INTRODUCING THE GREEN HELMET CONCEPT:- LESSONS FOR WTO FROM NAFTA

BY: -

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DECLARATION

I **ALBERT SIMIYU MURAMBI** do declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

Signed.....

5th December 2008

This thesis is submitted for examination with my approval as University supervisor.

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DEDICATION

To the memory of my late father and teacher, Vincent Wanyonyi Murambi and my late brother and dear friend George Munya Murambi for having positively influenced my life.

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List of Abbreviations

1. AB:- Appellate Body
2. Cartagena Protocol:- Cartagena Protocol on Biosafety to the Convention on Biological Diversity
3. CBD:- Convention on Biological Diversity
4. CEC:- Commission for Environmental Cooperation
5. CITES:- United Nations Convention on International Trade in Endangered Species of Fauna and Flora
6. DSB:- Dispute Settlement Body
7. DSU:- Understanding on Rules and Procedures Governing the Settlement of Disputes
8. E.I.A :- Environnemental Impact Assessment
9. EPA:- U.S. Environmental Protection Agency
10. ETM:- Environmental Trade Measures
11. FC& N:- Friendship, Commerce and Navigation treaties
12. GATT:- General Agreement on Tariffs and Trade
13. GMO:- Genetically Modified Organism
14. GSP:- U.S. Generalised System of Preferences
15. ICJ:- International Court of Justice
16. ITO:- International Trade Organization
17. MEAs:- Multilateral Environmental Agreements
18. MFN:- Most Favored Nation treatment principle
19. MMPA:- U.S. Marine Mammal Protection Act
20. Montreal Protocol:- Montreal Protocol on Substances that Deplete the Ozone Layer
21. NAAEC:- North American Agreement on Environmental Co-operation
22. NAFTA:- North American Free Trade Agreement
23. NTP:- National Treatment Principle
24. OTC:- Organization for Trade Cooperation
25. PPMs:- Process and Production Methods
26. SPS:- Sanitary and Phytosanitary Measures
27. TEDs:- Turtle Excluder Devices
28. TRIPS:- Trade-Related Aspects of Intellectual Property Rights
29. U.N.:- United Nations
30. U.S.:- United States of America
31. UNCED:- United Nations Conference on Environment and Development
32. UNCLOS:- United Nations Convention on the Law of the Sea
33. USTR:- The United States Trade Representative
34. WTO:- World Trade Organisation

Table of Agreements, Treaties and Statutes

1. Agreement between Canada and the Government of the U.S concerning the Transboundary Movement of Hazardous Waste 1983
2. Agreement between the U.S and the United Mexican States on Cooperation for the Protection and Improvement of the Environment on the Border Area 1980
3. Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000
4. General Agreement on Tariffs and Trade-1947
5. Montreal Protocol on Substances that Deplete the Ozone Layer-1987
6. North American Agreement on Environmental Co-operation-1993
7. North American Free Trade Agreement-1993
8. Protocol of Provisional Application to the General Agreement on Tariffs and Trade-1947
9. Rio Declaration on Environment and Development-1992.
10. The Marrakesh Agreement-1994
11. Trade-Related Aspects of Intellectual Property Rights-1994
12. United Nations Convention on Biological Diversity-1992
13. United Nations Conference on Environment and Development-1992
14. United Nations Convention on International Trade in Endangered Species of Fauna and Flora-1973
15. United Nations Convention on the Law of the Sea-1982
16. WTO's Agreement on the Application of Sanitary and Phytosanitary Measures-1994
17. U.S-Canada Free Trade Agreement
18. Canadian Federal Fisheries Act 1985
19. U.S. Clean Air Act 1990
20. U.S. Endangered Species Act 1973
21. U.S. Trade Act of 1974
22. U.S Trade Agreements Act of 1979
23. U.S. Marine Mammal Protection Act 1990

CHAPTER ONE

1.0 INTRODUCTION AND HISTORICAL BACKGROUND

1.1: INTRODUCTION

This thesis demonstrates that the World Trade Organisation (WTO) rules that were formulated in 1994 need to be reformulated to effectively prevent and resolve environmental disputes. WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), concentrated on disputes relating to tariffs and trade. International environmental concerns took a back seat when WTO was negotiated. In contrast the North American Free Trade Agreement (NAFTA)[1] through the North American Agreement on Environmental Co-operation (NAAEC)[2] that was negotiated at almost the same time with WTO has concrete provisions aimed at preventing and effectively resolving conflicts that may arise between state's obligations to promote trade and protect the environment.

International relations are moving more towards dispute prevention than settlement. The green helmet concept provides that international environmental law should be reviewed and developed to, *inter alia*, identify and prevent actual or potential conflicts, particularly between environmental and social/economic agreements or instruments.[3] It further emphasizes that through the United Nations system, parties should consider broadening and

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[1] North American Free Trade Agreement, December 8, 1993, 32 I.L.M. (1993)) (entered into force on 1st January 1994).

[2] North American Agreement on Environmental Co-operation, December 8, 1993, 32 I.L.M. (1993) (entered into force on 1st January 1994).

[3] Id. at Article 39.3 (g).

strengthening the capacity of mechanisms to identify, avoid and settle internal disputes in the field of sustainable development, duly taking into account existing bilateral and multilateral agreements for the settlement of such disputes.[4] Since the concept of dispute avoidance (the "green helmet") was introduced at the Sixth (Legal) Committee of the United Nations General Assembly during its forty-fourth session in 1989,[5] dispute avoidance as opposed to settlement has gathered momentum at the international level. The concept of dispute avoidance was first examined at a meeting of experts convened by the Rockefeller Foundation in Bellagio, Italy, in 1974.[6] The third United Nations Conference on the Law of the Sea (UNCLOS III) encouraged and carried forward the dispute avoidance agenda as opposed to settlement.[7] Agenda 21[8] also encouraged dispute avoidance.

This study contends that NAFTA, through the NAAEC has taken the green helmet concept to new heights by incorporating environmental dispute avoidance provisions in a trade treaty. The NAAEC has established institutions such as the Commission for Environmental Cooperation whose organs play an oversight role over the environment. The three organs are the Council, Secretariat and Joint Advisory Board. The Council provides a forum at which State parties discuss environmental matters and promote and facilitate cooperation. The Council also recommends on the use of economic instruments in pursuit of domestic and internationally recognized environmental objectives. The Secretariat prepares an annual report on parties' activities around the NAAEC. The report includes data on party's

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[4] Id. at Article 39.3 (h).
[5] UN Doc. A/C6/44/SR.7ober 1989.
[6] A. O. Adede, *Management of Environmental Disputes: Avoidance Versus Settlement*, in Sustainable Development and International Law 115 (Boston, MA et al. eds., 1995).
[7] Id. at 116.
[8] Commission on Environmental Law of IUCN, Agenda 21: Earth's Action Plan (Nicholas A. Robinson ed. 1993)

environmental opinion whose moral force imposes rectitude of conduct. The Secretariat may also prepare a factual record. A factual record contains technical, scientific or other information. If a party acts on the conclusions and recommendations of the factual record, potential disputes between parties will have been prevented. The most radical green helmet provision in NAFTA is the specific recognition and subordination of its trade obligations to several Multilateral Environmental Agreements (MEAs). This means that a party can deploy Environmental Trade Measures (ETMs) provided for in MEAs without offending NAFTA. Consequently, disputes are avoided because ETMs are justifiable under specific MEAs. The WTO, on the other hand, subtly stokes trade and environment disputes. This thesis has examined disputes between WTO and NAFTA (jointly referred to as trade rules) on one hand and environmental conservation rules and policy on the other hand. It has examined WTO rules and how NAFTA has managed to prevent trade versus environment disputes. It has proposed reforms to WTO rules to take into account the green helmet concept that is hitherto unrecognized and make its dispute resolution process 'greener'. The reason why NAFTA has been used over other trade agreements is because it has firm and tested green helmet provisions. In addition, its membership accounts for a substantial share of global trade as opposed to other regional trade agreements.

