societal civilization, to governments negotiating on treaties of commerce and amity covering tariffs and customs as well as treatment of persons travelling as merchants, its current standing as a subject of law developed in the 1940's.⁸ It remains difficult to find a comprehensive definition of international economic law but at least it comprises the underlying principles of private international trade, the structure of international trade and monetary systems and the basic rules of international development and investment.⁹ The first international convention and organization in this field was the International Sugar Union from 1902 with its Permanent Commission, recognizing the difficulties of international trade with subsidies.¹⁰ For the first decades of the 20th century bilateral and multilateral trade agreements grew in number, addressing trade of specific products for reasons of public policy, all from import prohibitions protecting human health to economic provisions securing and improving international cooperation.¹¹ After the First World War, the League of Nations established an economic committee, a financial committee and many others which covered issues and contained principles now placed under the WTO system.¹²

There are three sub-sections of international economic law, that of trade, monetary and investment, with the focus of this dissertation being on international trade law. International trade law is based on a normative economic assessment, guided by the principle of comparative advantage a principle that asserts that every nation, worker or production entity has a production activity that incurs a lower opportunity cost than that of another nation, worker or production entity, which means that trade between the two can be beneficial to both if each specializes in the production of a good with lower relative opportunity cost.¹³ The fundamental issue is the opportunity cost, i.e. the embodiment of making a “bad” situation look better for less advanced countries, meaning that every nation, every person, can find at least one product or service that it can produce more cheaply than another nation or person,

8 For example the Treaty of Amity, Commerce, Navigation and Extradition between Venezuela and the United States from 1860. See: Steve Charnovitz : “What is International Economic Law?”, p. 7-8.

9 Steve Charnovitz : “What is International Economic Law?”, p. 3.

10 Subsidies are the monetary assistance from general treasuries to a person or a particular group that is regarded as a support for its standing on the market. See: Andreas F. Lowenfeld: *International Economic Law*, p. 216.

11 For example the Treaty of Versailles from 1919.

12 Steve Charnovitz : “What is International Economic Law?”, p. 10.

13 It was the British economist and stock trader, David Ricardo, who introduced comparative advantage in 1817.

which can then be exchanged to the benefit of both sides. Therefore, trade law usually deals with some kind of intentional or unintentional discrimination involved against imported product being similar or alike, or in competition with the domestic product, whereas international trade law predominantly seeks to minimize or regulate trade restrictions. Economists later on have attempted to ameliorate the older comparative advantage model, for example by focusing on the different natural abilities and resources between states predicting that exporting states will export the product that utilizes its resources that exist in a plentiful supply.¹⁴

The justification of the international trade regime is the objective of free trade, based on the reason that free trade greatly enhances international trade and worldwide consumption. Those representing commerce and industry tend to see free trade in the most appealing form consisting of non-discrimination i.e. trade free of discrimination, and environmentalists tend to prescribe free trade, in an opposite manner, as trade free of burdens i.e. based on a concept of laissez-faire government.¹⁵ Tariffs are the accepted form of trade restraints according to the GATT Agreement, whereas certain taxes can be imposed on a certain foreign product by an importing state as a condition of importation of the good into its territory from abroad usually formulated as percentage of the value of the products being imported.

14 Andreas F. Lowenfeld: *International Economic Law*, p. 6-7.

15 David M. Driesen: "What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate", p. 285.

3 The GATT/WTO system

3.1 The GATT Agreement

During World War II the Allies had hopes for three international organizations, one for trade, a second one for capital and a third for investment, and during a conference held in Bretton Woods, New Hampshire in 1944 the need for international institutions for these categories was recognized. However the outcome was the establishment of an International Monetary Fund and a World Bank but not a trade organ, probably due to the fact that only financial ministers attended but not those representing trade. A committee was established by the United Nations Economic and Social Council in 1946 to work on a draft for an international trade organization, but at the same time 23 states were involved in tariff-cutting negotiations.¹⁶ These negotiations involved over a thousand meetings and concluded with a single document, the GATT Agreement, a multilateral agreement signed on October 30th, 1947 in Geneva. In November 1947 delegations from 56 states met in Havana, Cuba to consider the draft on an international trade organization, but with the trade agreement in place, the enthusiasm for an international trade organization had faded away and in the end the establishment of such an organization was stillborn, leaving the GATT Agreement as the only international instrument covering international trade.¹⁷ The GATT Agreement came into force on January 1st, 1948. What the drafted Havana Charter of the International Trade Organization contained, but was left outside the scope of the GATT Agreement, were provisions covering employment policy, fair labour standards, economic development and reconstruction, restrictive business practices and intergovernmental commodity agreements.

In its early years the GATT Agreement and its trade rounds concentrated on the reduction of tariffs until the 1960's when an Anti-Dumping Agreement was established with a scheme on development and followed by an attempt to deal with non-tariff trade barriers and improving the system. In 1986 the eighth trade negotiations under the GATT began in Uruguay, which lasted until the year 1994. The Uruguay Round led to the establishment of the WTO. The GATT Agreement from 1947 remains operative under the WTO as the GATT 1994, which is the amended version of the GATT Agreement after the Uruguay Round. While the GATT Agreement is a set of rules, a multilateral agreement with no institutional foundation, the WTO is a permanent organization with its own secretariat and whereas the GATT applies to trade in merchandise goods, the WTO also constitutes other agreements

¹⁶ Andreas F. Lowenfeld: *International Economic Law*, p. 26.

¹⁷ Ibid, p. 27-28.

covering trade in services, trade-related aspects of intellectual property and other matters. On 1st January 1995 the WTO entered into force and has become the largest, most influential international trade organization. There are currently 159 members and observers to the WTO.¹⁸

3.2 The Major Principles and Obligations

The GATT Agreement does not mention environmental measures as a possible exception from its main principles, whereas the general obligations are to be implemented for environmental measures in the same manner they are applicable for other policy functionings. The substantive law of the WTO is extremely extensive and technical, while there are certain basic principles that can be identified. The two most important principles in WTO law are market access and non-discrimination. Market access follows from various WTO rules that are each based on agreed concessions on a reciprocal and mutually advantageous basis. Members must in principle be granted unlimited access to each other's markets. As a main rule quantitative restrictions are prohibited and to a certain extent technical standards, sanitary measures and licensing requirements are restricted. The market access principle is not enough in itself, as it must take place on a non-discriminatory basis, as members must not discriminate among its trading partners. Once products have crossed borders the imported product must receive the national treatment. This only applies to similar situations, i.e. similar situations must be treated in a similar way.

There are three main principles in the GATT Agreement having the purpose of liberalizing trade and getting rid of discrimination between members. Those are article I on the so-called most favoured nation principle requiring states to treat all WTO members in no less favourable manner than any other, article III which is the national treatment principle requiring importing states to treat imports the same as it does domestic products, and article XI prohibiting the establishment of quantitative restrictions of trade mirroring the principle of tariffication.

As the GATT aims at reduction of tariffs and elimination of discriminatory treatment in international trade, all GATT members are supposed to benefit from the expanded trade in goods. The most favoured nation principle in article I speaks of the obligation to treat products of one country no less favourably than products from another. If granting any

¹⁸ The latest to join was Tajikistan, becoming a member on 2 March 2013.

advantage, favour, privilege or immunity to one member state, such must be granted equally to all other member states. The principle applies to every rule regarding imports and exports and the non-discriminatory treatment protects contracting states from tariffs or other trade reductions being automatically applied to them. This means that as a main rule concessions agreed upon by member states under the GATT Agreement applies equally to all other contracting parties of GATT. Accordingly all parties undertake the obligation to apply duties and similar charges on import or exports of products equally without regard to the origin of the goods. In practical terms this means that tariffs are to be the same for a certain product imported from the state of another contracting party.

The national treatment principle invokes a general obligation to treat imported products in no less favourable manner than domestic product enjoy. All restrictions, regulations and taxes that apply to imported products shall be applied to like products that are domestically produced. This is to guarantee that when products are already through a member states importation process they acquire the same treatment as like domestic products and are thus offered the same market conditions. States are still free to uphold domestic taxes or uphold legislation, as long as it is not in a discriminatory manner.

Tariffs are the accepted form of trade restriction according to the GATT Agreement but governmental restraints on the movement of goods should be kept to a minimum and if they are to be altered with it should be to reduce them but not to increase. The binding of tariffs is a principle by which individual states agree to tariff levels for particular products and to bind those tariff levels in schedules set forth at the close of tariff negotiations.¹⁹ So-called quantitative restrictions and measures having similar effect are prohibited in article XI, which restricts quantitative limitations in the form of quotas, bans and licenses on imported and exported products, whereas it is intended to impede quantitative restrictions on exports and imports.

3.3 General Exceptions

The WTO contracting states nevertheless realize that there can be overriding motives justifying deviation from GATT principles and each of the principles are subject to exceptions. The GATT Agreement's article XX includes a number of general exceptions which might otherwise be considered in breach of WTO rules. From these general exceptions

¹⁹ Article II of the GATT Agreement.

there are three that are mainly relied on in environmental disputes, i.e. disputes concerning the protection of the environment as such. They are article XX (b), (d) and (g) that are the ones of most concern considering the scope of this dissertation. These provisions apply to both multilateral as well as unilateral measures. The provisions state the following:

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:

(b) necessary to protect human, animal or plant life or health, [...]

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices, [...]

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

There are however two requirements that must be fulfilled before applying any of these measures, which are in accordance of the chapeau of article XX.²⁰ Firstly, the measures taken cannot be arbitrary or unjustifiable discriminatory between countries where the same conditions prevail and secondly, the measures cannot be taken as a disguised restriction on international trade. Therefore the GATT Agreement does not prevent measures in order to protect human, animal and plant life or health, measures designed to secure compliance with laws that are not inconsistent with provisions of the Agreement, or to conserve natural resources. Article XX (b) accepts necessary measures for the protection of human, animal or plant life and health. The dispute settlement panels have deemed a measure necessary if a contracting state is not able to use any alternative measures consistent with the GATT Agreement and if the measure is the one least affecting trade. Whether a measure is the least restrictive measure as possible the Dispute Settlement Body has not recognized that being the least restrictive one does not necessarily mean it is the most effective option in establishing a desirable situation. Article XX (d) allows derogations when enforcing laws and regulations or

²⁰ A chapeau of an article is its introductory text.

other obligations consistent with the GATT Agreement. Article XX (g) permits contracting states to apply a measure in relation to the conservation of exhaustible natural resources. These measures must be in accordance with the domestic situation in the state.

In addition to these general exceptions there are other exceptions that allow for derogations from the main GATT principles. For example when negotiating on the GATT Agreement the United Kingdom and the United States compromised that the United Kingdom and other colonial powers could continue to keep bilateral trade preferences with its dependent countries. This exception has in practice been a declining factor for international trade, as it meant that the states in question, for example Nigeria and Egypt, could maintain lower customs on products in their bilateral trade than what was offered by them to other contracting states. The effect therefore an exception from the most favoured nation principle. Attempting to gain states' support of the GATT Agreement and achieve comprehensive membership, it was provided with the so-called "grandfather clause". This allowed member states to keep their existing legislation when joining the Agreement, i.e. to become a member without seeking to amend current legislation. This exception was inserted into most accession protocols for contracting states but it has been interpreted narrowly by the WTO Dispute Settlement Body as being applicable only to domestic legislation requiring measures opposed to part II of the GATT Agreement, but not to legislation only authorizing opposing measures.²¹ Another exception is for example the exception found in article XXI of the GATT Agreement., which accordingly holds that nothing in the Agreement should prevent a contracting state from taking action necessary for the protection of its essential security interests. As it seems to be a self-judging measure for each state there is a risk of an abuse, that states use trade restrictions disguised in the name of security.

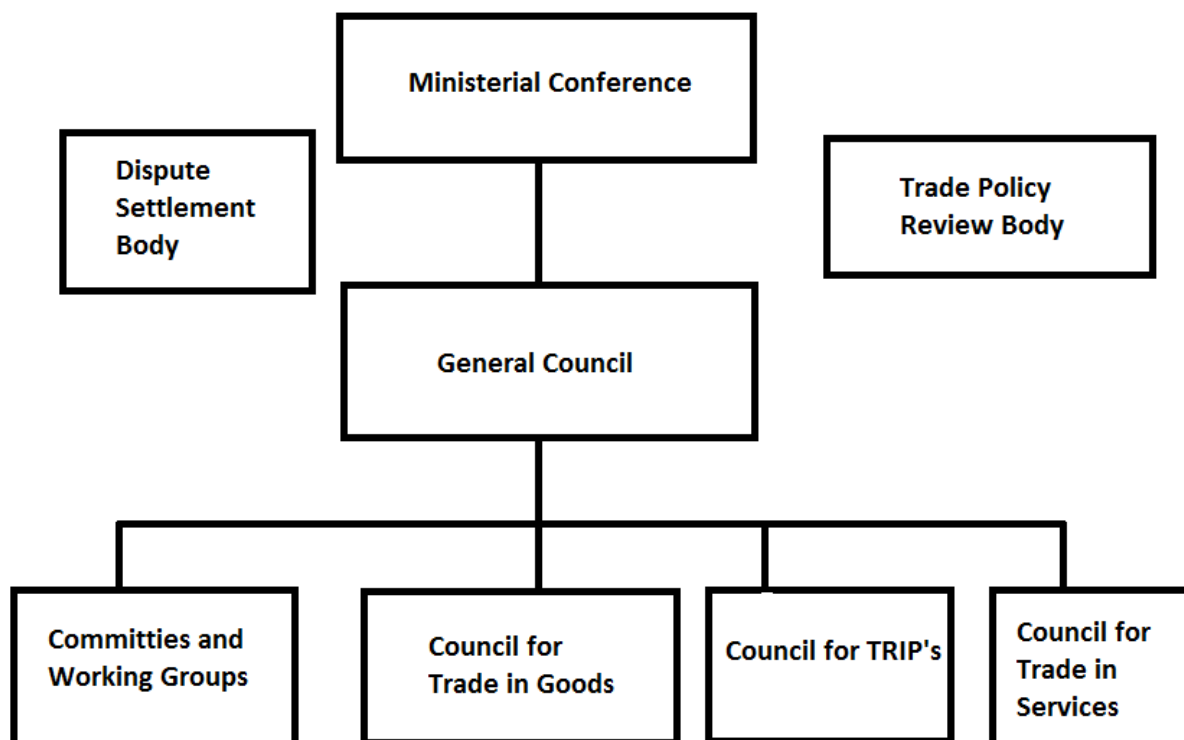
3.4 Organizational Structure

The WTO's principal role is to control and assure that trade runs steadily and continuously, in the most foreseeable and unrevised manner as possible. It is inherent to its member states, which decisions are made in several bodies of the organization, e.g. committees and councils, all of which are comprised by all of the WTO members.²² All the WTO members can take part in these councils and committees except in the Appellate Body, dispute settlement panels and

²¹ The "grandfather clause" was originally in the Protocol of Provisional Application, allowing states like the United States to join.

²² WTO: *World Trade Organization* (brochure), p. 6.

the plurilateral committees. Members of the WTO have not made an explicit agreement on the environment but they can under WTO legislation assume trade-related measures for the protection of the environment, when certain circumstances to avoid misuse of these for protectionist means, are fulfilled.



3.5 Highest Authority

The WTO Ministerial Conference is the superior body of the WTO and as such has the highest decision-making powers. It has the authority to take decisions concerning all matters under any of the multilateral trade agreements.²³ The Ministerial Conference usually meets once every two years and to date there have been eight Ministerial Conferences held, the ninth is scheduled to be held in Bali, Indonesia in December 2013. Under this organ all of the members of the WTO are united, both countries as well as custom unions.²⁴

²³ The structure of the Ministerial Conference was set up in article IV paragraph 1 of the Marrakesh Agreement establishing the WTO. See the WTO website at: http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

²⁴ See WTO website: http://www.wto.org/english/thewto_e/minist_e/minist_e.htm.

3.6 Second Level Bodies

Daily operations are supervised by the General Council, which under various circumstances meets as the General Council, the Dispute Settlement Body or as the Trade Policy Review Body. These three bodies are comprised by all of the WTO members and answer to the ministerial conference. As the General Council it represents the ministerial conference on all WTO matters. When meeting as the Dispute Settlement or the Trade Policy Review Body it manages the settlement of disputes between WTO members and canvasses the trade policy of every member, each on its own terms.²⁵

The General Council is the WTO's primary decision-making organ, which meets on regular basis to execute obligations and carry out the functions set forth by the WTO Agreement and the ministerial conference. The General Council operates out of Geneva with delegates assigned by each member's government. Currently the chairperson of the General Council is Mr. Shahid Bashir from Pakistan, that of the Dispute Settlement Body is Mr. Jonathan Fried from Canada and heading the Trade Policy Review Body is Mr. Joakim Reiter from Sweden.²⁶

3.7 Third Level Bodies

Reporting to the General Council are then three other councils, each of whom is accountable for the relevant subject matter, i.e. the Council for Trade in Services, the Council for Trade-Related Aspects of Intellectual Property Rights and the Council for Trade in Goods. Like the second level bodies, they are comprised by WTO members. These councils all have secondary organs working within the relevant fields fulfilling the obligations assigned to them by agreements.²⁷

Not on quite the same magnitude but on the same level of the organization there are committees answering to the General Council as well. They are comprised by WTO members and handle matters like trade and development, regional trading arrangements, administrative issues along with environmental affairs.²⁸

At the 1996 Ministerial Conference in Singapore new working groups were established with the purpose of observing and examining three of the four aforementioned Singapore

25 See WTO website: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

26 See WTO website: http://www.wto.org/english/thewto_e/secre_e/current_chairs_e.htm.

27 See WTO website: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

28 Ibid.

issues, that of investment and competition policies, the issue of transparency in government procurement practices and the issue of trade facilitation practices.²⁹

Like the subject title of this dissertation indicates the body covering environmental affairs, i.e. the Committee on Trade and Environment (CTE) is the one of topmost interest here and will now be further discussed.