The thesis discusses various aspects of trade and environment disputes that deserve intervention of the green helmet concept. The first aspect of discussion is the role of process and production methods (PPMs) as a basis of product differentiation and cause of dispute between environment and trade. Products produced under high environmental standards have a higher cost of production per unit than like products produced in a lax environmental legal

regime. How should trade rules deal with the comparative advantage enjoyed by the latter goods? The second aspect to be examined will be the dispute between MEAs on one-hand and trade rules on the other hand. The third aspect of dispute to be discussed will be the attempt by some WTO members to impose domestic environmental conservation standards in other members' jurisdictions by conditioning access to their domestic markets.

The foregoing disputes play out on application of two basic trade principles. The first of these principles is the Most Favored Nation treatment principle (hereinafter referred to as MFN). The MFN principle require members to immediately and unconditionally accord any advantage, favour, privilege or immunity granted by a Contracting Party to any product originating from or destined for any other country to the like product originating from or destined for the territories of all other Contracting Parties.[9] The other principle is the National Treatment Principle (hereinafter referred to as the NTP). The NTP obligate Contracting Parties not to discriminate between domestic goods and like products imported from contracting parties. [10]

1.2: BACKGROUND TO THE PROBLEM

The modern day international economic legal order is traceable to classical economics. The theories of Comparative and Absolute Advantage as advanced by classical economists form the foundation of trade between nations and can be considered as the leading causes of

[9] Protocol of Provisional Application, October 30, 1947, 55 U.N.T.S 308.
[10] Id. at Article III.

international trade.[11] Classically, it was believed that factors of production were internationally immobile. Thus if, for example, wages are higher in Kenya than in Sudan, then, they stay higher for migration cannot take place on a scale sufficient to eliminate discrepancies. If one country can produce one product more cheaply than it can be produced in the other, each will have an advantage in the production of one commodity and a disadvantage in the production of the other. Each country will be keen to export the commodity in which it has an advantage and import the commodity in which it has a disadvantage.[12] Even when one country can produce both commodities more efficiently than another country, both can gain from specialization and exchange, provided that the efficiency advantage is greater in some commodity or commodities than in others.

The idea here is that if country A can produce some set of goods at a lower cost than country B and country B can produce some other set of goods at a lower cost than country A can produce them, then clearly it would be best for country A to trade its relatively cheaper goods for country B's relatively cheaper goods. The consequence is that both countries would gain from trade. A country is said to have a Comparative Advantage in the production of a commodity if it can produce it at a lower opportunity cost than another country. The theory of Comparative Advantage as postulated was to encourage specialization by and between nations with the resulting need for trade between states and efficient resource allocation.

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[11] Irwin D. A, *An Intellectual History of Free Trade*, in The Regulation of International Trade 1, (Michael J. Trebilcock et al. eds.,1996).

[12] Jackson, J. H., *Legal Problems of International Economic Relations* 9 (1st ed.1995).

1.2.1: GROWTH AND DEVELOPMENT OF WTO

Prior to GATT 1947, international economic relations between states were conducted on bilateral basis based on treaties of Friendship, Commerce and Navigation (hereinafter referred to as FC & N Treaties). These treaties would be signed between countries outlining the basic principles upon which trade relations would be premised. FC & N Treaties are traceable to the United States of America (U.S.) practice since 1833 when it would conclude treaties with countries with which it had trading relations. Due to proliferation of FC & N Treaties, particularly by the U.S., other trading powers especially in Western Europe took to concluding FC & N Treaties. The international arena was replete with a plethora of FC & N treaties most of which were contradictory. There was need to harmonise competing treaties through a multilateral effort. This led to the formation of GATT.

After World War II, the U.S. emerged as a dominant economic powerhouse. In her attempts at restructuring the inter-war period international trade protectionist measures, it held the position that a liberalized system of international trade based on non-discrimination and elimination of trade barriers was an integral part of the world's economic well being. To achieve a rational reorganization of world trade, an international conference on trade and employment was held at Havana between 1947 and 1948.[13] The International Trade Organization (ITO) charter which included agreements on commercial policy, restrictive business practices, commodity agreements, employment, economic development and international investment, and a constitution for a United Nations agency for international

[13] Henkin, L. et al, International Law Cases and Materials 1396 (West Publishing Co.. St. Paul 3d ed. 1993).

trade was approved by the Conference.[14] The ITO charter never came into existence principally due to U.S. and British opposition. At that time, the U.S. was disenchanted with international organizations as a result of the cold war and the upsurge in protectionist sentiment.[15] This opposition killed the ITO.

However the I.T.O.'s void was quickly filled by GATT. GATT was initially intended to be a transitory measure while awaiting ratification of the I.T.O. by U.S Congress. GATT was the commercial structure slated to be part of the I.T.O. The GATT was applied pursuant and to the extent prescribed by the Protocol of Provisional Application of October 30, 1947 that became effective on 2nd February 1948. The desirability of the protocol was in light of the need to operationalise GATT as soon as possible. When the ITO, and the subsequently proposed Organization for Trade Cooperation (OTC), did not come into force, GATT, through the Protocol, became the principal instrument for regulating international trade.[16]

Under GATT, tariff and trade negotiations were primarily conducted through `rounds'. The first round was held in Geneva, Switzerland in 1947 and it involved 23 countries. The 2nd round was held in Annency, France in 1948 involving 33 countries. The Torquay Round in which 34 countries were involved was held in England in 1950. A further Geneva Round which involved 22 countries was held in 1956. The `Dillon Round' was held between 1960 and 1961 involving 45 countries. These rounds focused on negotiations for the reduction of tariffs. The Sixth Round called the `Kennedy Round' involved 48 participating countries. Its main achievements were the attainment of tariff reductions by 50% on a range of goods, the

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14 Id. at 1397.
15 Protocol of Provisional Application, *supra* note 9.
16 U.N. Doc., *supra* note 5.

development of an anti-dumping code, and special exceptions for less developed countries. The Seventh round was referred to as the Tokyo Round. It commenced in Geneva in 1973 and was concluded in 1979. It involved 99 countries. This round focused on non-tariff barriers to trade. Codes and Agreements were concluded that covered such matters as subsidies, unification of anti-dumping rules, customs valuation, discrimination against foreign goods in government purchasing, countervailing duties and quality specifications that burden foreign imports.