3.7.1 The CTE

The founding of the CTE followed quite a deliberation and its ineradicable status is considered a success. Those in favour of its establishment anticipated it to be an important improvement in the trade and environmental interaction, making the trading system more susceptible to the environment.³⁰ Those opposing the creation of a committee focusing on this narrow subject argued that it would be impotent compared to the complex trade system and admonished that environmental protection could become a strategy intended for trade limitations.³¹

The later was stressed more by developing countries than the developed ones, as they had concerns for the free market, i.e. that exceptions and relief from trade requirements and standards would permit importing states to make environmental criterion that would greatly influence and stimulate protection for domestic industry.³² The less developed countries also have less financial backing to recourse to for the establishment of an effective trade regime with sufficient environmental regulation to affect domestic industry. Deficiency in technology in these countries hinders the less developed from applying more stringent environmental standards so if countries were allowed to disfavour products causing more environmental harm, their products would be ostracized in markets that have environmental standards at a higher level. Developing countries are often of the opinion that since the developed countries acquired the advantage of industrial practices, before more environmentally congenial practices were incorporated, they too should be given the possibility to develop their industry and economy on an equal ground.

On 15th April 1994 the CTE was established, even though its functioning and governance was still debated. Some suggested that instead of a permanent committee, the CTE should be in the form of a forum, where trade and environmental interaction could be discussed without

29 Ibid.

30 Kristin Woody: "The World Trade Organization's Committee on Trade and Environment", p. 461.

31 Ibid.

32 Ibid.

being distributed specific assignments. Among developed countries there was a stronger will for a fixed program and timetable regarding the issues within its field. They stated that if kept without structural basis it would spur interruption and neglect of issues. Developing countries further accentuated that if established as a permanent committee, the CTE should make its own program and timetable, stating that otherwise the view of developed nations would be dominant.

Environmentalists worried about the equivocal jurisprudence of the CTE, and feared that as a part of the trade regime it would focus more on how the environment acts as an obstacle to free trade than how international trade affects the environment. Thus while some environmentalists were trying to assure the CTE's jurisprudence and efficiency, others hoped to confine and harness the range of its potency since the CTE was missing environmental expertise.

Eventually a compromise was sought, trying to reconcile these aspects and not restraining the CTE of all power. It was instructed to report to the first Ministerial Conference held two years later in Singapore and given an ambitious list of issues to consider.³³ Its general mandate had three aspects, firstly, it was to identify the relationship between trade measures and environmental measures in order to promote sustainable development, secondly, to recommend relevant alterations of the multilateral trading system with proper regards of developing countries and their specific disadvantages and thirdly, to observe and determine the consequences of trade measures implemented for environmental purposes and also the trade effects of environmental measures.³⁴ To begin with the CTE started its work by putting together a ten point working program some of which it put the focus on and started working on, other items on the original mandate have been taken over and commenced by the Doha Ministerial Conference negotiations and are now some of the Doha Round's key components.³⁵ For example the issue of fisheries is a subject matter of the Doha negotiations where eliminating fishery subsidies could aid in the protection of fish stocks.

All of the WTO members have access to the CTE and some international organizations have the status of observers.³⁶ By supporting sustainable development it has promoted understanding of the connection between trade and the environment. Also an important role of the CTE is to deal with the conflict between multilateral environmental agreements and the

33 Kristin Woody: "The World Trade Organization's Committee on Trade and Environment", p. 465.

34 Kristin Woody: "The World Trade Organization's Committee on Trade and Environment", p. 463.

35 See WTO website: http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm.

36 See WTO website: http://www.wto.org/english/tratop_e/envir_e/envir_neg_measures_e.htm.

multilateral trading system. The relationship between those two affords an opportunity to make a successful cooperative interaction of the two fields at the international level. These multilateral environmental agreements may possibly go against the trade regime provisions for example by allowing or obliging states to prohibit imports and exports with non-contracting states. Such provisions would be a breach of article XI that prohibits the establishment of quantitative restrictions of trade, article I the most favoured nation principle and article III which is the national treatment principle, requiring importing states to treat imports the same as it does domestic products. The CTE has made several propositions in order to comprehend the struggle between the two, a subject which it discusses in special sessions. The first proposition it reported to the Singapore Ministerial Conference, a proposal for maintaining the status quo of WTO rules, i.e. the view that WTO rules were in full conformity with trade measures applied by multilateral environmental agreements.³⁷ The Dispute Settlement Body has also been found to be adequate to deal with issues arising in relation to multilateral environmental agreements where individual states could rely on article XXV paragraph 5 of the GATT Agreement in the case of a conflict between a multilateral environmental agreement obligation and those of the trading system.

Those supporting this view noted that at the time of the Singapore Ministerial Conference, only around twenty multilateral environmental agreements contained trade provisions that had never been contested under the trade regime. Grounds for arguments against the proposition was mostly that the process of granting contracting states the right to waiver is a time consuming process and the waiver can be challenged by other members under article XXIII initiating the dispute settlement.³⁸

3.8 Fourth Level Bodies

The higher level councils have subordinate bodies each handling specific matters combined by member countries and reporting to their governing council. For example the Council for Trade in Goods has eleven subsidiary committees that handle separate areas, e.g. the Textiles Monitoring Body comprised by 10 members acting in their own capacities.³⁹

37 CTE: *Multilateral Environmental Agreements (MEAs) and WTO Rules: Proposals Made in the Committee on Trade and Environment (CTE) from 1995-2002*, p. 3.

38 Ibid.

39 See WTO website: http://www.wto.org/english/thewto_e/whatis_e/tif_e/orgl_e.htm.

3.9 Informal Bodies

Major achievements and success are seldomly made during official meetings of councils and committees, especially those at a higher level. Unofficial consultations and conversations between members are crucial for bringing differing parties to the table and towards an agreement. The most difficult issues are easier to solve in smaller groups where the leading agent of the negotiations usually tries to settle differences with representatives separately and/or in groups.⁴⁰ These informal meetings are usually held at the office of the head of the delegations but there are also examples of having meetings on mutual grounds, such as at the office of the director-general of the WTO. In order to ensure that those not present at those meetings don't feel like being kept out of the loop they must be informed and allowed some input during the process. Otherwise their membership to the negotiations may be compromised. Many states have conformed coalitions to gain more bargaining powers, i.e. they partner up with other states on specific subjects, i.e. fisheries, to make sure they are represented at every level of the negotiation process. This seems to be the optimal way for smaller members to impose their will, since decisions aren't made unless all members have reached consensus. Informal negotiations are therefore very important in order to reach a unanimous decision and thus cannot be separated completely from formal meetings but is a necessary means for achieving agreements acceptable by all member states.⁴¹

3.10 The Dispute Settlement Body

The Dispute Settlement Body has two subsidiary organs, consisting of dispute panels and the Appellate Body. Any member state can call for the obligatory jurisdiction of the Dispute Settlement Body by requesting the convening of a dispute panel for the settlement of a conflict.⁴² The panel's decision can then be appealed to the Appellate Body.⁴³

International policies and politics are greatly influenced by economic components and the WTO has relinquished its earlier power-oriented procedure in trade judicial rules to a more accurately structured procedure within an unprejudiced Dispute Settlement Body.⁴⁴ On both stages, both the panels and the Appellate Body depend more on legal conjecture and have established an effective procedural jurisprudence. Its measures derive from the treaty law, case

40 See WTO website: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

41 Ibid.

42 Article VI of the Dispute Settlement Understanding.

43 Article XVI of the Dispute Settlement Understanding.

44 James Cameron and Kevin R. Gray: "Principles of International Law in the WTO Dispute Settlement Body", p. 248.

law, customary international law as well as general principles. By acting in conformity with international law and general legal principles and consistent procedures the Dispute Settlement Body has enabled it to be considered a strong judicial body and trusted by members to deal with their disputes.⁴⁵ Also when interpreting the WTO treaties the Dispute Settlement Body often looks to the drafting history and working papers beyond the text of the treaties. The most immediate problem in treaty interpretation within the WTO is how contracting obligations are inflicted by country's membership to other international agreements. This is an occurring matter at the Dispute Settlement Body when it comes to multilateral environmental agreements and as the Vienna Convention on the Law of Treaties holds, all treaties should be interpreted in compliance to one another.⁴⁶

In case a state party finds that another state party is in breach of the WTO agreement and its obligation, it can take the matter before the Dispute Settlement Body. Before a panel is appointed the countries in question must try to settle the dispute themselves and allow up to 60 days for consultations. In some cases the WTO director-general, who supervises the administrative functions of the WTO, acts as a mediator between the parties.⁴⁷ If these consultations do not succeed the Dispute Settlement Body establishes a panel of experts to solve the case and has up to 45 days to appoint one. The panel, which is essentially an aid for the Dispute Settlement Body in solving the case, has 6 months to conclude a report on the matter but in very urgent cases the timeframe is only 3 months. The parties of the dispute submit a written statement to the panel of their case before a hearing is held. At the hearing both the complaining country and defending country appear and also third members, i.e. countries that have declared having any interest at stake regarding the case. After rebuttals and oral arguments the panel can consult with experts or establish a group of experts to assist in the report making. The parties are given two weeks to comment on a first draft of the panel's report, which does not prescribe any findings or conclusive details. In an interval report however its findings and conclusions are reported to the disputing parties who then have a week to ask for a revised report from the panel. The panel can assemble meetings of the parties during its revision period. The final report is issued to both parties and circulated to all WTO members three weeks after that. Either the Dispute Settlement Body accepts or rejects the panel's report, but to be rejected a consensus must be reached, so the final report of the

45 Ibid, p. 254.

46 Ibid, p. 264.

47 The current WTO director-general is Pascal Lamy from France.

panel is seldomly reversed. The WTO Dispute Settlement Body has therefore more of a formal involvement in the disputes themselves, with the panels and the Appellate Body acting as the hands-on mechanisms.

At all stages the countries can always seek a conclusion through consultations or mediations as the preferred settlement of disputes is always that the countries themselves discuss their issues. After the Dispute Settlement Body accepts or rejects the report it can be appealed by both parties to the permanent Appellate Body. The Appellate Body does not reevaluate evidence or new legal issues, but only examines the points of law put before the panels. It is comprised by seven members who represent the various range of WTO membership and are not subordinates to any one government. The Appellate Body can take between 60 and 90 days to reach a conclusion, whether to uphold, reverse or make alterations to the panel's findings. As with the panel's report the Dispute Settlement Body has the final say, and either accepts or rejects the appealing report, but rejection is only possible by consensus.

As the sole international judicial body which takes under consideration trade and environment disputes, the WTO Dispute Settlement Body is of great importance, establishing authoritative interpretations with an increased ruled-based procedure instead of earlier practiced power-based decisions.⁴⁸

48 Richard Tarasofsky: *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism*, p. 4-5.

4 The Environment in Trade Negotiations

In the first decades of the GATT Agreement the environment was very much under the radar of trade policy- and decision-making. Trade policies dealt almost exclusively with the way manufactured goods were treated at state borders and the two areas did not touch upon a common ground in order to overlap. It was during the preparation of the United Nations Conference on the Human Environment in Stockholm 1972, which the GATT members started to consider the connection between trade and the environment. States were starting to anticipate that measures taken by governments for environmental reasons could have a negative impact on trade. In 1971 a forum was created, the Group on Environmental Measures in International Trade, in which members could express their concern. Not a single member brought an issue to the group in the first two decades of its existence. The group was first summoned at the UN Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, held in June 1992. Both the principles adopted at UNCED and its action plan, Agenda 21, focus on trade and economic growth as a key tool in meeting environmental challenges where trade and environment are clearly thought to be on convergent tracks.

During UNCED, the Uruguay Round trade negotiations were closing in on its final stage, and by that time drafts of agreements, leading to the establishment of the WTO, were becoming clear.⁴⁹ The mission of lowering tariffs on manufactured goods was essentially completed, now the attention of the trading system was shifting to the effect of non-tariff barriers on trade, including environmental measures on trade. One might state that the GATT centered around border control and the WTO focuses on domestic actions.⁵⁰ The agreements awoke criticism, on the one hand that they were too invasive and upsetting for state sovereignty over their domestic regulations and on the other hand some claimed they did not go far enough and developing countries argued that standards were promoted by the interests of developed countries. At the Uruguay Round, trade policy was extended into trade in services and intellectual property along with strengthening the subsidies code and further ensuring that domestic policies affecting trade were non-discriminatory, transparent and the least trade-restrictive option available. Through the WTO and its regulation of international trade, the WTO affects the environmental character of trade and trade-related environmental issues.

The WTO Ministerial Conference as the WTO's highest decision-making body takes

⁴⁹ The Marrakesh Agreements adopted in April 1994.

⁵⁰ WTO: *The World Trade Report 2012*, p. 39.

decisions on all matters under any of the multilateral trade agreements.⁵¹ The first WTO Ministerial Conference was held in Singapore in 1996 to assess progress of the implementation commitments of the member states and to review ongoing negotiations and work programmes under the WTO. The outcome of the conference was The Ministerial Declaration which acknowledged the importance of the integration of developing countries in the multilateral trading system. The significant commitments that were undertaken by developing countries were recognized and the difficulties developing countries were facing in complying with their commitments were acknowledged. In line with this recognition, the member states made commitments to improve the availability of technical assistance to developing countries under the agreed guidelines.⁵² The first WTO Ministerial Conference ended with misgivings and resolved very few issues between developed and developing countries. Their different views of the linkage between trade and the environment were evident, indicating a rocky road in multilateral trade negotiations of the future. The developed economies also raised four issues for the first time in Singapore. The four “Singapore issues” are the issue of relationship between trade and investment policy, the issue of interaction between trade and competition policies, the issue of transparency in government procurement practices, and the issue of trade facilitation practices.

The Geneva Ministerial Conference was held from May 18th to 20th 1998. There was no significant development in relation to the trade and environment linkage as the focus in the Geneva Ministerial Conference was on celebrating the 50th anniversary of GATT. Developing countries were shown as not being ready for issues such as the trade and environment relationship, and so environmental NGO’s and developed countries continued to pursue their objective of linking trade with the environment without their involvement.

In December 1999 a Ministerial Conference of the WTO was held in Seattle with the intent to launch the new Millennium Round but high hopes of effective trade talks were overshadowed by pepper spray, armored cars and riots. The event which is now remembered as the “Battle in Seattle” drew the attention of demonstrators from all over, including those with environmental agendas.⁵³ One very important legal consequence of the meeting however, made on behalf of the United States, is significant. A month earlier President Clinton issued

51 The structure of the Ministerial Conference was set up in Article IV paragraph 1 of the Marrakesh Agreement Establishing the WTO. Available at: http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

52 *Singapore Ministerial Declaration*, p. 4. Available at: http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf.

53 James Salzman: “Seattle’s legal legacy and environmental reviews of trade agreements”, p. 503.

an executive order⁵⁴, committing the United States government to carry out environmental reviews of trade agreements and at the same time emitted a statement on environmental trade policy.

Environmental reviews have now become a key element in environmental law, not only in the United States but worldwide. Over seventy percent of the world's nations have now implemented environmental impact assessment requirements for certain types of government projects.⁵⁵ Environmental reviews are important in the trade and environment debate since they have the possibility of driving two important progresses. Firstly, integrating environmental deliberations into trade decisions open up the trade policy decision-making process, which has usually and mostly been influenced by trade and commercial actors.⁵⁶ Environmental reviews convince states to alter certain provisions of their agreement outlines, suggest supplementary domestic actions or institutional framework, or to make a whole other agreement. Thus, the environmental reviews raise the environmental awareness of negotiators. This happened for example in the NAFTA negotiations⁵⁷, that led to much more integrated relations between trade, environment, and economic agents at the domestic level of the member parties, Canada, Mexico and the United States.⁵⁸ Secondly this allows for increased public involvement in decision-making. By allowing the public to have a say in the environmental effects of suggested trade policies and their alternatives can reduce suspicion of ulterior means by those of great economic concerns.⁵⁹

Eventually developed countries and environmental groups achieved to place trade and environmental issues on the agenda of a Ministerial Conference held in the capital of Qatar, Doha in 2001. The Doha Declaration set forward the trade and environment debate within the WTO and put the environment on the agenda. It addressed many pressing issues including the relationship between WTO rules and environmental agreements, the elimination of trade barriers, ecolabelling and the effect of environmental measures on market access, and the relationship between the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) and the Biodiversity Convention. Developing countries had no choice but to accept this and by accepting the trade and environment provisions in the Doha Declaration, developing countries realized that it would not be appropriate to resist the agenda. While

54 Executive Order No. 13.141 on Environmental Review of Trade Agreements.

55 James Salzman: "Seattle's legal legacy and environmental reviews of trade agreements", p. 506.

56 Ibid, p. 515.

57 The NAFTA Agreement came into force on January 1, 1994.

58 See art.104 of NAFTA.

59 James Salzman: "Seattle's legal legacy and environmental reviews of trade agreements", p. 517-518.

developing countries accepted the agenda, they remained skeptical about its implications and the use of its provisions by their developed counterparts.⁶⁰ While the Doha Declaration recognized the issues that were the subject of the developing countries' concerns, the recognition and inclusion of those issues in the Declaration does not guarantee the elimination of those concerns. The extent of environmental issues is likely to keep the tension between developed and developing countries alive.