The Uruguay Round (1986 – 1993) saw the creation in 1994 of the WTO as the principal institution overseeing multilateral trade. This Round continued detailed work in many non-tariff measures, but greatly expanded the scope of the trading system by adding services and intellectual property issues. This round involved over 120 countries. The Marrakesh Agreement [17] has within its ambit the GATT and numerous other Agreements.

The WTO establishes the Ministerial Conference as the highest-level decision making organ. This Conference meets, at least, once every two years. The General Council is subordinate to the Conference and meets several times in a year.[18] The Council is made up of Ambassadors and Heads of Delegation in Geneva. The General Council is responsible for governance issues. It is also the Trade Policy Review Body and the Dispute Settlement Body. The Council appoints panels to investigate members' complaints and make recommendations. It also adopts Panel and Appellate Body reports, conducts surveillance of implementation of rulings and recommendations and suspension of concessions or obligations under the covered

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[17] Protocol of Provisional Application, *supra* note 9

[18] Bowett, D. W. Law of International Institutions 117 (Philippe Sands & Pierre Klein eds., 5th ed. 2001).

agreement.[19] Unlike the Panels, the Appellate Body is a standing body of seven members knowledgeable in international law and trade. The Goods Council, the Services Council and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council report to the General Council.

The first Ministerial Conference was held in Singapore in 1996 followed by the second one held in Geneva in 1998. The November 1999 Ministerial Conference in Seattle was scuttled by protesters led by consumer groups, agricultural groups and labour unions. The collapse was also accentuated by lack of consensus among WTO membership for the launch of a "Millennium Round." There were further Ministerial Conferences in Doha and Cancun Mexico in 2001 and 2003 respectively. Modern international trade is dominated by the WTO with its numerous agreements that closely bind its members. Formation and operation of regional trading blocks as recognised under GATT is still recognised by WTO. One such block singled out for comparative study with WTO, due to its innovative environmental dispute management systems, is NAFTA and its side agreement, the NAAEC.

1.2.2: GROWTH AND DEVELOPMENT OF NAFTA

NAFTA was concluded in 1992 by the Canada, Mexico and United States of America. Its primary objective was to substantially reduce tariffs and trade barriers among state parties. After NAFTA's conclusion, environmentalists raised five concerns. One of the concerns was that expanded economic activity would increase chances of environmental degradation [20] and

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[19] Id. at 117

[20] Hunter, David Salzman and Zaelke D., International Environmental Law and Policy 1222(2007).

that non-tariff barriers to trade are a threat to domestic environmental regulations.[21] It was argued that trade rules would bar state party from introducing or using ETMs.[22] It was also argued that the secretive nature of the negotiations would curtail citizen's right to raise environmental concerns.

Differences in domestic enforcement of environmental standards between NAFTA Parties were most visible in the sixty-mile wide free trade zone along the 2000-mile United States – Mexico border – known as the Maquiladora zone.[23] The Maquiladora Programme was established in 1965. They are factories owned by U.S. and Mexican investors operated on the Mexican side of the border. They were largely unregulated. Mexico lacked the resources and political will to enforce its environmental standards.[24] Fears were abound that NAFTA would facilitate the spread of Maquiladora like conditions in other NAFTA parties. Public opposition to NAFTA was widespread. NAFTA was ratified by the House of Representatives on 17th November 1993 and by the Senate on 20th November 1993 after the conclusion of labour and environmental side agreements in September 1993. All three agreements – NAFTA, the Labour Side Agreement and the Environmental Side Agreement were signed by President Bill Clinton on 8th December 1993 and entered into force on 1st January 1994.[25] The Environmental Side Agreement, NAEEC, was concluded with a view to addressing environmental concerns that may arise under NAFTA.

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[21] Id. at 1222.
[22] Id. at 1223
[23] Id. at 1223
[24] Id. at 1223
[25] Id. at 1223

As observed from a historical perspective, GATT and later on WTO heavily lean in favour of trade and lacks environment versus trade dispute prevention provisions. Having discussed the historical evolution of trade rules, it is important to look at the intricate synergy between trade and environmental conservation with the resultant actual and potential conflicts.

One of the sources of dispute between environment and trade is PPMs. Varying PPMs have been a challenge to trade liberalization rules. While trade rules seek uniform treatment of like products, environmental conservation rules seek to distinguish like products by PPMs. Trade rules look at consumer tastes and habits, end use, tariff classification and nature and quality of the products to make any distinction. PPM is not one of the considerations used to distinguish products under GATT. In the *Tuna-Dolphin case*[26] GATT's dispute settlement panel observed that regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. It observed that trade rules obliged the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponded with that of United States' vessels. PPMs are used by some WTO members to distinguish like products. In this case the U.S. used PPMs to distinguish U.S. tuna from Mexican Tuna. Such use of PPMs brings to the fore a dispute between trade rules and environmental conservation rules.

Multilateral efforts to conserve the environment have been manifested through enactment of MEAs. MEAs are negotiated outside trade rules but use trade measures to achieve their objectives. The United Nations Convention on International Trade in Endangered Species of

[26] United States-Restrictions on Import of Tuna, Aug., 16, 1991, 330 I.L.M. 1594.

Fauna and Flora (CITES)[27] for example, requires contracting parties to prohibit importation of products made of or containing cognizable parts of endangered species. The Montreal Protocol on Substances that Deplete the Ozone Layer[28] at Article 4 projects trade measures that impose control over ozone depleting chemicals, products containing ozone depleting chemicals and products manufactured with but not containing ozone-depleting substances. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity[29] applies the precautionary principle as contained in Principle 15 of the Rio Declaration on Environment and Development[30] on biotechnology products.

The precautionary approach has evolved from the realization that scientific certainty often comes too late to design effective legal and policy responses for preventing potential environmental threats. The principle anticipates environmental harm and seeks to prevent it from occurring. It provides that lack of scientific certainty is not a reason for postponing cost-effective measures to prevent environmental degradation. On the other hand, trade rules on the Application of Sanitary and Phytosanitary Measures (SPS)[31]require members to ensure that their sanitary or phytosanitary measures are based on an assessment of risk that shall take into account available scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, prevalence of scientific diseases or pests, existence of pest or disease-free areas, relevant ecological and environmental

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[27] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, March 3, 1973 12 I.L.M. 1085(entered into force July 1, 1975).

[28] Montreal Protocol on Substances that Deplete the Ozone Layer , Sept. 16, 1987 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

[29] Cartagena Protocol on Biosafety, Jan. 29,2000, Australian Treaty Series 1993 No. 32 (entered into force Sept. 11, 2003).

[30] U.N. Doc. A/CONF.151/26 (vol. 1) 1992

[31] John H. Jackson, Documents Supplement to Legal Problems of International Economic Relations, 121 (3d ed. 1995).

conditions and quarantine or other treatment.[32] This provision contemplates full scientific certainty in invoking ETMs as opposed to the precautionary principle under Cartagena Protocol. NAFTA's Article 715 gives parties the leeway to adopt environmental, health and safety measures where scientific evidence is insufficient to determine the actual risk posed by a given product or service.

The third problem is the apparent breach of sovereignty of states by others. One primary indicia of sovereignty is the doctrine of domestic jurisdiction. A State is ideally supposed to have exclusive domestic jurisdiction. A State's legislative power should be confined within its territory and should not be projected beyond its territory, whether directly or indirectly. States may be tempted to legislate extra jurisdictionally especially in instances where they seek to address transboundary pollution or environmental concerns affecting global commons. Although conservation measures sought to be achieved may be domestic or transboundary, the measure taken (legislative as opposed to conclusion of a treaty) is unilateral. Extra jurisdictional application and imposition of domestic standards and notions of environmental conservation policies may bring about disputes between states. While urging restraint in using ETMs unilaterally and extra jurisdictionally, Agenda 21 provides:-

> ... Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided... Domestic measures targeted to achieve certain environmental objectives may need trade measures to render them effective[33]

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[32] Id. at Article 5(1) and (2).
[33] Commission on Environmental Law of IUCN, *supra* note 8.

Agenda 21 acknowledges that ETMs are a necessary tool to deal with environmental challenges outside the importing countries jurisdiction but should be employed through negotiation of MEAs and not unilateral measures.

The WTO has no provisions to prevent these disputes. Instead, WTO Contracting Parties have to fall back to its Dispute Settlement Body (hereinafter referred to as DSB) to resolve disputes after they have already occurred. As presently structured the DSB does not have the capacity to sufficiently resolve trade disputes with environmental concerns. The WTO's dispute settlement process is severely limited when it comes to incorporating views from environmental experts. GATT Article XX *chapeau* and paragraphs (b) and (g) limit the DBS's interpretation of WTO rules with environmental concerns. The *chapeau* and relevant paragraphs have no provision as to the treatment of MEAs, PPMs and extra jurisdictional application of domestic environmental standards. On the other hand NAAEC,[34] under the aegis of NAFTA[35] provides a comprehensive trail-blazing framework that establishes preventive and adjudicative institutions incomparable to WTO's.

1.3: STATEMENT OF THE PROBLEM

The post 1995 WTO trade regime is structured to promote free trade without seeking to identify and prevent environment versus trade disputes or resolve disputes in an environmentally sensitive manner. This has led to an increase in environment versus trade disputes. NAFTA on the other hand provides strong environment dispute prevention and resolution mechanisms. The WTO regime can lead to sustainable development if it is

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[34] North American Free Trade Agreement, *supra* note 2.
[35] North American Agreement on Environmental Cooperation, *supra* note 1.

reformed to prevent environmental disputes and to give primacy to environmental concerns in its dispute resolution procedures.

1.4: THEORETICAL FRAMEWORK AND LITERATURE REVIEW

1.4.1: THEORETICAL FRAMEWORK

This thesis is predicated on the fact that international and national environmental law and policy issues are linked to international trade issues in various legal instruments by consequences of their respective goals. ETMs, in these legal instruments, are used to achieve national and international environmental objectives. ETMs in MEAs have far reaching consequences on MFN and NTP. National trade decisions, values and norms influence the environment and vice versa.

Sovereignty represents the basic constitutional doctrine of the law of nations. The principal corollaries of sovereignty are:-

(i) A jurisdiction, prima facie exclusive, over a territory and the permanent population living there;

(ii) A duty of non-intervention in the area of exclusive jurisdiction of other states; and

(iii) The dependences of obligations arising from customary law.[36]

Jurisdiction is an aspect of sovereignty and refers to judicial, legislative and administrative competence.[37] Legal jurisdiction refers to the supremacy of the constitutionally recognized

[36] Brownlie I., Public International Law, 287 (7th ed. 2008).

organs of the state to make binding laws within its territory.[38] Although legislative supremacy within a state cannot be denied, it may be challenged especially if it contravenes universally accepted norms of international law. Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:-

(i) That there should be a substantial and bona fide connection between the subject matter and the source of jurisdiction;

(ii) That the principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed;

That a principle based on elements of accommodation, mutuality and proportionality should be applied.[39]

In exercise of exclusive domestic competence to legislate, states have taken measures with extra-territorial consequences. Courts in the United States have taken the view that whenever activity abroad has consequences within the United States which are contrary to local legislation then the American courts can make orders requiring certain conduct of foreigners.[40] Similarly, the United States Congress has passed legislation for federal use that have extra territorial implications. How then is the principle of exclusive domestic jurisdiction reconciled with international trade law and national and international environmental law? How are states exercising their legislative competence expected to submit to international trade law?

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[37] Id. at 298.
[38] Shaw M. N., International Law, 307 (6th ed. 2008)
[39] Brownlie I., *supra* note 36 at 310.
[40] Shaw M. N., *supra* note 38 at 307.

States may submit to the international legal order by negotiating trade and environment treaties. A treaty is an agreement between parties on the international scene.

Once concluded, treaties are applied in accordance with the Vienna Convention on the Law of Treaties[41] (Vienna Convention) and customary international law. The Vienna Convention is a treaty for treaties. It sets out rules on how treaties are to be applied and interpreted. Article 30 of the Vienna Convention provides that:-

> (i) Between parties to a treaty that later become parties to an inconsistent treaty the early treaty applies only in so far as its provisions are not incompatible with the later treaty; and
>
> (ii) Between a party to both treaties and a party to only one of them, their mutual rights and obligations are determined by the treaty to which both are parties.

The provisions of Article 30(1) of the Vienna Convention mean that for WTO and NAFTA members who subsequently become parties to an MEA, their relationship is governed by the MEA. Accordingly, provisions of WTO and NAFTA would not apply to the extent of their inconsistency with the MEA. Article 30(ii) contemplates a situation where a WTO and NAFTA member is also a party to an MEA while the other member is not party to the MEA. In such circumstances, trade rules and not the MEA would apply.

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[41] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

Article 31(3) (c) of the Vienna Convention provides that any relevant rules of international law applicable in relations between parties shall be taken into account. This provision can be used to consider other legal norms, values and rules while interpreting trade rules.

Sustainable development is defined as 'a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs.'[42] Sustainable development means different things to ecologists, environmental planners, economists and environmental activists, although the term is often used as if consensus exists concerning its desirability. Sustainability sometimes refers to the resource base itself, and sometimes to the livelihoods that are derived from it. Other times sustainability is used to refer to sustaining levels of production and or consumption.[43] Sustainable development is not a yester year concept. In 1873 John Stuart Mill emphasized the idea that we need to protect nature from unfettered growth if we are to preserve human welfare before diminishing returns begin to set in.[44] The term development, as used, embraces the notion that the use of measures such as Gross National Product to measure the well being of nations is itself limiting. Development embraces wider concerns of the quality of life, educational attainment, nutritional status, access to basic freedoms and spiritual welfare.[45] Sustainability revolves around the desire to maintain a constant and uninterrupted natural capital stock. Natural capital stock is defined as the stock of all environmental and natural resource assets, from oil in the ground to the

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42 World Commission on Environment and Development, Our Common Future 9(1987).