In September 2003 a Ministerial Conference was held in Cancún, Mexico, where the Doha Agenda's progress was to be revised. The state parties however, failed to come to a conclusion and the conference ended in disagreement. The largest disagreement revolved around the failure to reach consensus in the field of agriculture as developing countries resisted suggestions made by the EU and the United States on negotiations on agriculture. The difference between the developed and the developing countries was further widened by the developed countries pursuit of the issues raised in the 1996 Singapore meeting. Those attending the conference stated that its failure was an obvious consequence of the members not to launch official negotiations on those issues.⁶¹ This made the next assignment for the Ministerial Conference to rectify these various pending issues.

The sixth Ministerial Conference was held in 2005 in Hong Kong. Its outcome turned out to be a limited success. The biggest achievement is that the meeting did not collapse over disagreements and at least a certain amount of agreements were reached.⁶² The main issues for discussion at the conference included agriculture, non-agricultural market access and services.⁶³ Generally, the Ministerial Conference gave some constructive progress in the core areas of the Doha Development Agenda, although the final effect of the Round is still in up in the air.

The long over-due seventh WTO Ministerial Conference took place in Geneva, Switzerland in 2009. Due to previous meetings and the fact that there was still no agreement in sight on the eight year old trade negotiations, governments and other officials did not have high hopes towards its outcome.⁶⁴ Knowing this and without risking another conference failure the Geneva conference put its focus on the WTO, the Multilateral Trading System and

60 Surya P. Subedi: "The Road From Doha: The Issues for the Development Round of the WTO and the Future of International Trade", p. 432.

61 Simon J Evenett: "The Failure of the WTO Ministerial Meeting in Cancun: Implications for Future Research", p. 11.

62 Mapato Rakhudu: "An Overview of the WTO's 6th Ministerial Meeting in Hong Kong", p. 2.

63 Ibid., p. 2-3.

64 "WTO Ministerial Conference Opens in Geneva; Expect No Surprises", p. 1.

the Current Global Economic Environment. The attending parties made a day of the conference to a working session, in order to review WTO's activities including the Doha negotiations. Another one-day working session dealt with the WTO's contribution to recovery, growth and development.

At the start of the eighth Ministerial Conference, held in Geneva in 2011, there was a divide amongst members concerning the future of the Doha Round. During the 2011 conference the option of introducing new issues into the global trade body to address emerging challenges, such as climate change, energy and food security, was suggested to keep the global trade body current and credible in the light of the difficulties of the Doha Round. The next regular Ministerial Conference is set to be held in December 2013 in Bali, Indonesia.

5 Regional Trade Agreements on Environmental Protection

Regional treaties and agreements are important to the discussion of the trade and environment relationship. Especially there are two of the most importance, the NAFTA and the Treaty on Functioning of the European Union (TFEU). Other regional trade agreements are for example the Free Trade Agreement between the Kingdom of Sweden and the Republic of Estonia from 1992 and the Singapore – Australia Free Trade Agreement from 2003.

From an economic perspective, liberalizing trade policy towards free trade can best be achieved by international agreements and measures.⁶⁵ But for practical and political reasons this has been attempted at the regional level. From an environmental point of view there can be no presumption that an international agreement on measures is the best option for success. Environmental protection constitutes a wide range of environmental objectives with many of the issues being local or regional. On the contrary there are also many environmental issues on a global scale, for example climate change. Whereas contracting parties to a trade agreement greatly benefit from joining in on such agreements, gaining market access to other contracting states, there is no such benefit of joining in on an environmental agreement. This changes by adding financial and technology transferral to multilateral environmental agreements and has been attempted to be tempered in the trade regime by adding environmental provisions to trade agreements, such as article XX in the GATT Agreement. Both NAFTA and TFEU have equivalent provisions at the regional level.

5.1 The North American Free Trade Agreement

On January 1st, 1994 the NAFTA Agreement entered into force between Canada, Mexico and the United States, establishing the largest free trade area, with a population of over 450 million people producing \$1.7 trillion worth of goods and services.⁶⁶ The NAFTA Agreement has four aspects in which it attempts to bring environmental issues to the table.

Firstly, in chapter XXI of the NAFTA the general exceptions from the GATT Agreement are incorporated and even enhanced by stating that for the purpose of trade in goods and technical barriers to trade article XX of the GATT Agreement are made part of the NAFTA Agreement, realizing that paragraph (b) includes environmental measures for the protection of human, animal or plant life of health and that paragraph (g) applies to conservation of living

65 Steve Charnovitz: “A Critical Guide to the WTO’s Report on Trade and Environment”, p. 376.

66 See the website of the Office of the United States Trade Representative: <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

as well as non-living exhaustible natural resources.⁶⁷ In the same provision the chapeau of article XX of the GATT Agreement is mirrored by stating that such measures cannot be applied in an arbitrary or unjustifiable manner or as disguised restrictions on trade between the parties. Also paragraph (d) of the GATT Agreement is incorporated by making measures necessary to secure compliance with laws or regulations not inconsistent with other NAFTA provisions possible.⁶⁸

Secondly, in the NAFTA Agreement's article 104 on relations to environmental and conservation agreements it notes that in the event of an inconsistency between the NAFTA Agreement and specific trade obligations set out in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the agreements set out in annex 104.1 to the NAFTA Agreement the obligations should prevail provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party should choose the alternative that is the least inconsistent with the other provisions of NAFTA.

Thirdly, the NAFTA Agreement gives member states a choice to select a forum for environmentally related trade disputes, i.e. disputes under article 104, disputes under the NAFTA chapter on Sanitary and Phytosanitary Measures, and disputes two places under the NAFTA chapter on Standards – Related Measures that implicate the environment or public health. These provisions allow complaining parties to choose either the WTO Dispute Settlement Body or a NAFTA forum to resolve a dispute.⁶⁹

Fourthly, the NAFTA Agreement directs its contracting states to use relevant international standards, except where those standards would be an ineffective or inappropriate means of fulfilling its legitimate objectives. For example is the ISO 14000 standard, which addresses various aspects of environmental management, providing practical tools for companies and organizations to minimize how their operations cause harm for the environment and how they can fulfill their obligations according to environmental legislation.⁷⁰

Other side agreements to the NAFTA contain environmental features such as the North American Commission for Environmental Cooperation, an environmental commission

67 See article 2101 paragraph 1 of the NAFTA Agreement.

68 See article 2101 paragraph 2 of the NAFTA Agreement.

69 Steve Charnovitz: "A Critical Guide to the WTO's Report on Trade and Environment", p. 378.

70 Ibid.

working in analogy to the trade agreement. Its role is to map and observe the impact of NAFTA on the environment, to strengthen the cooperation on the development and improvement of environmental laws and regulations.⁷¹ The Commission has held a series of conferences to find out whether the NAFTA helps or hurts the environment, the first in 2000 supported by the World Bank, bringing together specialists from different sectors of government, academia, non-governmental organizations and industry.⁷² The commission's most important assignment is to hold three different countries to three different environmental legislations, in order to uphold the set environmental standards. The commission has not much capability to sentence a contracting state in case of a breach of its own environmental laws but the success of the commission from an environmental point of view is the ability for non-governmental organizations and individuals to bring a complaint about governmental failure to act, making public access a part of environmental legislation enforcement.

As stated in the beginning of this chapter, the benefits of contracting states of trade agreements are more obvious than those of members to environmental treaties. The trade regime has attempted to reconcile trade and environmental matters by adding environmental provisions to the trade agreements. Where the NAFTA Agreement fails to ensure this reconciliation is by not requiring a straightforward harmonization of standards. While recognizing and maintaining the states's right to set its own environmental standards to protect its domestic environment, there is still a pressure of a general harmonization of standards through the purpose of eliminating trade barriers and easing trade between the members in general. This indicates a promise to respect state's choices towards environmental protection as long as they are in conformity with the general goal of promoting trade.⁷³ This two-folded delivery causes countries with high environmental standards to be able to maintain their standards and still enjoy their standards of living. Those with lower standards then need to raise their environmental standards, otherwise losing their competitive advantages in higher standard economies.⁷⁴

71 Kristina Eastham: "Playing the Right Role: The CEC and Alternative Solutions to the Environmental Impacts of NAFTA", p. 83.

72 Timothy Whitehouse: "International Trade and the Environment: An Address at the International Law Students Association Conference at Pace Law School", p. 246-247.

73 Ileana M. Porras: "The Puzzling Relationship Between Trade and Environment: NAFTA, Competitiveness, and the Pursuit of Environmental Welfare Objectives", p. 73.

74 Ibid, p. 65.

5.2 The European Union

The EU was set up with the aim to end frequent and merciless wars between neighbouring states peaking in the Second World War. In 1950 the European Coal and Steel Community was established by Belgium, France, Germany, Italy, Luxembourg and the Netherlands in order to secure lasting peace with economical and political cooperation. The East and West remained divided and the gap widened even more during the Cold War in the 1950's. In 1957 the European Economic Community was created by the Treaty of Rome for the development of a customs union between members. After the fall of the Berlin Wall and the entry of Turkey into the community, the Eastern bloc became more open. Finally the Maastricht Treaty was signed in 1992, establishing the EU. Together the TFEU and the Maastricht Treaty establish the various EU institutions, jurisprudence and objectives. The EU has made an effort to promote the integration of trade policies and environmental concerns, not only within its own organs but also as an observing party to the WTO, for example at the beginning of the Doha trade round the EU accomplished to make sustainable development a subject matter at the negotiations.

A big challenge for the EU, like with the NAFTA, is to bring together the 27 different and diverse member states of the union.⁷⁵ According to article 4 paragraph 2 of the TFEU, or the so-called Treaty of Rome, the EU shares competence with member states on environmental policy-making.⁷⁶

All union policy must also according to article 191 follow the set objectives of preserving, protecting and improving the quality of the environment, human health and natural resources pursuant to principles of precaution, prevention, remediation at the source and the polluter pays.⁷⁷ This is a much more programmatic process of “greening” the integration with trade policies than with NAFTA. In 2009 a codecision procedure was made the ordinary legislative procedure within the EU, whereas the European Parliament was given the same weight as the Council in different fields, for example decisions on environmental issues. Typical environmental measures are taken to pursue the ordinary legislative procedure but more sensitive policy areas are steered by the EU Council on unanimous voting. Most of EU's environmental regulation is in the form of directives, whereas regulations are not very often used. Directives are basically orders aimed at states in order to stipulate specific objectives

⁷⁵ Markus G. Puder: “The Rise of Regional Integration Law (RIL): Good News for International Environment Law (IEL)?”, p. 180.

⁷⁶ See the Consolidated Version of the Treaty on the Functioning of the European Union, C 83/47.

⁷⁷ Ibid.

inside their national legal systems. With harmonization, member states must then take their content and change it to the appropriate form, where room for interpretation differs from how widely the wording of the directive is.⁷⁸ Implementation of directives into national law must be in fact as well as in law, i.e. it is not considered sufficient only to have a formal legislation if it does not work accordingly. The only exception from this is where a member state will surely never face a given situation, for example a directive that would stipulate the quality of mountain areas would hardly need to be implemented in a strict manner by the Netherlands. Member states thus can choose the form and method they wish to implement the directives in, and can adapt the content of a directive into their national legal systems of environmental law by using their own legal instruments and terminology.

In article 34 of the TFEU the member states are prohibited to apply quantitative restrictions on imports and all other measures with equivalent effects, i.e. a rule on non-tariff barriers to trade. An exception from this rule is put forth in article 36 which includes measures for the protection of health and life of humans, animals or plants, provided that these measures do not constitute a means of arbitrary discrimination or are disguised restrictions on trade between member states. As with the WTO, the environment is not expressly mentioned as a reason for derogation. When environmental measures are accepted under article 114, for the advancement of the internal market, a member state may if it deems it necessary to keep its national provisions in consideration of article 36 or for environmental protection, it shall notify the European Commission of the provisions as well as the grounds for maintaining them. Furthermore, if a member state finds it necessary to introduce new national provisions based on new scientific evidence relating to the protection of the environment because of a problem specific to that member state after the adoption of the harmonization measure, it shall notify the European Commission of the envisaged provision as the grounds for introducing them.⁷⁹ The European Court of Justice has played a large role in developing the criteria to determine the conditions under which environmental protection measures taken by EU member states are to be permitted.⁸⁰ For example in the absence of specific EU legislation establishing a rule of environmental protection, then national environmental rules restricting trade between member states are considered permissible if the rules are necessary to protect the environment and the effect on trade is not disproportionate to the objective pursued

78 For example directive 2000/53/EC on batteries gives very little room for interpretation as transposition into national law is necessary to achieve the result and also a given time limit is set.

79 Article 193 of the TFEU.

80 Philippe Sands and others: *Principles of International Environmental Law*, p. 848.

applied in a non-discriminatory manner against producers in third countries.

In a case from 2001, *Pruessen Elektra AG – Schleswig AG*, the European Court of Justice dealt with environmental protection measures and measures concerned with the related goal of ensuring public health and safety.⁸¹ The court had to determine the compatibility of German legislation with article 34 of the TFEU as the national law obliged electricity supply undertakings, operating a general supply network, to purchase the electricity produced in their area of supply from renewable sources of energy. The court noted that in accordance to previous findings all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and inconsistent of article 34. However even if the German law was capable of these hindrances to intra-community trade it was not found to be in breach of article 34 given its aims and the features of the electricity market. The court found that the use of renewable energy sources for producing electricity as the German law was intended to promote, was useful for protecting the environment in so far as it contributed to the reduction in emissions of greenhouse gases which are among the main causes of climate change, and the EU and its member states were determined to battle.

81 *Pruessen Elektra AG – Schleswig AG*, Judgement of the ECJ, 13 March 2001, C-379-98.

6 Global Environmental Law

Looking into the trade and environment interaction one must examine the principles and tools of each field. In the aforementioned Agenda 21, the objective is to reach a mutual supportiveness in favour of sustainable development and therefore the role of international organizations dealing with trade and environment-related issues, like the WTO, must be clarified, including their conciliation procedure and dispute settlement.⁸²

Global environmental law is comprised from the leading principles and procedural methods of national, public international and transnational environmental legal systems, all with the common aim of environmental protection in one way or another, for example with natural resources management.⁸³ The global environmental legal system is the initiative of governments and other organizations to reconcile and amend national environmental standards. This harmonization and legal cooperation can most easily be detected in formal international treaties and institutions, like the WTO.⁸⁴

Particularly in the field of environmental law, global effects and the world as a whole has been a key issue because of the trans-boundary nature of many environmental problems. With increasing globalization the boundaries between national and global law have been further blurred, as reflected by the prompt increase of multilateral environmental agreements.⁸⁵ To determine the governing principles of the global environmental field one must look at the common trends that have developed in national, public international and transnational environmental regulatory system.

In 1972, at the request of the Swedish delegation, the UN convened a conference on the environment held in Stockholm. The conference resulted with the signing of the Stockholm Declaration on the Human Environment, an instrument that set the tone for following environmental law instruments. At the Stockholm Conference proposals were made of the United Nations Environmental Program whose activities cover a wide range of environmental subjects. The UN General Assembly adopted the Stockholm Declaration, making from that time on the conservation and improvement of the environment an issue for governments. No mentioning was made of the possible conflict with the law of international trade and connection to the GATT Agreement.⁸⁶ Subsequently the number of multilateral environmental

82 Halina Ward: "Trade and Environment in the Round - and after", p. 265.

83 Tseming Yang and Robert V. Percival: „The Emergence of Global Environmental Law“, p. 616.

84 Tseming Yang and Robert V. Percival: „The Emergence of Global Environmental Law“, p. 627.

85 Tseming Yang and Robert V. Percival: „The Emergence of Global Environmental Law“, p. 664.

86 Andreas Lowenfeld: *International Economic Law*, p. 378.

treaties proliferated, both at regional and international levels, making new obligations between the contracting parties and also on their interactions with non-party states.⁸⁷ In 1987 a report was published by a World Commission on Environment and Development convened to address the question of how to decrease global levels of poverty while at the same time protecting the global environment. This report was called “Our Common Future” but is generally known as the Brundtland Report after the commission’s chairperson, the then prime minister of Norway, Gro Harlem Brundtland. This report opened up the discussion of sustainable development, which was defined in the report as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The UNCED in Rio was initially set up to review the questions still unanswered after the 1972 United Nations Conference on the Human Environment in Stockholm, making the UNCED standing as a major turning point in international environmental politics and legislature, adding new approaches and principles to environmental policy making.⁸⁸ All eyes were on UNCED at the time and never before had the environmental problems of the world gained such attention.⁸⁹ This made a huge difference for public awareness and knowledge in environmental matters, bringing the discussion of environment and development closer to the people.⁹⁰ The increased participation of the private sector, non-governmental organizations (NGO’s) and other groups in international affairs and foreign policy was also remarkable at UNCED, with some 2500 NGO’s from over 150 countries participating. This staggering number of NGO’s taking part, presenting their causes and opinions, ranged from religious groups to scientific associations and foundations.⁹¹

At UNCED an agreement on a declaration on the environment and development was reached, i.e. the Rio Declaration as well as the Agenda 21 action plan and two conventions covering biodiversity and climate change. Ten years later a World Summit on Sustainable Development was held in Johannesburg, South Africa. Like the name indicates its focus point

87 Ibid.

Among the multilateral treaties negotiated at this time were the Convention on the International Trade in Endangered Species from 1973, the Vienna Protocol for the Protection of the Ozone Layer from 1985 and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal from 1989.

88 The preparation for the UNCED was a long process, with meetings being held almost two years before the June 1992 conference.

89 Daniel C. Esty: “Beyond Rio: Trade and the Environment”, p. 387-388.

90 Ibid., p. 389.

91 Ibid.

The NGO’s used the forum to critique the progress of the UNCED and to negotiate 33 alternative treaties to serve as outlines for future work.

was on sustainable development, and governments had come to realize that the social and economic pillars needed to be interconnected with environmental concerns.