43 Michael Redclift, Sustainable Development and Popular Participation: A Framework for Analysis, in *Environmental Action. People's Participation in Sustainable Development* 23, 25 (Dharam Ghai et. al ed., 1992)

44 www.econlib.org/library/Mill/mlp.html_1k <accessed on 5th January 2007>.

45 Pearce David et. al., Sustainable Development Economics and Environment in the Third World (Cheltenham, England: Edward Elgar Publishers Ltd.) 1990.

quality of soil and groundwater, from the stock of fish in the oceans to the capacity of the globe to recycle and absorb Carbon.[46]

Development is also defined as a vector of desirable social objectives; that is, it is a list of attributes that society seeks to achieve or maximize. The vector's principal elements are:-

(i) Increase in real per capita income;

(ii) Improvement in health and nutritional status;

(iii) Educational achievement;

(iv) Access to resources;

(v) A `fairer' distribution of income;

(vi) Increase in basic freedoms.[47]

Sustainable development is, in this context, defined as a situation in which the development vector does not decrease over time. It is a requirement that a vector of development's characteristics be non-decreasing over time; where the elements to be included in the vector are open to ethical debate and where the relevant time horizon for practical decision-making is similarly indeterminate outside of agreement on intergenerational objectives.[48]

The key condition for the attainment of sustainable development is the achievement of constancy of the natural capital stock. The natural capital stock and environmental quality

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[46] Id.
[47] Id. at 2.
[48] Id. at 3.

are required not to suffer any negative change. The Brundtland Report gives the maintenance of natural capital stock pre-eminence by asserting that:-

> If needs are to be met on a sustainable basis the Earth's natural resource base must be conserved and enhanced.[49]

Robert Repetto defines sustainable development as:

> ...(i) development strategy that manages all assets, natural resources, and human resources, as well as financial and physical assets, for increasing long-term wealth and well-being. Sustainable development as a good rejects policies and practices that support current living standards by depleting the productive base, including natural resources, and that leaves future generations with poorer prospects and greater risks than our own.

It is necessary to conserve the natural stock of resources. The need to conserve the resource base arises from: man's inability to absolutely understand the intricacies of life support functions of the natural environment; man's inability to get substitutes for the functions that are reversible; some of the losses are irreversible. The uncertainty and irreversibility therefore forms part of the basis of conserving the natural stock.[50]

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[49] World Commission on Environment and Development, *supra* note 42 at 57.
[50] Pearce David et. al, *supra* note 45 at 7.

Natural capital stock needs to be constantly maintained. However, for non-renewable resources, consumption does not lead to constancy. Consumption of non-renewal resources reduces their availability. Consequently, constancy is interpreted in economic terms. This allows for a declining physical stock with a rising real price over time maintaining a constant economic value. The underlying idea for constancy is that future generations would inherit a combined capital stock no smaller than the one in the previous generation.[51]

The economic dimension of the concept of sustainable development is predicated upon present and future anticipated demand, assessing environmental costs in terms of foregone economic growth and closer attention to environmental factors.[52] Natural resources, especially non-renewable, are limited in supply. Environmental damage caused by mans' over dependence and continued exploitation of non-renewable resources has the potential of imperiling our ability to run industrial growth. The depletion of the ozone layer is an example of reckless and unsustainable production systems.[53] Consequently, there is need to protect the environment from unfettered and destructive economic growth to forestall the setting in of diminishing returns.

It is undoubtedly true that international trade moves goods, services and people globally with the aim of attaining economic growth and development. Along the production and consumption chain, goods and production processes may harm the environment. To avoid, control and minimize harm and therefore attain sustainable development, it is important that trade be regulated nationally and internationally. Such regulation should aim at attaining

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[51] Id. at 10.
[52] Michael Redclift, *supra* note 43, at 23, 31.
[53] Id. at 32.

sustainable development and guarding against environmental degradation. The concept of sustainable development, in this context, postulates a delicate balance between trade and environmental conservation. Trade should not impair environmental conservation and vice versa. To this end, persons should trade without impairing the available natural capital stock. To achieve sustainable development, avoidance and sound management of environment and trade disputes is mandatory.

The linkage between trade and environment is based either on some relationship between the norms of trade and environment or on the consequence of their respective norms' goals to each other.[54] To say that trade and environment are linked implies that decisions, values or norms in trade will influence the environment and vice versa. Environment is linked to trade because they are substantively related. Substantive normative linkage is captured in various legal instruments. The Marrakesh Agreement,[55] at the preamble, while seeking to enhance international trade, postulates that trade should be conducted while bearing in mind the concept of sustainable development. NAFTA's preamble provides that it is intended to contribute to harmonious development of world trade in a manner consistent with environmental protection and conservation while promoting sustainable development and strengthening the development and enforcement of environmental laws and regulations.

Various multilateral instruments project trade measures to conserve the environment. CITES[56] utilises listing of species in three appendices to protect plants and animals from

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[54] David W. Leebron, Linkages, 96 AJIL 5, 11 (2002)
[55] Protocol of Provisional Application, *supra,* note 9
[56] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 27.

threats of extinction. Trade in Appendix 1 fauna and flora and their products are strictly regulated and only permissible in exceptional circumstances. Appendix 1 species are mostly species facing possible extinction. Trade in Appendix 11 species is also controlled in order to avoid use incompatible with species' survival. The Montreal Protocol on Substances that Deplete the Ozone Layer[57] at Article 4 projects trade measures that discourage trade in ozone layer depleting substances. The Convention on Biological Diversity[58] is home to the Cartagena Protocol.[59] This protocol promotes the precautionary principle while dealing with biotechnology products. As it is shown at Chapter Two, the precautionary principle contravenes the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures.

ETMs are invoked by most multilateral instruments to conserve the environment. ETMs are normative statements that may emanate from a primarily environment conservation instrument with implications on trade rules. Trade rules recognize dynamics at play between trade and environment. They (trade rules) recognize that there should be exceptions to free trade in the event of likely harm to the environment.

This position is aptly captured in GATT's Article XX *chapeau* and paragraphs (b) and (g). These provisions, which are illustrative of the normative and consequential linkage between trade and environment, *inter alia* provide:-

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[57] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 28.
[58] Convention on Biological Diversity, opened for signature June 5, 1992, 1760 U.N.T.S (entered into force on December 29, 1992).
[59] Cartagena Protocol on Biosafety, *supra* note 29

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

These provisions postulate that free trade may be curtailed by a Contracting Party without being held to be in breach of GATT if the discriminatory policies are undertaken with intent to conserve human, animal or plant health. In addition, barriers to trade or other discriminatory measures undertaken for the conservation of exhaustible natural resources are permissible under GATT.

Trade and environmental normative linkage came under close scrutiny in the case of *United States-Standards for Reformulated and Conventional Gasoline*[60] that was before the Appellate Body (AB) of the WTO's dispute resolution organ. Brazil and Venezuela, the complainants, had argued that U.S. procedures for establishing standards for imported gasoline differed from those applicable to domestic gasoline, and that those procedures treated imports less favourably than they treated like products of domestic origin.

The U.S., under the Clean Air Act, established two programmes to reduce pollution from gasoline combustion. The first programme required the use of 'reformulated gasoline'

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[60] *United States-Standards for Reformulated and Conventional Gasoline,* Appellate Report, (May 20, 1996) AB-1996-1, WT/DS2/AB.

mandated a 15% reduction in pollutants as measured against a 1990 'baseline' for each individual refiner, blender or importer. The second was intended to prevent the 'dumping' of pollutants removed from reformulated gasoline into the remaining product, i.e. 'Conventional' gasoline. It required that conventional gasoline be at least as 'clean' as it was in 1990, also measured against the baseline applicable to each refiner, blender or importer. This rule was issued by the U.S. Environmental Protection Agency (EPA) and came into force on 1st January 1995.[61]

The Gasoline Rule established three methods for determining individual baselines for domestic refiners, blenders and importers. Domestic refiners unable to establish baselines by the first method were required to use the second or third methods but blenders and importers unable to satisfy the first method were required to use a baseline contained in the Clean Air Act itself. The GATT panel concluded that this inconsistency was not justified under paragraphs (b), or (g) of GATT Article XX. The U.S. appealed to the AB on Panel's conclusion with respect to Article XX (g).[62] The Panel had found that the baseline establishment methods of the Gasoline Rule met the 'primarily aimed at' conservation of exhaustible natural resources interpretation as earlier held in the *Herring and Salmon* Panel report.[63] The AB also held that the rules were 'primarily aimed at' conservation of an exhaustible natural resource.

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[61] 40 c.f.r. Part 80, paras. 80, 1 – 80, 135.

[62] Palmeter David, *The WTO Appellate Body's First Decision*, 9 Leiden Journal of International Law, 337, 341 (1996).

[63] Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Panel Report (March 22 1988), BISD 355/98.

In *Herring and Salmon* case[64] the Panel was called to adjudicate upon a claim that Canada's prohibition on exports of unprocessed Herring and Salmon in contravention of Article XI constituted a system of resource management thereby related to the conservation of fish resources. In trying to avoid unbridled protection the Panel held:-

> as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources...while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as `relating to' conservation within the meaning of Article XX(g).[65]

This interpretation clearly brings out the nexus between trade and environment. Although the `primarily aimed at' test is tailored to prevent possible trade protectionism, it is abundantly clear that an environmental measure that is primarily aimed at conserving exhaustible natural resources can be invoked to restrict trade. The concerned environmental trade measures must be made effective in conjunction with restrictions on domestic production or consumption. The conservation measure cannot be accepted as primarily or

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[64] Id.
[65] Id.

even substantially designed for implementing conservationist goals if no restrictions are imposed on like domestic products.

The foregoing amply illustrate that trade and environment are interlinked. To avoid disputes and attain sustainable trade, balance between trade and environment has to be achieved.

1.4.2: LITERATURE REVIEW

There is little literature on this area of study. Adede[66] discusses management of environmental disputes. He traces the 'green helmet' concept from inception and how it was captured at the United Nations Conference on Environment and Development and other conferences such as the third United Nations Conference on the Law of the Sea. He also discusses the concept's vital principles and how they operate in environmental instruments. This thesis has examined the green helmet concept and how it can be used in preventing environmental conflicts under WTO and how it has been used under NAFTA. The interaction between trade rules and the green helmet concept are not discussed in Adede's article.

Janet McDonald[67] writes generally on trade and environment. Her article does not analyse NAAEC's dispute prevention provisions and avoidance in general. McDonald discusses the Montreal Protocol on Substances that Deplete the Ozone Layer[68] and CITES[69] but not in the context of either NAFTA or GATT. In addition, at the time she published her article, a

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[66] Adede A. O., *supra* note 6.

[67] McDonald J., Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order, 397 Environmental Law 23 ENVTL. L. 397, 463-64 (1993).

[68] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 28.

[69] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 27.

critical plank in conservation efforts, namely the Cartagena Protocol on Biosafety to the Convention on Biological Diversity[70] had not been negotiated. Her analysis of dispute resolution between MEAs and GATT does not give prominence to the Vienna Convention on the Law of Treaties[71] and customary international law. She did not look at the possibility of utilizing the already existing international dispute resolution infrastructure to resolve trade and environment disputes. She did not propose any role for the International Court of Justice as a possible appellate arbiter outside of the traditional trade rules. This thesis has examined NAAEC's dispute prevention provisions and how trade rules interact with MEAs. This thesis proposes the application of the Vienna Convention on the Law of Treaties and customary international law in dispute resolution. It also proposes the use of the International Court of Justice to render advisory opinions in on appeal.

Robert Van Slooten[72] examines ETMs as provided in the Montreal Protocol[73] in the context of PPMs. He did not examine Montreal Protocol's relationship and implications on trade rules with reference to the MFN and NTP as much he discussed ETMs. This thesis discusses implications of ETMs imposed by Montreal Protocol on the MFN and NTP as espoused by trade rules and proposes reforms to facilitate prevention of disputes.

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70 Cartagena Protocol on Biosafety, supra note 29.

71 Vienna Convention on the Law of Treaties, *supra* note 41.

72 Robert Van Slooten, "The Case of the Montreal Protocol," OECD 1993 Trade and Environment: Processes and Production Methods, Paris.

73 Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 28.

Jamine Ferretti[74] examines PPMs and their impact on NAFTA. She does not look at PPMs effect on the GATT. This thesis analyses PPMs and NAFTA and proposes ways of preventing and resolving conflict between PPMs and GATT along lines suggested by Ferretti in resolving conflicts between PPMs and NAFTA.

David Esty[75] in discussing extraterritorial application of ETMs argues that unilateral imposition of ETMs in defence of global commons should have a very firm grounding on a significant threat to the sustainability of an important global ecosystem or species.[76] He did not discuss the imposition of ETMs on other territories for domestic environmental protection nor on the basis of the precautionary principle as espoused in Cartagena Protocol.[77] This thesis intends to discuss and propose that scientific certainty should not be a pre-requisite in imposing ETMs extra territorially. The thesis illustrates that having common environmental standards as contemplated under NAFTA will avert the need for extra territorial application of domestic norms by WTO members.

1.5: OBJECTIVES OF RESEARCH

- To identify and seek ways of preventing and resolving trade and environment disputes in a manner that is compatible with the tenets of sustainable development;
- Identify how NAFTA and NAAEC prevent and resolve trade and environment disputes;

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[74] Jamine Ferretti, "PPMs and the NAFTA," OECD 1993 Trade and Environment: Processes and Production Methods, Paris.

[75] Esty C. Daniel, "Greening the GATT: Trade, Environment and the Future," Institute for International Economics Washington, DC July 1994. ISBN paper 0-88132-205-9

[76] Id. at 108.

[77] Cartagena Protocol on Biosafety, *supra* note 29.

- Transplant NAFTA's and NAAEC's green helmet provisions into the WTO System.

1.6: BROAD ARGUMENT LAYOUT STRUCTURE

Trade rules and values are generally in conflict with environmental conservation rules and values. WTO rules as presently configured are incapable of being objectively used to prevent and/or resolve disputes between promotion of trade and protection of the environment because they are by themselves pro-trade. MEAs and trade rules are in conflict. This is illustrated by MEAs' use of ETM to achieve environmental conservation objectives. In contradistinction, GATT Article XX (b) and (g) does not necessarily approve of ETMs.