6.1 General Principles and Procedures

Among the most identifiable principles and methods of global environmental law are the principle of states' sovereignty over natural resources, the precautionary principle, the polluter pays principle, the principle of preventive action, environmental impact assessments and emission control. The trend of sustainable development has had the concern shift from only regulating the connection between peoples and to the relationship between all of humanity and the general exterior. The common principles have the potential to be applied to all members of the global community across the array of their activities and in executing the protection of all aspects of the environment. It is beyond the scope of this dissertation to look into whether a particular norm or procedure suffices to be considered a principle. Without further considerations, these will be referred to as principles.

In general states have the sovereignty over its natural resources and over the time they have made attempts to expand this sovereignty into areas or certain resources that were previously considered to be the common heritage of mankind, for example the exclusive economic zone which was extended to 200 nm to give states better control of maritime affairs outside its territorial limits in the late 20th century. This principle implies both territorial sovereignty and territorial integrity as enshrined in principle 2 of the Rio Declaration on Environment and Development, no state has the right to use or permit the use of its territory in such a manner as to cause injury in the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence, ensuring the sovereign rights of states to exploit their own resources and preventing others from causing damage beyond the limits of their national jurisdiction.⁹² This principle confirms that states do not have unlimited sovereignty over their natural resources but are subject to significant constraints of an environmental character. The principle finds its basis in a case from 1941, the Trail Smelter case between the United States and Canada, where a smelter plant located in Canada was found to have caused air pollution damage to a region in the state of Washington.⁹³

92 United Nations General Assembly: Rio Declaration on Environment and Development, Document no. A/CONF.151/26.

93 United Nations: *Reports of International Arbitral Awards*, p. 1965.

The principle of preventive action requires prevention of damage to the environment and reduction, limitation or control of activities that might cause or risk such damage. In the ICJ Pulp Mills case this approach was affirmed, where the ICJ pointed out that: „the principle of prevention, as a customary rule has its origins in the due diligence that is required of a state in its territory“.⁹⁴ The preventive principle requires action to be taken at early stages and, if possible, before any harm is done.⁹⁵ It is supported by a comprehensive group of domestic environmental protection legislation that applies during the procedure of authorizing operations, as well as provisions adopting some international and national commitments on environmental standards, access to environmental information, and the need to carry out environmental impact assessments in relation to the conduct of certain proposed activities. The principle has been relied upon and endorsed in a large number of treaties dealing with particular environmental schemes or activities.

The precautionary principle has been one of the most baffling issues in international environmental law. It expands the preventive principle as it is meant to advance environmental protection by preventing scientific uncertainty to justify postponing action when facing potentially serious threats for the environment. Its clear appearance is mirrored in principle 15 of the Rio Declaration, stating that in order to protect the environment a precautionary approach shall be widely applied by states in accordance to their capability.⁹⁶ It embodies that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for delaying cost-effective measures to prevent environmental damage. The precautionary principle is used as a connector between economic factors and environmental protection, thus playing a large role for attaining sustainable development and the relationship between environment and trade.

The polluter pays principle requires that the costs of pollution be paid by those who are causing it. In its first appearance its aim was to figure out how to appoint the expenditure of regulating and preventing pollution, i.e. the polluter should pay. Originally it can be found at the international in the 1972 OECD Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, where it says that the

94 ICJ Case concerning Pulp Mills on the River Uruguay, Argentina v. Uruguay, 20 April 2010, p. 45. The case arose from allegations by Argentina that Uruguay had failed to follow correct procedures laid down in the 1975 Statute of the River Uruguay before authorizing the construction of two pulp mills and a port on the river, and that the mills would cause various types of pollution to the river's ecosystem.

95 Lluís Paradell-Trius: „Principles of International Environmental Law: an Overview“, p. 97.

96 United Nations General Assembly: Rio Declaration on Environment and Development, Document no. A/CONF.151/26.

principle is to be used for assigning the costs of actions preventing and regulating pollution to encourage reasonable use of exhaustible natural resources and to avoid impairing international trade and investment. Also the 1972 OECD Recommendations add that the polluter pays principle means that the polluter should bear the cost of carrying out measures decided by public authorities to ensure that the environment is in an acceptable state.⁹⁷ The principle is also enclosed with principle 16 of the Rio Declaration.⁹⁸

A principle of equitable utilization of resources has been expressed in judicial decisions as the duty of states to take into account other states interests before developing a resource, by engaging at least in negotiations and consultation.⁹⁹ This was stated by a tribunal in the 1957 Lac Lanoux case, when France had unilaterally built a dam on the Carol River which Spain utilized waters from for agricultural irrigation. The tribunal noted that France had attempted negotiations with Spain but no matter how inconclusive the negotiations were France must give reasonable weight to Spain's interests.¹⁰⁰

The subject matter of other principles of global environmental law transform when merged with the rising principle of sustainable development. Sustainable development makes these principles take account of not only environmental aspects, but also economic and developmental. The term is generally considered to have been coined by the 1987 Brundtland Report.¹⁰¹ Sustainable development has entered the body of international environmental law, requiring different directions of international law to be treated in an integrated manner. In the ICJ Gabcíkovo - Nagymaros case, the ICJ invoked the concept in relation to a future regime to be established by the parties, indicating that the term has a legal function. This case was the first case before the ICJ to raise a question of international environmental law. The parties' actions were not judged to be against an international sustainable development standard, rather they were required to "look afresh" at the environmental impact of the power plant in question and sustainable development therefore recognized as being of procedural nature.¹⁰²

97 OECD: *Guiding Principles Concerning the International Economic Aspects of Environmental Policies*, 26 May 1972, Document no. C(72)128.

98 United Nations General Assembly: Rio Declaration on Environment and Development, Document no. A/CONF.151/26.

99 Elli Louka: *International Environmental Law: Fairness, Effectiveness, and World Order*, p. 53.

100Ibid, p. 41-42.

101Lluís Paradell-Trius: „Principles of International Environmental Law: an Overview“, p. 98.

102ICJ Case concerning the Gabcíkovo - Nagymaros Project, Hungary v. Slovakia, 25 September 1997, p. 78. The case arose out of the signature of a treaty concerning the construction and operation of the Gabcíkovo - Nagymaros system of locks. The treaty also provided that the technical specifications concerning the system would be included in a joint contractual plan, to be drawn up in accordance with the treaty. As a result of intense criticism which the project in Hungary, the Hungarian government decided to suspend the work. Czechoslovakia (now Slovakia) started investigating alternative solutions. One of them, an alternative

The meaning of sustainable development is still debated amongst legal scholars, but is one of the most discussed principle. Two courts in the United States have addressed a separate opinion given in the ICJ Gabčíkovo-Nagymaros. In one case the opinion was used to proof the right to life which could be impaired by environmental degradation.¹⁰³ In the other case the opinion was used as a basis to argue for the recognition of the human right to a clean environment, incorporating the right to life, health and sustainable development.¹⁰⁴

Environmental impact assessment, a procedural principle, is the process by which the expected consequences on the environment of a proposed development or project are measured. If the likely effects are unacceptable, design measures or other relevant mitigation measures can be taken to reduce or avoid those effects. Environmental impact assessment today is increasingly a routine decision-making technique worldwide.¹⁰⁵ The United States were the first to introduce environmental impact assessments as a way to assess the environmental implications of development projects, and since then a number of national and international environmental instruments have included provisions for assessment.¹⁰⁶

Emission trading is a market-based procedure used for pollution regulation by providing economic dividend for reaching reductions in the discharging of polluting materials. The largest emission trading scheme is by far the European Union Emission Trading Scheme, whose aim is to avoid hazardous climate change. New carbon markets are emerging in many jurisdictions however, especially in the Pacific Rim region, where markets are developing from California to China. In 1999 the International Emissions Trading Association emerged from the United Nations Conference on Trade and Development. Now it has over 155 international companies and has formed several partnerships including the World Bank, who is assisting 15 developing countries establishing a market mechanisms in addressing their climate concerns. This increase of emission trading schemes around the world is evidence of that market-based trading systems are gaining more support in the developed as well as the developing world.¹⁰⁷

solution, entailed a unilateral diversion of the Danube by Czechoslovakia. The Hungarian Government transmitted to the Czechoslovak Government a termination of the 1977 treaty.

103C.D.Cal. the case of Sarei and others v. Rio Tinto Plc., 9 July 2002, p. 1157.

104S.D.N.Y the case of Flores and others v. Southern Peru Copper Corporation, 16 July 2002, p. 521.

105See for example the Icelandic Act on Environmental Impact Assessment no. 106/2000 with the stated objective to ensure that, before consent is granted for a project which may, due to its location, its concomitant activities, its nature or extent, have significant effects on the environment, an assessment of the environmental impact of the relevant project has been carried out.

106See the 1970 National Environmental Policy Act.

107IETA: *Greenhouse Gas Market 2012: New Markets, New Mechanisms, New Opportunities*, p. 4.

The principle of common but differentiated responsibilities was born because of the differences between developed and developing countries. It acknowledges the different responsibilities regarding environmental protection by reasons of different contributions to environmental degradation and the fact that not all countries have the same resources to dedicate to environmental issues. It also enshrines an obligation for developed countries to provide additional funding to developing countries and for the transferral of resources and technology. Most recently is the insertion of human rights into the environmental regime raising the awareness of how fundamental the environment is as a condition for the enjoyment of human rights. The United Nations Environmental Programme (UNEP) has organized meetings on the issue and the UN human rights branch has also drawn attention to the connection between these relationships.¹⁰⁸

6.2 Trade Theory in Environmental Standards and Governance

When trying to figure out the effects of trade on the environment it is crucial to apprehend trade theory the way it applies to environmental considerations. Trade theory calculates the radical gains from trade through specialization and comparative advantage. The fundamental trade theory standards ignore destructive outside factors resulting from economic procedure damaging the environment. To adjust for the negative environmental externalities trade theory makes a new standard for trade. Trade is based on production and having calculated environmental considerations into the equation production levels usually decrease.

Environmentalists frequently argue that free trade harms the environment. They claim, for example, that trade induces production and other polluting factors such as transportation. Probably the most famous argument for stating that free trade will reduce environmental measures is the so-called “race to the bottom argument”. Its basic idea is simple, i.e. that free trade makes it simple and less demanding for industries to settle in other countries and since countries have varied environmental regulations, companies are attracted to relocating to countries with less strict regulatory standards. Since states are aware of this and look towards retaining or attracting more industry, they have an incentive to reduce environmental regulations. Because of this many companies pollute more than they would without free trade.

This argument can certainly be opposed when noting that free trade may provoke economic growth, which may allow countries to avoid negative pressure on environmental

¹⁰⁸See: Human Rights Council resolutions no. 7/23 2008 and 10/4 2009 focusing on human rights and climate change.

standards. With more wealth, countries have the opportunity to preserve present standards of their legal and regulatory systems when opposed with competing states. And if free trade encourages income, countries might be able to sustain stricter standards and consequently free trade would have caused more demanding environmental requirements.¹⁰⁹

Trade laws have impacted environmental governance and from its establishment in 1995, the WTO has had a remarkably prompt ascent in international operations. However there are still doubts and deliberations over the organizations stability and strength, particularly after the still non-conclusive Doha Round.¹¹⁰ Critics from developed countries argue that human rights standards, labour regulations, and environmental protection are coerced by officials in Geneva, paying no attention to non-trade priorities and undermining democratic processes at the national level.¹¹¹ On the other hand the critique of developing countries is more the matter of the lack of agricultural standards and intellectual property holding back on their chance to develop and gain a comparative advantage. The broader membership of the WTO means that many developing countries are now subject to its disciplines and entitled to its protections.¹¹² Members from the developing countries are increasingly inclined to approach dispute settlement, to challenge the environmental or health measures of developed countries that they see as being undermining their WTO market access rights.

The institutional dominance of the WTO sharply contrasts with the disintegration, dysfunction, and weakness of the international environmental regime. There is no international organization responsible for administering, coordinating or overseeing the growing collection of environmental treaties, or that could speak with a single voice representing environmental priorities. There is no single dispute settlement system or a particular dispute procedure with operational enforceability. The environmental say is therefore discreet compared with the WTO, even in procedural relations between parties. Whereas the WTO has bystander rights in most multilateral environmental agreement meetings, the WTO is still assessing how to allow members from the environmental treaties to attend WTO meetings. Accordingly, the establishment of an overarching World Environment Organization or Global Environment Organization has been proposed by scholars and

109Nicole Hassoun: „Free Trade and the Environment”, p. 55.

110Jan McDonald: „Politics, Process and Principle: Mutual Supportiveness or Irreconcilable Differences in the Trade-Environment Linkage”, p. 527.

111Ibid.

112The enlargement of the WTO's to 158 states gives it far greater democratic legitimacy, although the power unbalance between the developed and developing countries, the processes for negotiating new undertakings, and the democratic deficits of individual member states are still problematic.

governments. Proponents of the international trading system have long criticized the trade and environment linkage debate as introducing non-trade elements to a regime that is ill-suited to accommodating such considerations. But the establishment of such an organization would not change the fact that WTO members hold the right to challenge environmental measures under WTO dispute settlement procedures where they can show that the measures violate their WTO rights. The possible establishment of a World/Global Environmental Organization will be addressed later in this dissertation.

Contracting members of multilateral environmental agreements have recognized the need to incorporate trade regulations to a certain degree, as a measure to effectively address environmental problems. However trade has also been acknowledged as a means to a constructive environmental impact, for example to promote transferral of more environmentally friendly technology and products. Within the UN the UNEP is the general umbrella environmental organization of the UN regime. The work of the UNEP is centered on the improvement of the quality of life, observing the state of the global environment and how these are managed through the various agreements. It administers several of the multilateral environmental agreements of the world, for example the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.

Under UNEP, the congruity between the WTO and multilateral environmental agreements is strengthened whereas governments, local authorities and industry are encouraged to develop and adopt policies and practices that are more clean and safe with an efficient use of natural resources and states supported in using use integrated assessments for reducing poverty and achieving sustainable development. In these multilateral environmental agreements the trade-related measures are very diverse as the environmental concern they are designed to address. There is a common denominator however to these measures. One variation is the regulation of trade of a certain species, animals or plants, or other products derived from those species.¹¹³

Another is the regulating of trade in environmentally hazardous products or goods, such as labeling and packaging requirements acknowledging the risks to human health and the

¹¹³See for example article III, IV and V of The Convention on International Trade in Endangered Species of Wild Fauna and Flora, which establishes a permitting system for international trade in listed species, requirements for trade with non-Parties, and measures for cases of noncompliance.

environment by the movement of hazardous wastes and other wastes.¹¹⁴ Also measures supporting the phase-out of certain substances, enhancing informed decision-making and encouraging standardized information systems are included in several of the multilateral environment agreements.¹¹⁵ Multilateral environmental agreements must try to avoid free-riding non-members from taking advantage of other countries increasing and upping their environmental standards and measures. This can be hindered by promoting a leveled scene and prohibiting the import and export of the subject-matter to or from a non-member to the agreement in achieving the environmental goal.¹¹⁶ For ensuring compliance with multilateral environmental agreements some of them allow for the use of trade-related measures to address non-compliance, for example the permanent or temporary suspension of a certain trade-related benefit.¹¹⁷

6.3 Methods of Implementing and Monitoring

Within the international environmental legal system the importance of information availability and technology transfer have become important for its implementation along with the aforementioned environmental impact assessments.

With ameliorated access to environmental information on action having damaging consequences is a prerequisite for effective national and international environmental management and protection. Information allows for preventive and mitigating measures to be taken, ensures civilian participation in domestic decision-making, clarifies whether states are in compliance with their legal obligations and it can influence the consumer as well as corporate behaviour. Several multilateral environmental instruments now include the obligation for states to exchange scientific and technological information and knowledge, individual access to environmental information, ensure public participation, assure the notification of environmental emergencies and the timely notification of environmentally dangerous activities in advance.¹¹⁸ Another significant step in the advancement of technological transfer and access to environmental information within Europe was the Aarhus

114See for example article 4.7 (b) and (c) of The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

115See for example the trade-related measures aimed at generating and providing information to decision-makers with notification and prior informed consent requirements in article 6.2 of The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

116United Nations Environmental Programme: *Trade-related Measures and Multilateral Environmental Agreements*, p. 28-29.

117Ibid, p. 29.

118See for example the Rio Declaration's principles 9, 10, 18 and 19.

Convention from 1998. The convention awoke corporates and tribunals including in the trade field to accept the importance of transparency and the public availability of information and increasing interest in making proceedings on international environmental matters open to the public. In the WTO Dispute Settlement Body a number of cases concerning health and quarantine issues have featured publicly accessible hearings. Public hearings within WTO dispute settlement processes was suggested for years by the United States in an effort to make the work of the Dispute Settlement Body more transparent.¹¹⁹ In 2005 the first public hearing and observation in a dispute settlement proceeding when a case was brought by the European Communities following an earlier dispute, on the suspension of concessions by the United States and Canada. The case, Canada and the United States – Continued Suspension, revolved around the request of the European Communities that Canada and the United States should be found obligated to remove retaliatory measures since the European Community had removed its earlier found WTO-inconsistent measures.¹²⁰ The panel and the Appellate Body both agreed to hold its hearings in open sessions where over 200 members of the public attended. During this first open panel hearing the public and other WTO member states could directly witness the hearings through video broadcast to another room near the WTO offices in Geneva. The only reason it was not held at the same exact location was simply the lack of space at the hearing. Another case that drew a lot of attention from the public and media was the European Communities – Large Civil Aircraft case, where the dispute concerned subsidies granted by the EU and certain EU member states to the French origin company Airbus.¹²¹ The complaint was made by the United States. In this case the considerable amount of commercially sensitive business information associated with the dispute prevented public access to the entire hearings, but video broadcasting was permitted for those parts that included non-confidential information.

It is now established through the WTO Dispute Settlement Body's practice that any member of the public can register with the WTO to view hearings, reflecting the advantage and public value for having the hearings open for public observation to improve the transparency of the dispute settlement system. There are at least ten different techniques mirrored in various multilateral instruments for the improvement of transparency and

119President Bill Clinton especially promoted such development at the GATT Agreement's 50th anniversary in 1997.

120Canada and the United States – Continued Suspension of Obligations, Appellate Body Report and Panel Report adopted on 14 November 2008, WT/DS320 and WT/DS321.

121European Communities – Measures Affecting Trade in Large Civil Aircraft, Arbitration Suspension on 20 January 2012, WT/DS316.

information distribution. Amongst these are the obligation to exchange information, the obligation of notification and that of consultation.

An obligation to exchange information can be found in every multilateral environmental agreement.¹²²

Exchange of information is a procedural manner of cooperation between states. This is for example included in the Convention on Transboundary Air Pollution and its protocols which has many articles on the exchange of information. Its articles 3, 4, 8 and 9 provide that states must exchange information on emissions and major changes in national policies and technologies for reducing transboundary air pollution. The monitoring system under the convention establishes a system for the parties about emissions and compliance by other parties. Another example is chapter 40 of Agenda 21 which also includes similar provisions regarding exchange of information and more detailed provisions on information to be given to other contracting parties can be found in the Montreal Protocol on Substances that Deplete the Ozone Layer for the best technologies for the improvement of containment, destruction and recycling of ozone-depleting substances, the possible alternatives to those substances and the costs and benefits of various control strategies. This information can involve trade secrets and patents and therefore companies are usually reluctant to release this type of information to other states and competing companies.

With notifications from states on the origin of transboundary environmental issue, other states get the relevant information. For example the Convention on Environmental Impact Assessment requires the state of origin to notify the affected state, and the affected state is required to respond within a certain time frame set forth in the notification. Several multilateral instruments oblige states to notify others in case of an emergency. After the Chernobyl accident for instance, the Soviet Union neglected to notify the affected states within a timely manner. To prevent repetition of such, a treaty was established in 1986 that obligates the origin state to notify all affected states in case of an accident of radiological safety significance, and reversely the affected state must respond to that notification for further information and ask for consultations.¹²³

The obligation of a notified state to consult is an extension of notification, whereas the affected state has to consult with the state of origin after notification of an action having transboundary environmental impact. This does not mean that the affected state holds veto

¹²²Philippe Sands and others: *Principles of International Environmental Law*, p. 626.

¹²³See the Convention on Nuclear Safety.

powers over a planned activity.¹²⁴ International environmental law has long considered notification and consultation an obligation of states. In the arbitration concerning the use of the waters of Lake Lanoux in the Pyrenees from 1957, a dispute between Spain and France, the tribunal found that France was obliged to notify and consult with Spain regarding a proposed project on the lake, however this obligation did not give Spain an inherent right to veto the French project. Other treaties also include a given prior consent, in addition to the obligations of notification and consult. For example the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals in International Trade from 1998 and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity from 2000, both require a prior consent of the importing country.¹²⁵

To understand the fundamentals and the magnitude of environmental problems and how to properly control and confront these problems the proper data must be given. Many treaties now include the requirement of reporting and monitoring. Some of those instruments require states to report on their performances that they are obliged to undertake under the same treaties, others require the reporting according to set schemes and plans, for example within a set time frame or under specific conditions. Most multilateral environmental agreements make reporting a requirement. The disadvantage of periodic reporting is that they are usually not followed by a specific assessments of the information given by the report and most requirements do not stipulate the subject matter and issues supposed to be addressed in these reports.

In most recent treaties the reporting requirements seem to be given more specific directions of content. In the United Nations Framework Convention on Climate Change from 1992 it is required that states include a national inventory of emissions of greenhouse gases and their removal of greenhouse gases by the usage of sinks with comparable methodologies. The developed countries must also give a specific summary of their policies and actions in their attempt to address the relevant issues. To prevent the dismissal of sensitive information to other member states, the secretariat to the convention shall regard the given information as confidential if asked to do so.

¹²⁴Elli Louka: *International Environmental Law*, p. 123.

¹²⁵Ibid, p. 124.

7 Case Law Analysis

Since the establishment of the WTO in 1995 the WTO Dispute Settlement Body, has dealt with several cases focusing on environmentally related trade measures seeking to carry out a range of different policy objectives. In the disputes coming before the Dispute Settlement Body, it has been thorough in balancing the opposing objectives of trade and environment.

7.1 Of Tuna and Shrimp

In the 1990's there were two events that touched environmentalists' in their hostility and suspicion towards the GATT Agreement and the WTO, believing the organization to represent only liberal trade policies detrimental to the environment. One was the United States - Mexican Tuna case brought by Mexico against the United States in 1991.¹²⁶ The other was the United States - Shrimp case in 1998 between India, Malaysia, Thailand and the Philippines complaining over measures taken by the United States.¹²⁷

For unknown reasons yellowfin tuna and dolphins travel together while seeking food for thousands of miles in a part of the Pacific Ocean, from California to Peru and as far west as Hawaii, called the Eastern Tropical Pacific. The dolphins bouncing visibly over the surface of the ocean while the tuna jets the depths.¹²⁸ Tuna fisheries attempted to catch the tuna with the use of a technique where a large net is laid by two boats circling a group of fish and the bottom of the net then closed. This caused injuries and drowning of dolphins that got caught in the nets along with the tuna.¹²⁹ In response to this the United States Congress enacted the Marine Mammal Protection Act (MMPA) in 1972, for the maintenance of optimum sustainable population of such species.¹³⁰ The MMPA established a prohibition on hunting, capturing, killing and import of marine mammals except in a manner prescribed in the act, therefore causing a conflict between national environmental policy objectives and the international trade regime. The import ban applied to any tuna import, caught inside as well as outside of United States' territorial jurisdiction, from any nation exceeding the standard set by

126United States – Restrictions on Imports of Tuna, not adopted, DS 21/R. It should be emphasized that the panel report in this case was not adopted, so it cannot be taken as one having the status of a legal interpretation of the GATT Agreement.

127United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

128Dorothy J. Black: "International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna", p. 123.

129The nets are called purse-seine nets.

130Dorothy J. Black: "International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna", p. 123.

the United States of incidental dolphin injury. The import of tuna from countries purchasing it from these countries were also prohibited. In 1991 the United States banned tuna import from Mexico claiming that Mexico was killing more dolphins than the set standard. Following these measures, Mexico filed a complaint with the GATT, claiming that the embargo was in breach of article XI, the provision prohibiting the establishment of quantitative restrictions of trade i.e. quotas and embargoes on exports and imports.

The United States claimed that the embargo could be justified under article XX paragraph (b) since the measure was necessary for the protection of dolphin life and health reaching beyond its territory and that there were no alternative measures available within reason to attain the objective of the act. It was also argued that article XX paragraph (g) covered these measures since the embargo was primarily concerned with the conservation of dolphins, an exhaustible natural resource. The import ban from countries purchasing tuna from a country subject to the embargo was held by the United States to be justified under article XX paragraph (d), for the enforcement of domestic laws. Mexico on the contrary held that article XX paragraphs (b) and (g) were not applicable extraterritorially and that the United States could have been able to protect dolphin's lives and health by undertaking a negotiation in international cooperation.

The panel found that the embargo on tuna caught in a purse-seine net was not a regulation allowed in article III, only allowing restrictions on products but not processes. Therefore finding the embargo inconsistent with the national treatment principle and furthermore the finding the measure inconsistent with article XI, forbidding quantitative restrictions. Finally, regarding the extraterritorial application of restrictive measures the panel found that measures to conserve natural resources or animal life and health could not be applied extraterritorially and even if article XX would allow extrajurisdictional measures the embargo would still fail to meet the requirement of necessity, by not exhausting all consistent alternatives. Also the panel warned about too liberal extraterritorial measures being used and stated that by permitting a member state to determine unilaterally the protective policies of other states would be contrary to all original goals of the GATT.¹³¹ Being a clear winner of this GATT dispute, Mexico never submitted its finding to a full vote within GATT contracting parties and therefore the report is not binding and Mexico was not authorized to take retaliatory trade measures against the United States.

¹³¹Rachel C. Hampton: "Of Dolphins and Tuna: The Evolution to an International Agreement", p. 124.

The MMPA embargo led to another dispute in 1992 when the European Economic Community and the Netherlands questioned its consistency with GATT legislation.¹³² The panel's decision was essentially the same as in the earlier one with the important difference of finding that article XX paragraphs (b) and (g) could be applied extraterritorially.¹³³ This was concluded after examining the wording of article XX where nothing says that the measures mentioned have territorial limitations, noticing other GATT provisions having extrajurisdictional application and as such it could not forbid such measures *a priori*. However the conclusion was the same as in the former case, finding the importation ban inconsistent with article XX paragraphs (b), (d) and (g), not being necessary for the conservation objectives since it required other nations to change their policies.¹³⁴

In the United States – Shrimp case the tables were turned. The dispute revolved around an amendment made by the United States Congress in 1989 to the Endangered Species Act by adding a new provision, section 609, requiring the Secretary of State to initiate negotiations as soon as possible for the development of bilateral or multinational agreements with other nations for the protection of the endangered sea turtle and prohibiting importation of shrimp and shrimp products harvested with methods considered harmful for the endangered sea turtles.¹³⁵ The United States also made it compulsory for American trawlers to install turtle-excluder devices and as a result the four complaining states, India, Malaysia, Pakistan, and Thailand, which did not require the use of turtle-excluder devices on their shrimp trawling vessels, were prohibited from exporting shrimp to the United States. The legislation was therefore applicable within United States' territory as well as outside its jurisdiction, within the territorial waters of states exporting shrimp to the United States. These four countries requested for the establishment of a panel in 1997 after failing to negotiate with the United States. They argued that section 609 was an illegal, extraterritorial measure imposed unilaterally by the United States which was inflicting its own environmental policy on other nations, disregarding the sovereign right states to establish their own policies.¹³⁶

On May 15, 1998 the panel found that section 609 was inconsistent with article XI of the GATT Agreement, amounting to a restriction on the importation of shrimp and that it was not

¹³²Ibid, p. 130-131.

¹³³United States – Restrictions on Imports of Tuna, circulated on 16 June 1994, not adopted, DS29/R.

¹³⁴Rachel C. Hampton: "Of Dolphins and Tuna: The Evolution to an International Agreement", p. 133.

¹³⁵Terence P. Stewart and Mara M. Burr: "Trade and Domestic Protection of Endangered Species: Peaceful Coexistence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization", p. 115.

¹³⁶Tracy P. Varghese: "The WTO's Shrimp-Turtle Decisions: The Extraterritorial Enforcement of U.S. Environmental Policy via Unilateral Trade Embargoes", p. 430.

justifiable under article XX paragraphs (b) and (g) for the protection of an endangered species through an international conservation agreement of which the disputants were parties.¹³⁷

The Appellate Body upheld the panel's decision on October 12, 1998, but the Appellate Body's reasoning seems to have widened development of the exceptions in article XX. Since the United States conceded to a violation of article XI the Appellate Body only looked into the import ban's consistency with the exceptions under article XX. It came up with a two-tiered process for examining article XX consistencies, and maintained that the panel had failed to use a correct procedure by reversing this process. The Appellate Body began with determining whether the taken trade measure could be justified under the exceptions listed in article XX paragraphs (a) – (j) and secondly, if passing this test, assessing the requirements made in the article XX chapeau. It found that section 609 was in accordance with article XX paragraph (g) since it was for aimed at the conservation of an exhaustible natural resource. It found however that it did not meet the requirements of the chapeau of article XX by constituting arbitrary and unjustifiable discrimination in failing to engage in across the board negotiations to develop a multilateral agreement for the protection of sea turtles before imposing the embargo and in its application did not take into account the different circumstances in different states.¹³⁸

After this, the United States made modifications to their implementation of section 609 in compliance with the ruling.¹³⁹ According to Malaysia the measure still did not comply with the GATT Agreement and brought another complaint before the WTO¹⁴⁰. Malaysia argued that article XX did not allow for a unilateral extra-jurisdictional measure to be imposed and that the embargo violated article XI. On June 15, 2001, the panel found that unilateral trade-restrictive measures to protect the environment were not *a priori* prohibited according to the GATT Agreement. The measure was found justifiable under article XX (g) as the United States had in good faith made efforts to negotiate a multilateral agreement with other contracting states in the South-East Asia region. The Appellate Body upheld the panel's findings.

137United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

138Ibid.

139Tracy P. Varghese: “The WTO's Shrimp-Turtle Decisions: The Extraterritorial Enforcement of U.S. Environmental Policy via Unilateral Trade Embargoes”p. 433.

140United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

7.2 Proof and Policy

The burden of proof is with the one asserting the affirmative claim or defense. If that party offers adequate evidence indicating that the claimed is not false and the burden of proof shifts to the other party which then must offer opposing evidence or arguments to proof the contrary. This indicates that the complainant has to bring forward a *prima facie* case, i.e. facts presumed true unless they are disproved, of a breach of the relevant provisions of the WTO Agreement.¹⁴¹

This was affirmed by the Appellate Body in United States – Wool Shirts and Blouses case regarding a complaint made by India on temporary safeguard measures imposed by the United States in the form of a quota on imports of woven wool shirts and blouses from India. The Appellate Body stated that article XX holds limited exceptions from obligations derived from other articles of the GATT Agreement and are not rules that establish obligations in themselves. It therefore found it only reasonable to appoint the burden of proof to the party asserting the affirmative defense.¹⁴² These provisions are cited by the defendants and are only considered after it has been determined that other provisions have been breached.

In a case brought by Brazil and Venezuela complaining over rules establishing baseline figures for gasoline sold on the United States' market with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution, the United States – Gasoline case, the Appellate Body concluded that the burden of proofing that a measure is in accordance with the preconditions set in the chapeau of article XX is with the defendant. Therefore a defendant arguing that a measure falls under an exception under article XX has to proof both that the measure comes within the scope of one exception and also that the measure is in compliance with the chapeau of article XX.¹⁴³ The Appellate Body laid out a two-tiered test as a part of the article, saying that in order for the article XX to be applicable and justifiable, the measure has to fall under one of the exceptions listed in paragraphs (a) – (j) and also meet the conditions of the chapeau of article XX, making the analysis of a measure two-tiered, firstly there is a provisional justification for the nature of the measure imposed and secondly, the examination of the nature of the same measure.

The Appellate Body did not agree with the panel in the United States – Shrimp case,

141Committee on Trade and Environment: *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, p. 5.

142United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, Appellate Body Report, adopted on 23 May 1997, WT/DS/33/AB/R.

143United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

where the panel had made its analysis of the chapeau of article XX and concluded that the requirements of the chapeau were applicable to all of the exceptions in article XX and could just as well be examined as the first step of the two-tiered test.¹⁴⁴ The Appellate Body referred to the United States – Gasoline case and did not agree with the panel that the process of analysis presented in that case could be reversed.¹⁴⁵ When analyzing the chapeau to prevent a measure from being applied in a non-arbitrary or as a disguised discrimination and restriction on international trade it must first be established what kind of a measure is being examined at that particular time. As the measures taken can be very variable the characteristics and subject matter of the standards set forth in the chapeau can be just as changeable.¹⁴⁶ Thus a measure, which is in line with one of the paragraphs of article XX, is possibly not in compliance with the chapeau. The order of which the analysis is performed both at panel and Appellate Body level is now in accordance with this ruling.¹⁴⁷

The Dispute Settlement Body does not contemplate on policies and policy objectives made by the governments. In the United States – Mexican Tuna case it was concluded that it is the measure that is under examination and not the objective of the governmental policy as the requirements set out in the exceptions of article XX refer to the trade measures taken.¹⁴⁸

In the United States – Gasoline case this was affirmed by the panel stating that it was not within its mandate to determine the objective of the contracting party's legislation and regulation. The limitations to its examination was bound by the measures raised in accordance with those rules and contracting parties were, in their sovereignty and independent authority, allowed to make their own environmental objectives. The measures taken to maintain and promote these objectives however must fulfill the obligations member states adhere to when being a party to the WTO. The Appellate Body reiterated this and pointed out that the WTO member states have autonomy to determine their own policies on the environment and its legislation and objectives.¹⁴⁹ The Appellate Body rejected the panels conclusion that it was the inconsistency of the measure that made it a breach of article XX paragraph (g) instead of the measure in itself. The level of protection invoked by a contracting state has to be

144United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

145Ibid.

146Ibid.

147Committee on Trade and Environment: *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, p. 7.

148United States – Restrictions on Imports of Tuna, not adopted, DS 21/R.

149United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

unambiguously separated from the measures taken. This was also made clear in the Australia – Salmon case where the Appellate body stated that one thing is the objective, quite another was the instrument used to uphold and implement this objective.¹⁵⁰

Trade measures are taken in pursuance of a goal. Article XX paragraph (b) may be applied when protecting human, animal or plant life or health. The measures taken must therefore operate accordingly. In the Thailand – Cigarettes case it was admitted that smoking causes a serious risk to human health and measures taken to diminish the consumption of cigarettes held to be in accordance with article XX (b). It was noted that the provision undeniably allows member states to put human health above trade liberalization.¹⁵¹

In the United States – Mexican Tuna case the protection of dolphin life and health was considered an objective falling under article XX paragraph (b)¹⁵² and in the United States – Gasoline case a policy with the objective to lessen air pollution caused by gasoline consumption was considered a policy falling within the protection of human, animal or plant life or health referred to in article XX paragraph (b). In determining the policy pursued through a measure and whether its objective falls under the reasons mentioned in article XX the Dispute Settlement Body often looks to expert findings on the matter, for example in the Thailand – Cigarettes case the panel took notice of an expert from the World Health Organization which stated that smoking was a serious risk to human health.¹⁵³ Also when parties disagree on whether a certain measure contains the mentioned protected interests in article XX the panel needs to perform an independent assessment. In the European Communities – Asbestos case the panel had to assess the health risk caused by chrysotile cement products to determine whether a policy aiming at diminishing the exposure to a risk, would fall within the scope of policies made to protect human life or health, given that a risk was existing. The panel then weights the evidence given by the parties and in this particular case the panel found that the European Communities had sufficiently shown that the policy to prohibit chrysotile asbestos fell within the scope of policies designed to protect human life or health.¹⁵⁴ The Appellate Body upheld the ruling and found that the panel was at liberty to

¹⁵⁰Australia – Measures affecting importation of Salmon, Appellate Body Report, adopted on 20 October 1998, WT/DS18/AB/R.