PPMs are not contemplated under GATT as a basis of product differentiation. ETMs imposed by most MEAs on the other hand distinguish products not by their nature but by PPMs and how environmentally safe the PPM is. The other area of dispute is whether or not trade rules permit extraterritorial application of municipal environmental standards. The concept of sovereignty in customary international law presupposes exclusive state competence over its territory. However, states have legislated within their territories pieces of legislation with extra territorial consequences. GATT does not permit such pieces of legislation. On the contrary, NAFTA's framework promotes harmonization of domestic environmental standards among members thereby reducing chances of dispute. WTO's dispute resolution mechanism has been incapable of objectively adjudicating these conflicts, it needs to be overhauled and an Environmental Agreement concluded to facilitate dispute prevention and resolution.

1.7: HYPOTHESES

(i) Trade and environmental conservation rules are in conflict.

(ii) WTO's dispute settlement mechanism is trade based, inadequate and biased in favour of trade and to the detriment of environmental conservation.

(iii) NAFTA through NAAEC has provisions superior to WTO in environment versus trade dispute prevention mechanisms.

(iv) To achieve sustainable trade it is necessary for WTO to have environment and trade dispute prevention mechanisms alongside predictable settlement provisions.

(v) It is important to involve institutions outside the WTO in dispute resolution to make it more objective.

1.8: RESEARCH QUESTIONS ANSWERED

(i) Is there a linkage between trade and environmental norms?

(ii) What are the actual and apparent conflicts between trade and environment?

(iii) How have NAFTA and NAAEC prevented disputes between environment and trade?

(iv) How can disputes between environment and trade be prevented under the WTO?

(v) How can disputes between trade and environment be resolved in an environmentally sustainable way?

(vi) Is the WTO dispute resolution mechanism as presently constituted sensitive to environmental conservation?

1.9: METHODOLOGY USED

The nature of this study required library research and internet searches.

1.10: CHAPTER BREAKDOWN

Chapter One introduces the subject of study and the problem. The chapter examines the theoretical framework and literature review. It also examines the objectives of the research, broad arguments, assumptions and research questions. Further, the chapter traces the historical development of international trade rules. In so doing, it undertakes a study of the factors that led to the formation of the International Trade Organization (ITO) and how it transformed into GATT. The chapter analyzes GATT's growth and the birth of WTO. It also investigates the factors that led to the negotiation of NAFTA and NAAEC. The chapter then proceeds to explore the concept of sustainable development and linkage between trade and environmental conservation rules.

Chapter Two examines free trade obligations as espoused by GATT and NAFTA. It looks at the MFN principle and the requirement that Contracting Parties do immediately and unconditionally accord any advantage, favor, privilege or immunity granted by any Contracting Party to any product originating from or destined for any other country to like product originating from or destined for the territories of all other contracting parties.[78] The chapter discusses why disputes between WTO and environmental rules revolve around application of the MFN on like products. In this chapter, the NTP as espoused at Article III (1) and Article 301 of GATT and NAFTA respectively are discussed. NTP requires Contracting Parties to recognize that internal taxes and other internal charges and laws

[78] Protocol of Provisional Application , *supra* note 9.

regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products. Article III (2) of GATT which is incorporated in Article 301 of NAFTA further provides that products from the territory of any Contracting Party imported into the territory of any other Contracting Party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.[79] This principle prohibits Contracting Parties from imposing countervailing taxes on like products from other Contracting Party territories that are produced in breach of MEAs or other environmental rules.

PPMs and product likeness as a possible source of dispute between trade rules on one hand and environmental conservation rules on the other hand are also discussed in this chapter. The chapter also gives an appraisal of specific provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer,[80] the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[81] and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.[82] In addition, it discusses the concept of State Sovereignty as conceived under public international law and how it relates to trade rules while applying municipal environmental rules extra territorially.

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[79] Id.

[80] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 28.

[81] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 27.

[82] Cartagena Protocol on Biosafety, *supra* note 29.

Chapter three discusses WTO's dispute settlement. It also discusses NAAEC's dispute avoidance mechanisms and NAFTA's green dispute resolution mechanisms. Chapter four makes recommendations to reform the WTO regime and make it preventive of environmental disputes. It also contains proposals to make WTO's dispute settlement mechanism receptive of environmental concerns. The chapter proposes to have PPMs recognized as a basis of differentiating products. For predictability in the global trading system the chapter proposes that an Environmental Agreement be negotiated under the aegis of WTO, to outline basic environmental standards, to be observed by Contracting Parties. Within the proposed WTO Environmental Agreement it, recommends criteria to be followed in recognizing MEAs and how they should relate with WTO.

CHAPTER TWO

2.0 DISPUTES BETWEEN FREE TRADE OBLIGATIONS AND ENVIRONMENT CONSERVATION

2.1: INTRODUCTION

In order to propose effective environmental dispute prevention and settlement techniques, it is important to examine and discuss areas of dispute between trade and environment. Environmental conservation and trade rules are interlinked as illustrated in chapter one. At the point of linkage there is bound to be dispute. Disputes manifest in three principal ways. Firstly, they are manifested through product differentiation on the basis of PPMs and product likeness. A product produced through environmentally injurious processes may be distinguished and treated differently from a like product produced in an environmentally friendly manner. The product that is produced in an environmentally injurious way may be denied access to a particular country's market on grounds that it is different from the one produced in an environmentally friendly manner. Alternatively, countervailing taxes may be imposed on the environmentally injuriously produced products on grounds that clean production processes are costly. Countervailing taxes would be expected to iron out the comparative advantage enjoyed by injuriously produced like products. Such a move would be in contravention of the WTO's, MFN and NTP thereby opening a front for dispute.

Secondly, NAFTA has a specifically defined relationship with MEAs, GATT's position is unclear. Some MEAs impose ETMs on certain products with the primary objective of controlling their consumption and trade believing that they are harmful to the

environment. ETMs are also used in some MEAs to conserve the natural stock of some species of fauna and flora that face possible extinction. ETMs also regulate trade in products that are deemed to be a danger to the environment or, in case of fauna and flora, the species threatened with extinction due to their direct consumption or consumption of their products or derivatives. The discussion herein seeks to examine the actual and apparent conflict between trade on one hand and the Montreal Protocol on Substances that Deplete the Ozone Layer (protocol),[1] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[2] and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD).[3]

Thirdly, potential source of trade and environmental conservation dispute is the extra jurisdictionally imposition of domestic standards and notions of environmental conservation on other States. Application of standards and notions is through promulgation of domestic trade and or market access rules. Denial of market access to imported products due to non-compliance with environmental protection requirements of the importing country would compel countries of export to observe environmental standards of import territories. This will lead to disputes over infringement of the MFN and NTP principles espoused by trade rules besides the universally accepted concept of sovereign equality of States.

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[1] Montreal Protocol on Substances that Deplete the Ozone Layer , Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1987).