¹⁵¹Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, adopted on 7 November 1990, BISD 37S/200.

¹⁵²United States – Restrictions on Imports of Tuna, not adopted, DS 21/R.

¹⁵³Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, adopted on 7 November 1990, BISD 37S/200.

¹⁵⁴European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

examining the provided evidence given by the parties of the case and to evaluate it.¹⁵⁵

7.3 Specific Requirements and Application of Article XX

7.3.1 Article XX paragraph (b)

When applying article XX paragraph (b) there has been established a process that the party invoking it must uphold in order to prove that a measure fulfills the requirements of the provision. Firstly, the policy behind the measure must fall within the range of policies for the protection of human, animal or plant life or health, secondly, the inconsistent measure should have been necessary to uphold the objective of the policy and thirdly, the measure must have been applied in accordance of the requirements of the chapeau of article XX.

The second step demands a test of the necessity requirement, where a measure must be necessary to protect the aforementioned interests. In the Thailand – Cigarettes case there was established a requirement of a least trade-restrictive measure on whether a measure was found to be necessary under article XX paragraph (b). The panel held that an examination, of whether a measure was the least trade-restrictive in terms of article XX paragraph (b), would only be a success if there were no alternative import restrictions which Thailand could have, within reason, applied its health policy objectives on, that were compatible with the GATT Agreement, or if they were no less inconsistent with it.¹⁵⁶

In the European Communities – Asbestos case, an environmental measure, i.e. the prohibition of importing asbestos and products containing asbestos on the grounds that it was for the protection of human health and the population subject to occasional exposure, was found to be in compliance with article XX paragraph (b). The Appellate Body held that the range of the alternative measures was judged according to the pursued goal, the more vital and indispensable nature of the interests being protected, the easier it would be to consider a measure necessary.¹⁵⁷ Therefore the Dispute Settlement Body seems to have different levels of examination when observing the measures taken, depending on the importance and vitality of the interests the measures are taken to protect, in this case it was the preservation of human life and health an interest of the highest degree.¹⁵⁸

¹⁵⁵Ibid.

¹⁵⁶Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, adopted on 7 November 1990, BISD 37S/200.

¹⁵⁷European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

¹⁵⁸Committee on Trade and Environment: *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, p. 16.

7.3.2 Article XX paragraph (d)

The application of article XX paragraph (d) requires two elements to be fulfilled. Firstly, a measure has to be formulated to secure compliance with laws or regulations, found consistent with provisions of the GATT Agreement. In *European Economic Community – Parts and Components* case the panel held that the provision comprehended measures that were for the enforcement of obligations under laws or regulations in accordance to the GATT Agreement.¹⁵⁹ The laws or regulations which are being protected are only domestic ones, not obligations of other member states under international agreements. These must furthermore be enforcement measures. In the *United States – Gasoline* case the panel determined that the measures being observed were not an enforcement mechanism that would secure compliance with laws and regulations, but simply a measure to improve a discriminatory system between imported and domestic gasoline. Therefore they were not measures which fell under article XX paragraph (d).¹⁶⁰

In the *United States – Mexican Tuna*, the panel ruled on whether the laws being secured adherence to were consistent with other provisions of the GATT Agreement. The United States had argued that an intermediary nations embargo was necessary to support a direct embargo so that countries whose exports were subject to such an embargo could not go around it by exporting to the United States through third countries. The direct embargo was found inconsistent with the GATT Agreement and therefore measures under the Marine Mammal Protection Act under which the embargo was imposed could not be justified under article XX paragraph (d).¹⁶¹

Secondly, there is an examination of the necessity of the measure to achieve this goal of compliance.¹⁶² The wording “necessary” has the same meaning within paragraph (d) as it has under paragraph (b) that is to allow member states to impose trade restrictive measures inconsistent with the GATT Agreement to achieve overriding objectives where these inconsistencies cannot be avoided.¹⁶³ In the *United States – Section 337* case the panel ruled

¹⁵⁹European Economic Community – Regulation on Imports of Parts and Components, Panel Report, adopted on 16 May 1990, L/6657 – 37S/132.

¹⁶⁰United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

¹⁶¹United States – Restrictions on Imports of Tuna, not adopted, DS 21/R.

¹⁶²Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Appellate Body Report, adopted on 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R.

¹⁶³Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, adopted on 7 November 1990, BISD 37S/200.

that for a measure to be considered necessary it had to be established whether an alternative could have been applied that would have been consistent with the GATT Agreement. Therefore a measure cannot be justified if an alternative measure was available which the member state could have, within reasonable expectations, applied. Furthermore if an alternative measure is not available the member state is obligated to apply, within reason, the measure that has the least trade-restricted effects.¹⁶⁴

In the United States – Measures Affecting Alcoholic and Malt Beverages case the view of the panel was that the United States had not manifested that the measure chosen, a common carrier requirement, was the least trade-restrictive enforcement measure available, to enforce their tax laws. In some states of the United States there had been applied less trade-restrictive alternatives in accordance with the GATT Agreement to enforce those laws.¹⁶⁵ In the Korea – Various Measures on Beef case the Appellate Body concluded on a test of necessity that involves a process of weighing and balancing of factors. This evaluation includes observing the effects of the measure taken to enforce law or regulations and contemplating on how important the common interests and values are being protected by the laws and regulations. A measure having only a minor effect on import or export could be more easily accepted as necessary rather than a measure having more restrictive effect.¹⁶⁶ On determining whether the measure taken is one of necessity it has therefore developed from being only the least trade-restrictive measures that fit the criteria of article XX paragraph (d) to a less trade-restrictive measure after having weighed and balanced the relevant factors.

7.3.3 Article XX paragraph (g)

When applying article XX paragraph (g) in order to protect exhaustible natural resources, the Appellate Body has come up with a three-tiered process for its approval. The measure must firstly be for the protection of exhaustible natural resources within the meaning of article XX paragraph (g). Secondly that the measure is designed for the conservation of exhaustible natural resources and thirdly, that it is made effective simultaneously as restrictions on domestic production or consumption.

So to fall under this provision there must be an exhaustible natural resource at stake. The

¹⁶⁴United States – Section 337 of the Tariff Act of 1930, Panel Report adopted on 7 November 1989, 36S/345.

¹⁶⁵United States - Measures Affecting Alcoholic and Malt Beverages, Panel Report adopted on 19 June 1992, DS23/R.

¹⁶⁶Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Appellate Body Report, adopted on 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R.

Dispute Settlement Body has considered a number of resources as exhaustible, such as tuna stocks and clean air. The provision is therefore not limited to non-living or mineral resources, applicable also to living species susceptible to depletion or exhaustion because of human activities.¹⁶⁷

It has also been established that in order for a policy to be accepted as a policy to conserve an exhaustible natural resource, the resource does not have to be already close to exhaustion or depletion, it only has to hold the potential to be.¹⁶⁸ Therefore a policy with the goal of reducing the depletion of a resource falls within the meaning of article XX paragraph (g).

In the United States – Automobiles case the panel considered whether a regulation had the objective to conserve an exhaustible natural resource, concluding that gasoline was produced from petroleum which was an exhaustible natural resource and therefore it fell under the provision of paragraph (g).¹⁶⁹

Whether a measure is designed for the conservation of exhaustible natural resources was contemplated on in the Canada – Salmon and Herring case, where the panel found that while paragraphs (b) and (d) require the measures taken to be necessary for the achievement of the policy purpose set out in the provisions, paragraph (g) calls for the measure to be related to the conservation of exhaustible natural resources. The panel concluded that while a trade measure does not need to be necessary for the protection of an exhaustible natural resource it has to be primarily designed for the conservation of an exhaustible natural resource to be considered as relating to the conservation within article XX paragraph (g).¹⁷⁰ This interpretation has later been referred to. For example in the United States – Mexican Tuna case the panel held that a measure based on unpredictable conditions could not be interpreted as primarily aiming at the conservation of dolphins.¹⁷¹ Also in United States – Automobiles, the panel considered a measure that does not further the objective of conserving an exhaustible natural resource cannot be deemed primarily aimed at such conservation and therefore concluded that the measure, found inconsistent with other provisions the GATT Agreement, did not fall under article XX paragraph (g).¹⁷² And in the United States – Gasoline case the Appellate Body found that a measure qualified as relating to the conservation of

167United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

168United States – Restrictions on Imports of Tuna, circulated on 16 June 1994, not adopted, DS29/R.

169United States – Taxes on Automobiles, circulated on 11 October 1994, not adopted, DS31/R.

170Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, adopted on 22 March 1988, BISD 35S/98.

171United States – Restrictions on Imports of Tuna, not adopted, DS 21/R.

172United States – Taxes on Automobiles, circulated on 11 October 1994, not adopted, DS31/R.

natural resources if the measure had a substantial relationship with the conservation of exhaustible natural resources but not just merely incidentally aimed at conserving clean air in the United States for the purposes of article XX paragraph (g).¹⁷³

Finally mentioning the United States – Shrimp case, where the Appellate Body held that in order to establish whether the United States’s measure and the objective of protecting sea turtles were substantially related, that it had to examine the relationship between the general structure and design of the measure and the policy objective sought.¹⁷⁴

In addition the measure must be made in conjunction with restrictions on domestic production or consumption. The panel found in the United States – Canadian Tuna case, that the measure taken by the United States, i.e. prohibition of imports of tuna and tuna products from Canada, had not been made effective in conjunction with restrictions on United States production or consumption on all tuna and tuna products and therefore not justified under article XX paragraph (g).¹⁷⁵ A measure for the conservation of exhaustible natural resources can be considered to be made effective in conjunction with production restrictions if its primary objective is to render effective these restrictions. In the United States – Gasoline case the Appellate Body stated that within its ordinary meaning the wording “...made effective in conjunction with...” referred to an operative governmental act or regulation taken together with restrictions on domestic production or consumption of natural resources. Thus there is a requirement that the taken measure imposes restrictions, on imported and domestic natural resources. This was found to be a requirement of even-handedness in the application of restrictions for the purpose of protecting natural resources.¹⁷⁶

7.3.4 The chapeau of article XX

If a measure is found in accordance with the conditions set out in one of the paragraphs analyzed above the Dispute Settlement Body observes if requirements of the chapeau, the introductory clause, are fulfilled. These are the requirements of an application in a manner which does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or constituting a disguised restriction on international trade. The

¹⁷³United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

¹⁷⁴United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

¹⁷⁵United States – Prohibition of Imports of Tuna and Tuna Products from Canada, Panel Report, adopted on 22 February 1982, BISD 29S/91.

¹⁷⁶United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

main reason for these additional general requirements made out in article XX is for establishing a balance between the right of a member state to apply one of the exceptions in the article and on the other hand the rights of other member states according to different provisions of the GATT Agreement. The different circumstances and values being protected in specific cases make this balance shift on a case-to-case basis.¹⁷⁷ Hence, the objective of the chapeau is to avoid abuse and illegitimate usage of the exceptions in article XX. The exceptions must be applied reasonably and with the legal rights of the other contracting states in mind and used in a manner as not to frustrate or defeat the legal obligations of the other rightholders according to the GATT Agreement.¹⁷⁸

If a measure is protested under the chapeau, one of the three requirements must be proven, as a means of unjustifiable discrimination, as a means of arbitrary discrimination or as a disguised restriction on international trade.

The requirement of arbitrary or unjustifiable discrimination applies to the application of a trade measure and not the measure in itself. So it must be established that a measure is applied in an arbitrary or unjustifiable manner. This has to do with the operating provision of a measure and also the manner in which it is actually applied, so attention must be given both to the provisions in question themselves and to the way they actually operate. A measure can also be discriminatory but not in an arbitrary or unjustifiable way. An unjustifiable discrimination is existing when no serious effort was made to negotiate with the the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal, and also depends on the flexibility of the measure taken. To avoid unjustifiable discrimination states must thus make an effort to reach agreements for the protection of the interests at stake instead of making unilateral decisions with the effect of being unjustifiably discriminatory. In the United States – Shrimp case the Appellate Body found that the United States failed to engage exporting members of shrimp to the United States, in a serious negotiation for the protection and conservation of sea turtles, before enforcing an import prohibition. The United States had negotiated with some members but not others, therefore acting in unjustifiable discriminatory manner.¹⁷⁹ This does not mean that a conclusion of an agreement must be reached between members, only that a serious effort is made before turning

¹⁷⁷United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

¹⁷⁸United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

¹⁷⁹United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

to the enforcement of unilateral measures. All interested parties must be invited to take part in these negotiations.¹⁸⁰ The measure taken must also be flexible enough to not be considered discriminatory in nature. In the United States – Shrimp case it was also noted that the import prohibition did not represent enough flexibility for the different situations in different states. By comparing the measure to conditions in exporting members and then to importing members and finding out if a measure needs to be exactly the same in order to achieve the same effect is an approach which can be used to find out whether a measure is flexible or not.¹⁸¹ By not taking into account the different conditions in different countries, imposing a single, rigid and unflexible requirements and without inquiry of the appropriateness of the measure in other countries, a measure is considered arbitrary under the chapeau of article XX.¹⁸²

Lastly a measure may not be a disguised restriction on international trade. All of the measures falling under article XX are certainly restrictions on international trade, but the word disguised points to intention. Therefore, a member that intentionally conceals a trade-restrictive measure and objectives with a measure falling under the paragraphs of article XX, is abusing the right to circumvent other obligations of the GATT Agreement.¹⁸³ There are three ways for the Dispute Settlement Body to determine if a trade measure is a disguised restriction on international trade. In the United States Canadian Tuna case the panel used a test of publicity, where it stated that the United States prohibition on importation of tuna and tuna products from Canada had been publicly announced as trade measures and should not be considered disguised restrictions on international trade.¹⁸⁴

The Dispute Settlement Body has then considered whether the application of a measure sums up to arbitrary or unjustifiable discrimination. In the United States – Gasoline case the Appellate Body stated that arbitrary discrimination, unjustifiable discrimination and disguised restrictions could be concluded on side-by-side, since they give meaning to one another. Disguised restriction can therefore be an arbitrary or unjustifiable discrimination taken under the guise of a measure formally within the terms of an exception listed in article XX.¹⁸⁵ Also

180Committee on Trade and Environment: *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, p. 23.

181Ibid., p. 24.

182Ibid., p. 25.

183European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

184United States – Prohibition of Imports of Tuna and Tuna Products from Canada, Panel Report, adopted on 22 February 1982, BISD 29S/91.

185United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel

taken into account when examining whether a measure is a disguised restriction is the design, architecture and revealing structure of the applied trade measure.¹⁸⁶

7.4 Extraterritorial Application

It has caused some disagreement in relation to article XX (b), (d) and (g) whether trade restrictions with the purpose of protecting the environment can be imposed outside of state boundaries, i.e. if they are applicable extraterritorially. Multilateral environmental agreements are established with the objective to solve global environmental problems and if interpreting article XX (b), (d) and (g) in the narrower direction, i.e. with a jurisdictional boundary, it would compromise that objective.

This was the primary issue in the aforementioned United States – EEC Tuna case and the United States – Shrimp case. In the United States – EEC Tuna case the panel focused on the negotiating history of article XX and concluded that it could not forbid *a priori*, measures taken for the protection of exhaustible natural resources or the living things protected under article XX, since during the negotiations of the Havana Conference the particular location of these resources and living things was not made an issue and no limitations on the location was made a part of the article.¹⁸⁷

The Appellate Body found in the United States - Shrimp case that trade measures, unilaterally imposed against countries for the protection of the environment outside of the imposing country's jurisdiction, could be upheld under the exceptions mentioned in article XX of the GATT Agreement.¹⁸⁸ The extraterritorial range of these measures does not *a priori* make them incompatible with the Agreement. The requirements of the article XX exceptions have however been proven difficult to meet when the restrictive measures have been applied unilaterally. As mentioned above the United States had to take into account the different circumstances in differing states, give them the same period of time to adjust to the set rules and to make the effort to deliver the relevant technology to all parties. The Appellate Body therefore has made it possible to impose trade measures outside of its jurisdiction for the protection of the environment, however with these very strict conditions having to be fulfilled in order to be considered consistent with the GATT Agreement, it rendered it difficult to

Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

186Committee on Trade and Environment: *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, p. 27.

187United States – Restrictions on Imports of Tuna, circulated on 16 June 1994, not adopted, DS29/R.

188United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

sustain.¹⁸⁹

7.5 Process and Production Methods

A process and production method (PPM) is the manner in which a product is made and the various processes have different environmental impacts. This is a matter that has caused some debate amongst the environmental community as environmental regulators want to attack the environmental issues as early on as possible. Trade law does not prohibit countries to discriminate on the basis of PPM's. However the GATT Agreement does not allow discrimination between like products, however different their environmental impacts are.

The most favoured nation principle and the national treatment principle are subordinate to the concept of "like products", stating that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally *to the like product* originating in or destined for the territories of all other contracting parties¹⁹⁰, and that products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, *to the like domestic products*.¹⁹¹

The problem with PPM's within the GATT/WTO system is the interpretation and determining of what should be considered to be like products. Can two products be like but not equivalent? Can two products be identical but not alike? The Dispute Settlement Body has made a criteria to be examined when determining on like products.

In the Japan – Alcoholic Beverages case the complaining parties argued that a liquor tax law violated the national treatment principle of article III paragraph 2 of the GATT, since it established a system of internal taxes applicable to all liquors at different tax rates depending on alcoholic content and thereby favouring the domestically produced spirit Shochu at the expense of imported spirits of higher alcoholic content.¹⁹² The panel and the Appellate Body said that whether products were found alike should be determined on a case-by-case basis, based on the product's properties, nature and quality, and its end uses, the consumers' tastes and habits and the product's tariff classification. In the case of vodka compared to Shochu,

189Eric Neumayer: "Greening the WTO Agreements: Can the Treaty Establishing the European Community be of Guidance?", p. 161.

190Article I paragraph 1 of the GATT Agreement.

191Article III paragraph 2 of the GATT Agreement.

192Japan – Taxes on Alcoholic Beverages, Appellate Body Report, adopted on 1 November 1996, WT/DS8/AB/R.

they were found to be like products and since vodka was taxed in excess of shochu, Japan was found in breach of the national treatment principle. Regarding other products, such as gin, genever and rum, there were found to be substantial differences in its physical characteristics compared to Shochu, like added ingredients and different appearances, making those not like products.

The issue concerning PPM's was raised in the United States – Mexican tuna case. The panel focused on whether the United States' measures to protect dolphins could be applied to tuna, whether domestic or imported. The panel decided that dolphins and tuna could not be identified as like products. The panel did not adjudicate on whether dolphin-safe and non-safe tuna were like products and therefore whether national restrictions on non-safe tuna were consistent with the GATT Agreement. In the United States – EEC Tuna case the panel also addressed the issue of PPM's within the trade regime.¹⁹³ The panels used different interpretations of article XX paragraphs (b) and (g). The later panel found that the United States' policy on dolphin conservation was consistent with the GATT Agreement and could be applied extraterritorially. The first panel however found that the actual measures were neither necessary nor in consistency with the GATT Agreement. The former panel considered that since the dolphin-safe labelling provisions of the United States' act applied to all tuna irrespective of its origin, these provisions were not inconsistent with the GATT Agreement.

In the findings of the WTO Dispute Settlement Body in the United States – Gasoline case it confirmed the principle that WTO members are free to implement national regulations to protect the environment under article XX of the GATT Agreement on conditions that these regulations are in consistency with the Agreement. The United States' objective was to limit toxic vehicle emissions, as gasoline consumption was considered to cause injurious health problems. The measures taken by the United States were found to be applied in a discriminatory manner against foreign refineries and thus inconsistent with the GATT Agreement. The case aroused substantial debates as the decision coerced the United States to accept imports of gasoline from Venezuela with higher concentrations of certain toxic pollutants.

The issue of PPM's needs to be settled in a reasonable manner to reconcile environmental matters with trade liberalization. The preferable way to prevent these trade and environmental conflicts based on PPM is cooperation. States should conjointly concur on harmonized

¹⁹³United States – Restrictions on Imports of Tuna, circulated on 16 June 1994, not adopted, DS29/R.

standards or negotiate on different national standards. Multilateral environmental agreements are one option to establish this kind of cooperation.

Under WTO rules both environmental standards and regulation of their related PPM's are covered by the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).¹⁹⁴

The TBT Agreement holds that environmental protection is a legitimate objective that enables WTO member states to uphold high protective standards.¹⁹⁵ The TBT Agreement further permits international technical standards as justification for derogations from article XX for the protection of health and safety. A crucial component of the TBT Agreement is regulatory proportionality, i.e. that any regulation on import measures, for example requirements on packaging and labelling, should not be unnecessary with due regard to the non-conformity it creates. All such measures should be applied in accordance with WTO principles.

The SPS Agreement establishes a benchmark for restrictive exceptions for the protection of humans, plants, and animals from contaminants, disease-carrying organisms and pests, in addition to article XX paragraph (b).¹⁹⁶ These measures must be supported by scientific evidence that is recognized by international agencies. When unsupported by scientific evidence, member states are allowed to temporarily uphold measures while seeking to achieve the necessary information needed and then within a reasonable time-frame to review the measures accordingly. These measures should also be applied in consistency with the WTO principles and must not be disguised restrictions on trade.

In the European Communities – Asbestos case the use of import restrictions on national health and safety grounds and the extent to which similar goods with different health effects can be viewed as like products.¹⁹⁷ Like mentioned above, France prohibited the sale or use of asbestos and asbestos-containing materials. The EU argued the case on France's behalf. The measure was supposed to eradicate disease caused by exposure to these materials. French legislation however allowed for the usage of non-asbestos materials serving the same purposes as fire resistance products, even though placing some risk towards human health, although not to the same extent. Canada, the complainant and a major asbestos exporter, held

¹⁹⁴These agreements were both negotiated during the Uruguay Round which was concluded in 1994.

¹⁹⁵Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis: *The World Trade Organization: Law, Practice, and Policy*, p. 788.

¹⁹⁶*Ibid.*

¹⁹⁷European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

that the French measure violated article III paragraph 4 by discriminating between like products. In considering the likeness of the products in question, the panel looked at the similarities based on the competitive relationship between the products and since they performed in a similar function found the measure discriminating and constituting a breach of article III paragraph 4 of the GATT, without considering the risk to human health and consumer tastes and habits. On the issue whether to consider the materials, asbestos and the substitute materials being used in France as like products, the Appellate Body focused on the health risk linked to asbestos and found the products not to be considered like products including the inconclusive scientific evidence showing the toxicity of asbestos. The Appellate Body performed a wider ranging test to determine whether these were to be considered like products. It included the products end-uses into this analysis and did not solely look to the market competitive relationship between the products. Firstly, it found that the difference in physical properties could include the capacity to pose a threat to human health. Secondly, it found that consumer tastes and habits could be determinative, and risk to human health might as well play a role in the way that consumers approached a product. The Appellate Body concluded that the criteria of the likeness of products was only an instrument and that it is subject to possible changes, but in all cases this approach must be comprised by all the relevant evidence at each time.

The added stimulus concerning PPM's at WTO level derives from consumers for the most parts, both on political and ethical basis, as the consumer has taken over as the main motivator for trade liberalization. This is a consequence of regulating trade in accordance to PPM's as it has led to increased qualitative issues in regard to the choices consumers regarding the production of products instead of the general price-, supply- and/or demand- issues.

Many governments and producers consider some PPM's to be already covered by some of the WTO Agreements but this is not a concluded issue within the leading developed countries and there is an obvious gap between the developed and developing countries on this matter, as developing countries are in doubt of the involvement of PPM's within the WTO expressing their concerns over reconciling environmental, technological and other quality standards set high by the developed countries.

Originally the GATT Agreement dealt with product labelling through its article IX on the marks of origin, created to obstruct fraud and the misleading of consumers. Since the WTO was established in 1995 this article has been partly replaced by the Agreement on Trade-

Related Aspects of Intellectual Property Rights (TRIPS) as it covers the likeness of products attached to its location specific character. For examples on wines and spirits the TRIPS recognizes that where a given quality, reputation or other characteristics of the good is fundamentally assignable to its geographical origin that could be a ground for sanctioning discrimination between like products.¹⁹⁸ Thus, by labelling a product, the information for the improvement of consumers choices are enhanced. This is an improvement made in a qualitative manner which holds the potential to resolve some of the PPM's issues, with the appropriate labelling of environmentally harmful PPM's.

In the United States – Mexican Tuna case the panel found that the labelling of dolphin-safe tuna was not in breach of article IX since it applied in a non-discriminatory manner to all tuna regardless of its source.¹⁹⁹ Like mentioned above the ruling was not adopted by the disputing members and therefore has no legally binding meaning. The decision however, i.e. that article IX allows for labelling requirements, indicates the WTO Dispute Settlement Body would find such requirements to be consistent if applied in a non-discriminatory way and given the sufficient scientific evidence on environmental harm.

7.6 The Precautionary Principle

The decisions of the WTO Dispute Settlement Body in a couple of cases suggest an expanding recognition of precaution. Three disputes will be discussed regarding this subject, the Thailand - Cigarettes case from 1990, the European Communities - Hormones case from 1998 and the European Communities - Asbestos case from 2001. These cases show this evolution clearly.

The Thailand - Cigarettes case is the first GATT dispute that clearly has to do with precautionary issues.²⁰⁰ The case was the result of a ban that Thailand adopted on the importation of cigarettes and other tobacco products. The United States complained that the import restrictions were incompatible with the GATT Agreement and that they could not be justified under the exceptions in article XX paragraph (b) as necessary for the protection of human life or health. Thailand argued that the restrictions were justified under the article, because the measures were set in order to protect human life or health. The panel did not use a precautionary approach which would have shifted the burden of proof to the United States to

¹⁹⁸Article 22 paragraph 1 of the TRIPS.

¹⁹⁹United States – Restrictions on Imports of Tuna, not adopted, DS 21/R.

²⁰⁰Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, adopted on 7 November 1990, BISD 37S/200.

proof that cigarettes from there were no more harmful than the ones made in Thailand. The panel however found that the import restrictions were inconsistent with the GATT Agreement because of scientific uncertainty on whether foreign cigarettes were more or less harmful than domestic cigarettes and thus the restrictions were not found necessary to protect human life or health. Thailand was subsequently forced to lift its import ban.

The European Communities - Hormones case resulted from an EU ban on the use of growth-promoting hormones in foods for human consumption.²⁰¹ In 1996 the United States and Canada challenged the ban, stating it was inconsistent with the SPS Agreement under the WTO regime. The SPS Agreement covers the scientific uncertainties regarding the safety of agricultural production methods and obliges members to perform a risk assessment when there is a potential risk to animal or plant life or health based on article 3 and article 5 of the treaty. The EU claimed that the precautionary principle was a general principle of international law and that it would justify the ban on the use of hormones as it preceded the obligation to perform a risk assessment. The WTO Appellate Body did not accept this argument and said that the precautionary principle did not override the specific obligation established by the agreement and would not allow members to implement trade-restrictive measures in the absence of a risk assessment. Nevertheless, the Appellate Body held that the SPS Agreement gave WTO members the right to establish their own levels of health protection they chose, even if they were higher than international standards, if other requirements of the agreement were being fulfilled. It also verified that a member challenging the SPS measure taken, must bear the burden of proof, insinuating that the SPS Agreement incorporates the precautionary principle.²⁰²

In the aforementioned European Communities - Asbestos case, resulting from a French prohibition of the manufacture, sale, export, import and use of asbestos fibers and products containing it, Canada argued that the ban was an unnecessarily extreme measure and suggested “controlled use” as a less extreme alternative measure to be taken.²⁰³ It was estimated that approximately 2.000 people died each year in France because of health problems linked with asbestos. Canada also challenged the ban arguing like aforementioned, that it was inconsistent with the GATT Agreement. Canada held that substitute material being

201European Communities - Measures Concerning Meat and Meat Products, Appellate Body Report, adopted 13 February 1998, WT/DS26/AB/R.

202Alan Boyle, Catherine Redgwell and Patricia Birne: *International Law and the Environment*, p. 781-783.

203European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

used in France instead of the asbestos, i.e. French-made polyvinyl alcohol and glass fibers, led to a less favourable treatment of imported asbestos compared to the domestic substitutes since they were like products.

On the argument that the measure was too extreme, the panel found that “controlled use” would not have been an available sufficient measure since France had with its ban aimed for eliminating the health risk of asbestos and that waiting for more scientific certainty, often difficult to achieve, would put unacceptable risk to the public health. The decision was appealed to the WTO Appellate Body, that confirmed the panel’s ruling. However the Appellate Body clarified a few issues in a very precautionary manner. Firstly, the Appellate Body said that WTO members had the right to establish the level of health protection they found appropriate. The Appellate Body also held that the burden of proof had shifted to Canada to show that the asbestos was not a health risk. To determine the necessity of the ban, the Appellate Body stated that even though a measure is not indispensable it can be necessary for the purpose of the exception. This decision is very equivalent to a precautionary approach, by finding a balance between the degree of risk versus the value being protected by the measure taken.

The precautionary principle started out as a vague German environmental policy but has slowly become an important factor in international law. While the interpretation of the precautionary principle is aided by the decisions of disputes settlement instruments and the interpretation of the definition in principle 15 of the Rio Declaration it still has no exact definition. International treaties that are considered to incorporate the precautionary principle have failed to give the principle a detailed definition. It has gained recognition in dispute settlements, as can be seen from the three cases discussed earlier, but decision makers should speak more clearly on the role of the principle and how it is to be applied if it is to become more effective.

8 World Environmental Organization

8.1 What could a World Environmental Organization achieve?

At the global and regional levels, as analyzed in previous chapters, there are institutions already integrating and solving disputes on environmental matters within their apparatus. From the last decade of the 20th century louder voices have been raised intermittently of a specialized international organization supervising and administering international environmental legislation and disputes. Those of this opinion mainly declare the WTO inadequate to handle environmental issues intertwined with trade matters and that just as the enhancing need for free trade after WWII called for a global trade regime, the more recent need for ecological consideration calls for a global environmental regime.²⁰⁴

At the Rio Conference in 1992 the former prime minister of New Zealand commented on the need for a new mechanism for environmental governance and adopted the International Labour Organization's structure for such an organ. This idea did not gain support at the Rio Conference, but rather a Commission on Sustainable Development was created.²⁰⁵ Following, in the 1990's, were other supporters such as the french president Jacques Chirac, former WTO director general Renato Ruggiero and lawyers and scholars from many directions, first and foremost professor Daniel C. Esty, who has relentlessly spoken for a World Environmental Organization (WEO) to this day.²⁰⁶

Ideas of such a centralized and specialized organ, show however the difficulties one is confronted with. For examples after the NAFTA Agreement was established many less developed countries held that environmental restrictions would function as non-tariff barriers to trade and market access since the access would be conditioned by high standard and costly environmental measures. The NAFTA's environmental side-agreement on the North American Commission for Environmental Cooperation indicates that the environment and trade are of ambiguous nature but on the other hand less developed states, like Mexico, are unwilling to make environmental commitments unless they gain expanded market access in return. In proposals for a WEO it would alleviate the WTO of its environmentally related obligations and when disputes over environmental policies came before the WTO Dispute Settlement Body the WEO could offer its knowledge.

204C. Ford Runge: "A Global Environment Organization (GEO) and the World Trading System: Prospects and Problems", p. 4.

205Steve Charnovitz: "A World Environment Organization", p. 325-326.

206Daniel C. Esty is a professor at Yale University, who served as a campaign advisor on energy and environmental issues in the Obama presidential campaign.

The establishment of a WEO would undoubtedly make global environmental law a better coordinated field. Most specialized agencies and international governmental organizations already have their own environmental agendas, each independent from one another with little coordination from one another. It can be compared to the non-existence of environmental ministries within states, having their programs and projects spread to other fields.²⁰⁷ This fractured method of managing the global environmental regime can be very ineffective and makes a centralized governing body seem preferable. The primary UN organ for environmental matters is UNEP, which lacks all executive power to enforce actions and has limited resources for the protection of the global environment. Suggested structures have been called by various names, in this dissertation the name World Environmental Organization will be used to address the different ideas of a global environmental organ.

8.2 Suggested Structures

Proposals for a WEO have been presented at different times and in a different setting but certain common features have characterized them. A WEO would have to further fundamentals of democratic doctrine, clarity and liability in performing its mandates, to raise public awareness about the global environment and also it would need a far-reaching credibility by encouraging cooperation between the executive, administering and legislative authorities. Furthermore a WEO should work towards gaining enhanced unity between developed and developing countries and recognize the issue of successfully covering its own financial backing.²⁰⁸

The structures proposed have some different elements to them regarding other features, but similarities can be identified from the focus points in which they are built upon. One option could be to keep the system in a decentralized manner, with the current environmental organizations still operative, but with an improved environmental protection within the UNEP, making the UNEP an international organization with a complete legal capacity, operating by its own budget and increased staff and legal powers.²⁰⁹ This type of an organization would central around cooperation with other international organizations demanding their member states to accord environmentally-related mandates and jurisprudence to the established WEO. This kind of a cooperation organization would therefore not change the legal standing of other

²⁰⁷Frank Biermann: "The Case for a World Environment Organization", p. 24.

²⁰⁸Dena Marshall: "An Organization for the World Environment: Three Models and Analysis", p. 85-86.

²⁰⁹Ibid, p. 91.

environmental agreements or other UN organizations but become either an independent international organization with its own membership or as an internal body established by the UN General Assembly agreed on by governments and would have a decision-making power that would bind all members.

Another option would be to change the current decentralized system where each organ has the focus on a different issue and to follow the WTO structure. This kind of a WEO would be established by an umbrella agreement, containing the general principles and objectives and coordinate the principles set out in the multiple environmental regimes already existent.²¹⁰ Such an agreement would have to encompass all the established principles of global environmental law as well as developmental concerns, for example the precautionary principle, the principle of sovereignty over natural resources, principle of sustainable development etc. Like the WTO, this kind of a suggested WEO would perform through multilateral as well as plurilateral environmental agreements, whereas the multilateral agreements demand ratifications of every contracting party and the plurilateral allow contracting states to refrain from signature.²¹¹ With this centralized structure a WEO could improve and enhance a shared and widespread reporting system representing the issue-specific environmental agreements, for example annual reports from contracting states, set up a Dispute Settlement Body, make reciprocally defined principles followed by other interconnected agencies and organs for example making an interagency agreement with the WTO Dispute Settlement Body who would then follow the same standards. Last but not least, such an organization could enhance a common regime of providing assistance to developing countries with financial and technological transfer.²¹²

Yet another option is that of a world environmental authority for the protection of the environment or the global commons, provided with enforcement authority used against states that do not comply with set environmental standards.²¹³ This type of organization is in the spirit of the UN Security Council, which has the power to order member states to comply with regulations otherwise facing counter-measures.²¹⁴ This appears to be the most unrealistic option, as large developing countries and industrialized countries would hardly cooperate in such an agreement where their sovereignty would be injured. On that note, ideas have been

²¹⁰Ibid, p. 94.

²¹¹Ibid.

²¹²Ibid, p. 95.

²¹³Ibid, p. 100.

²¹⁴Article 39 of the UN Charter.

expressed of an international environmental court or an international environmental council. Arguments for an international environmental court have been to address the need for a specialized bench with a sufficient expertise of international environmental law in ruling on pressing environmental problems, for individuals and organizations to have the possibility to have access to a justice system focused on the environment and to enable dispute settlements procedures to address the common interests of the environment.²¹⁵ Contrary, for arguments against such an establishment it has been pointed out that it could result in the further fragmentation of international law where existing judiciary organs are well equipped to consider environmental disputes already, which then take into account other aspects of international law.²¹⁶ This argument can be answered however with the fact that many of the already active agreements on the different aspects of international law have established such forums within their systems, like the WTO Dispute Settlement Body within the trade regime. These already established instruments increase the danger of diverging interpretations of international law away from international environmental principles without a and without a hierarchical relationship to an environmental instrument of the same level. But as an organization with punitive and sanctioning mechanisms it would probably only be feasible for small developing countries to take part and thus weaker environmental standards would prevail and the aim of environmental protection reversed.

8.3 Arguments In Favour

Three main arguments can be identified for the establishment of a WEO, they are the current lack of coordinated aspects of international law, the shortcomings of assistance to the developing world and the need to achieve further advancement of international environmental standards. Lack of coordinated international environmental governance may result in additional costs and cause less favourable consequences. With the growing number of international environmental organs the fragmentation of the field increased significantly, each with their own emphasis on different norms and standards, set by separate legislative bodies, taking little notice of consequences and relations with other fields. With the creation of the various issue-specific bodies already established, for example the WTO, states are found to be showing growing desires to operate in a more centralized manner. Furthermore an international environmental organization could play an important role in the environmental

²¹⁵Ellen Hey: *Reflections on an International Environmental Court*, p. 3.

²¹⁶Ibid.

abilities in developing countries, an issue that has been addressed in regimes concerning the ozone layer, climate change and biodiversity protection, where developed countries have recognized the need to compensate the developing countries for fulfilling with the set environmental standards. The lack of coordination is probably the main problem for the strengthened transfer of technology and finance to the developing world, as it enhances the opacity of the system and discourages participation. A WEO could be given the function of supervising and administering this transferral of financial and technology assistance to the most vulnerable countries in addressing environmental challenges. Supporters of a WEO maintain that it could make implementation and development of international environmental law much easier. Already various environmental organizations have as their objectives to further knowledge and research on the matter and make its member states obligated to report on their implementation process. Yet again the lack of coordination within the global environmental regime seems to hinder its effectiveness.

8.4 Arguments Against

Like the arguments in favour, the arguments against the establishment of a WEO primarily circled around three issues. Firstly, there is a claim that the already existing environmental organization and agencies, for example the UNEP, are perfectly suitable to sufficiently manage and administer the urgent environmental problems and that the diversity of environmental challenges makes it even better to have them dealt with under different issue-specific instruments.²¹⁷ Therefore coordination may be advantageous, whereas centralization is not preferable, and thus a WEO not necessary. Another argument is that a WEO would be difficult to manage and act as just one more branch of the aforementioned diverse global environmental regime.²¹⁸ Also as many environmental programmes are under the authority of state governments, it could be seen as a threat to the states' sovereignty over national environmental issues.²¹⁹ The less developed states are the ones of a strongest dissenting opinion for establishing a WEO, as they believe environmental protection to be used as disguised trade sanctions.²²⁰ This is the way many developing states consider the WTO system to function, acting more in the name of developed countries.

217C. Ford Runge: "A Global Environment Organization (GEO) and the World Trading System: Prospects and Problems"p. 25.

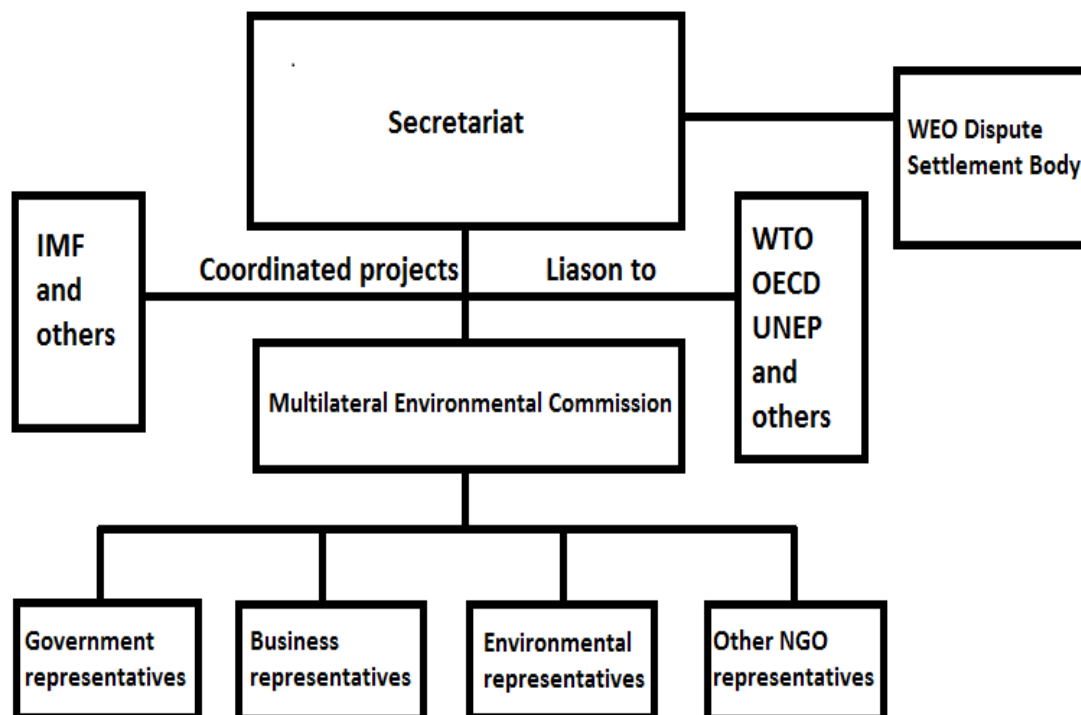
218Ibid, p. 25.

219Ibid, p. 26.

220Ibid, p. 27.

8.5 Effects on the WTO

A WEO could have a positive effect on the world trade system and the global environment regime, relieving the trading system of environmental issues enabling the WTO to concentrate on seeking to continually improve market access and eliminating constraints on trade, having only to deal with environmental matters in cases of apparent distortions of trade. With cooperation a WEO could make the environmental exceptions of the GATT Agreement more unequivocal for the WTO and set the appropriate guidelines of the minimal trade distorting procedures of the various multilateral environmental agreements. This coordination would neither have to be centralized nor cause the intrusion of governments' sovereignty. Following is a structural model presented by C. Ford Runge:²²¹



221C. Ford Runge: "A Global Environment Organization (GEO) and the World Trading System: Prospects and Problems", p. 43.

9 Conclusion

Originally the establishment of the WTO system was intended to create a trade specific regime. By the time the negotiations were completed in 1994 the preamble of the WTO Agreement covered sustainable development and the environment as a common interest. Under the GATT Agreement member states must, with a few exceptions, take on commitments to reduce tariffs and other barriers to trade and to eliminate discriminatory treatment in international commerce. A guiding principle within the GATT is that of non-discrimination, elaborated in article I mirroring the most favoured nation principle for constraining discrimination by member states among different foreign exporters and in article III adopting the national treatment principle to prevent the favouring of domestic products through domestic policies. The GATT Agreement severely limits the use of border restrictions on trade other than tariffs, prohibiting the use of quotas or import or export licences on the importation or exportation of goods into and out of any member state.

In the late 1960's with the appearance of the increasing international environmental movement, the liberalization of the trade system came under scrutiny. A number of multilateral and bilateral environmental agreements were adopted to handle the various environmental issues. A major stepping stone for the development of international environmental law was the 1972 UN convened Stockholm Conference, followed by the adoption of the Brundtland Report, opening the discussion for sustainable development in 1987. To revisit unanswered questions from the Stockholm Conference, the Rio Conference on Human Environment was held in 1992, attracting a lot of attention. Adopted in Rio were the Rio Declaration recognizing the generally accepted principles of international environmental law and an action plan, Agenda 21. The major principles are now included in most multilateral environmental agreements, having binding force to the contracting parties.

The relationship between trade and environment has therefore not been built on a parallel and directly combined ground, however their subjects are on convergent paths. Although the GATT Agreement does not specifically mention environmental problems as a justification to derogate from its main principles, the GATT panels and later the WTO Dispute Settlement Body have examined environmental measures under article XX of the GATT.

Article XX describes conditions in which a measure that would otherwise be considered inconsistent with the GATT Agreement, can be justified and employed. Three of article XX's sub-paragraphs are of main relevance for environmental disputes. They are paragraphs (b), (d)

and (g). When applying article XX paragraph (b) the measure must have the objective to protect of human, animal or plant life or health, and it has to be necessary to uphold this objective. For upholding article XX paragraph (d) it must be proven that measure is formulated to secure compliance with laws or regulations, found consistent with provisions of the GATT Agreement and also that there was a necessary means for this measure to achieve this goal of compliance. This requirement of necessity both within paragraph (b) and (d) has been found fulfilled when a contracting state is not able to use any alternative measure consistent with the GATT Agreement and if the measure is the one least affecting trade. Whether a measure is the least restrictive measure, the Dispute Settlement Body has held that the range of alternative measures should be examined in accordance with the interests that are being protected, making a measure be considered necessary more easily the more vital and indispensable the nature of the interest were. Paragraph (g) mentions that the taken measure must be relating relating to the conservation of exhaustible natural resources and made in concurrence with domestic production or consumption. The Dispute Settlement Body has considered a number of resources as exhaustible, such as tuna stocks and clean air. The provision is therefore not limited to non-living or mineral resources, applicable also to living species susceptible to depletion or exhaustion because of human activite. Furthermore the resource does not have to be already close to exhaustion or depletion, it only has to hold the potential to be. A measure for the conservation of exhaustible resources must be considered to be in conjunction with restrictions on domestic production or consumption.

These exceptions have two further requirements that must be fulfilled to be considered justifiable under the GATT Agreement, to be found in the in the introductory clause of article XX, the so-called chapeau. Firstly, the measures taken cannot be arbitrary or unjustifiable discriminatory between countries where the same conditions prevail and secondly, the measures cannot be taken as a disguised restriction on international trade. The requirements set forth in the chapeau are to prevent misuse of the exceptions. The requirement of arbitrary or unjustifiable discrimination applies to the application of a trade measure and not the measure in itself. An unjustifiable discrimination is existing when no serious effort was made to negotiate with the the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal, and also depends on the flexibility of the measure taken. A measure may not be a disguised restriction on international trade, meaning that a member state may not intentionally conceal a trade-restrictive measure under the article XX

exceptions, and thereby circumvent its obligations established by the GATT Agreement.

In the United States – Mexican Tuna case from 1991, the panel found that the imports of tuna should not be restricted under article XX paragraph (b) and (g) only because the protective policy in the exporting country was not identical to that of the importing country. The use of extraterritorial measures was not accepted by the panel and the United States could not impose its environmental policy unilaterally by using trade embargoes. As analyzed above, through case law, the WTO Dispute Settlement Body has established a more environmentally friendly approach by the functioning of these provisions. Already in 1994 the GATT panel in the United States – EEC Tuna case concluded on a different note, whereas it found that in the light of the negotiating history of article XX and that paragraphs (b) and (g) did not include any limitation by the location of the living things to be protected, and therefore the policy of the United States on conservation of dolphins could have extraterritorial effects and jurisdiction over the state's own property and persons, i.e. within its personal jurisdiction. However a state cannot force another state to adhere to its environmental policy and control the acts of other sovereign states, and the measures of the United States were in breach of article III and XI of the GATT Agreement.

By 1998, the WTO Dispute Settlement Body, widened even further the extent to which the article XX exceptions applied. In the United States – Shrimp case the panel found that the embargo made by the United States threatened the multilateral trading system and was found in breach of article XX. The Appellate Body also found the embargo in breach of article XX but disagreed with the panel's reasoning. The Appellate Body came up with a two-tiered process for assuring consistency with the article XX exceptions. Firstly, it accepted that the disputed matter was an environmental matter falling under article XX paragraph (g) as a conservation measure for the protection of an exhaustible natural resource. However the manner in which it was applied by the United States was against the chapeau of article XX, constituting arbitrary and unjustifiable discrimination. Therefore the prohibition on the import of shrimp was legitimate under article XX (g) but it did not fulfill the requirements of the chapeau. Also the embargo could not be used to force other states to adopt identical policies, bearing in mind the different situations of different states. The Appellate Body further articulated its finding in regard to the unilateral environmental policies, that they were to be expected, giving environmental measures a great boost within the WTO and is considered a major step forward for the WTO with respect to environmental issues. Unilateral measures

taken for reasons to protect the environment have thus been approved but not unconditionally. States have to take into account the different circumstances in different states, must give all relevant states the same period of time to adjust to the set rules and have to make an effort to deliver relevant technology to all parties involved.

The WTO Dispute Settlement Body has also started to consider the precautionary principle of environmental law and has expanded its findings in a precautionary manner when there is lack of scientific evidence on environmental effects of particular measures. The precautionary principle causes a shift of the burden of proof, laying it on the member state responsible for the potentially harmful activity. Earlier decisions of the GATT panels indicate that little attention was given to the principle, laying the burden of proof of harmful effects on the state protesting the potentially harmful activity. More recent decisions of the WTO Dispute Settlement Body however indicate a growing recognition for the principle. In a dispute between the United States and the EU on the use of hormones in food production there was a lack of scientific evidence on the potentially harmful and long-term effects of its usage. The EU argued that the precautionary principle was a general principle under international environmental law which would justify the ban on hormones. The Appellate Body held that WTO members had the right to set the level of health protection to a standard of their own choice even if above international standards and that the member state challenging a measure according to those standards would have to prove that a potentially harmful activity was harmless. A case from 2001 seems to confirm that the precautionary principle has found a foothold within the GATT Agreement. The case concerned a prohibition of the manufacture, sale, export and import of asbestos and products containing it, due to health problems linked with the substance. The Appellate Body said that WTO members had the right to establish the level of health protection they found appropriate. The Appellate Body also held that the burden of proof had shifted to the member state arguing against the prohibition to show that the substance was not harmful. To determine the necessity of the ban, the Appellate Body stated that even though a measure is not indispensable it can be necessary for the purpose of the exception. This decision has a precautionary approach and the Dispute Settlement Body links it to the finding of a balance between the degree of risk versus the value being protected by the measure taken.

The non-discrimination principles of the GATT Agreement, do not allow discrimination between like products based on different production and process methods. The first issue is

how to determine what are like products. The Dispute Settlement Body has established a criteria to determine on the likeness of products. Firstly, it must be established on a case-by-case basis and determined by the product's properties, nature and quality, its end useage, the consumers' tastes and habits and the product's tariff classification, having no specific hierarchy between those factors.

The like product question was a part of the European Communities – Asbestos case, as the complainant argued that there was a breach of article III paragraph 4 of the GATT Agreement, by discriminating between like products. The Appellate Body focused on the health risk linked to asbestos and found the products not to be considered like products including the inconclusive scientific evidence showing the toxicity of asbestos. The Appellate Body performed a wide ranging test to determine whether these were to be considered like products. It included the products end-uses into this analysis and did not solely look to the market competitive relationship between the products. Firstly, it found that the difference in physical properties could include the capacity to pose a threat to human health. Secondly, it found that consumer tastes and habits could be determinative, and risk to human health might as well play a role in the way that consumers approached a product. The Appellate Body concluded that the criteria of the likeness of products was only an instrument and that it is subject to possible changes, but in all cases this approach must be comprised by all the relevant evidence at each time. By the proper labelling of environmentally harmful products the issue of discrimination based on PPM's can possibly be resolved.

It seems obvious that the WTO pays an ever-increasing attention to the protection and preservation of the environment through its rules and enforcement mechanisms. The CTE was an important addition and improvement in the trade and environment interaction within the trading system. All members have access to the CTE. It makes important propositions to the WTO Ministerial Conferences, is to work on identifying the relationship between trade measures and environmental measures in order to promote sustainable development and to recommend relevant alterations of the multilateral trading system with proper regards of developing countries and their specific disadvantages. Also the CTE observes and determines the consequences of trade measures implemented for environmental purposes and the trade effects of environmental measures.

The WTO Dispute Settlement Body has developed into being amongst the most significant and powerful international judicial bodies. The strenght of the WTO Dispute Settlement Body

comes from its rule-based and accurately structured procedures. By taking into consideration other areas of public international law and interpreting the WTO Agreements in compliance with multilateral environmental agreements makes the WTO Dispute Settlement Body an even stronger judicial body and more trusted by its member states.

Like briefly discussed above, there have been suggestions of a World Environmental Organization with competence for major environmental issues. This is impelled by arguments of more specialization and distribution of work load. My conclusion is however that the downsides of such an organization weigh heavier than the advantages would. Rather, the emphasis should be put on the integration of trade and environment, as it makes it more likely for the two to gather in reconciliation that way. This would also be more in line with the objective of sustainable development, remembering that sustainable development is now the designated end goal of the WTO.

This analysis has demonstrated that through the exceptions of the GATT Agreement, environment and trade are given concurring grounds and environmental protection has been given importance within the WTO.

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