[2] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, March 3, 1973, 12 I.L.M. 1085(entered into force July 1, 1975).

[3] Cartagena Protocol on Biosafety, Jan. 29,2000, Australian Treaty Series 1993 No. 32 (entered into force Sept. 11, 2003).

A free trade obligation between nations is the cornerstone of international trade rules. The obligations seek to liberalize trade. These obligations are manifested through the MFN and NTP. The MFN obligation seeks to extend uniform treatment to all goods from trading bloc's member countries. The NTP on the other hand seeks to extend equal treatment to goods from a bloc member country and domestic goods. This chapter will examine the operation of these two basic trade principles and how they interact with environmental conservation.

2.2: THE MOST-FAVOURED-NATION TREATMENT

Article 1 of GATT[4] require members to immediately and unconditionally accord any advantage, favour, privilege or immunity granted by any Contracting Party to any product originating from or destined for any other country to the like product originating from or destined for the territories of all other contracting parties.[5] Under this rule should a Contracting Party A agree in negotiations with State B, which need not be a Contracting Party, to reduce tariffs on product X to a given percentage or such other advantage, favour, privilege or immunity then that particular benefit must be immediately and unconditionally passed on to all Contracting Parties.

The GATT Panel has had occasion to examine the application of the MFN principle. In *United States- Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*,[6] Brazil complained that the procedures under which U.S. countervailing

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[4] Protocol of Provisional Application, October 30, 1947, 55 U.N.T.S 308.
[5] Id.
[6] United States- Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear, GATT Panel Report, 39th Supp. BISD 128 1993 (June 19th, 1992).

duties were revoked (i.e. terminated) violated GATT's MFN clause. Brazil claimed that the U.S. applied different rules to goods imported under the U.S. Generalised System of Preferences (GSP) than were applied to Brazilian imports. The Panel considered whether the United States, through the operation of Section 331 of the Trade Act of 1974 accorded an advantage to countries subject to pre-existing countervailing duty orders on products designated as duty-free under the U.S. GSP programmes. The Panel found that automatic backdating of the effect of revocation of a pre-existing countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within GATT Article 1.1. Section 104 (b) of the U.S. Trade Agreements Act of 1979 does not accord this advantage to contracting parties that are signatories to the Subsidies Agreement. Such a signatory Contracting Party, while seeking revocation, has to request the U.S. for an injury review. If it is found to be a negative injury determination, the U.S. would revoke the countervailing duty order but the revocation is effective as of the date of the request for the review.

The Panel noted that neither Section 331 of the 1974 Act nor Section 104 (b) of the 1979 Act makes any distinction as to the particular products to which each applies. It found that in principle the products to which Section 331 of the 1974 Act accords the advantage of automatic backdating are the same as products denied the advantage under Section 104 (b) of the 1979 Act. The Panel noted that contracting parties had decided in previous cases that legislation requiring executive authority to impose a measure inconsistent with the GATT was inconsistent with GATT, whether or not an occasion for the actual

application of the legislation had arisen.[7] The Panel found that the two provisions, not merely their application in concrete cases, have to be consistent with Article 1.1. In conclusion the Panel considered that the grant of this non-tariff advantage under Section 331 of the 1974 Act to duty-free products originating in the territory of a Subsidies Agreement Signatory is inconsistent with the MFN provision of Article 1.1 of the GATT.

In the case of *Japan-Tariff on Import of Spruce-Pine-Fir (SPF) Dimension Lumber*[8] the complainant, Canada, asserted that Japan's tariffs on certain lumber cut to specific dimensions ("dimension lumber") violated the MFN clause. Lumber of some species was dutiable at 8 %. Canada argued that Article 1.1 of GATT required Japan to accord SPF lumber the advantage of the zero tariff granted by Japan to planed and sanded lumber of "other" coniferous trees. Substantively, Canada complained that Japan had arranged its tariff classification in such a way that a considerable part of Canadian exports of SPF dimension lumber to Japan was subjected to a tariff of 8% while like products enjoyed a zero tariff advantage. The Panel held that it should be borne in mind that differentiations may be used to circumscribe tariff advantage in such a way that they are conducive to discrimination among like products originating from different contracting parties. It went on to find that a Contracting Party prejudiced by such differentiation may request that its exports be treated as 'like products' in spite of the fact that they might find themselves excluded by differentiations retained in the importing country's tariff.

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[7] Id.

[8] *Japan-Tariff on Import of Spruce-Pine-Fir (SPF) Dimension Lumber* GATT Panel Report, 36th Supp. BISD 167, 1990.(July 19, 1989).

In the case of *Spain-Tariff Treatment of Unroasted Coffee*[9] the GATT Panel had occasion to discuss the issue of product likeness in the context of the MFN Principle. Before 1979, Spain treated unroasted, non-decaffeinated coffee under one tariff heading. In 1979 it subdivided its classification into five parts whereat three of them attracted a duty of 7% while the other two did not attract any duty. Brazil lodged a complaint with the GATT Panel. The panel in its finding concluded that unroasted, non-decaffeinated coffee beans should be considered as "like products" within the meaning of Article 1.1 of GATT. The tariff regime as applied by Spain was found to be discriminatory as against Brazilian coffee and therefore in breach of the MFN.

This principle was captured in NAFTA[10] at Article 102 which States that its objectives include:-

> ...national treatment, *most favoured-nation* treatment and transparency.[11]

NAFTA's preamble, in establishing the Free Trade Area expressly recognizes the need to "build *on the parties'* respective rights and obligations under GATT and other multilateral and bilateral instruments of co-operation.[12]

NAFTA has therefore entirely incorporated the MFN obligation as espoused in GATT both by reference and express provision. Article 1103 of NAFTA binds each party to

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[9] *Spain-Tariff Treatment of Unroasted Coffee* GATT Panel Report, 28th Supp. BISD 102, 1982 (June 11, 1981).

[10] North American Free Trade Agreement, December 8, 1993, 32 I.L.M. (1993)) (entered into force on 1st January 1994).

[11] Id. Article 102 (1).

[12] North American Free Trade Agreement, *supra* note 10 Preamble.

accord another party's investors and their investments treatment no less favourable than that it accords, in like circumstances, to investments and investors of any other party or of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

The net effect of the MFN Principle is to liberalise trade. Liberalisation is achieved through elimination of discrimination among members by extending favourable concessions to any country to all contracting parties. Each member grants to the other members the broadest rights and privileges which it accords to any other nation in the treaties it has made or will make.[13] Progressively, international trade is broadened and discriminatory practices between States dismantled.

2.3: THE NATIONAL TREATMENT PRINCIPLE

NTP obligates parties not to discriminate between domestic products and like imported products. The NTP is aptly captured at Article III of GATT.[14] It provides that

> Contracting Parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

Article III (2) of GATT provides that;

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[13] Kolorrat vs Oregon, 1961, 366 U.S. 187, 193, 81, S.Ct.922, 6 L.Ed. 2d.218.
[14] Protocol of Provisional Application, *supra* note 1 at Article III

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

Products of any Contracting Party imported into the territory of any other Contracting Party shall be accorded treatment no less favourable than that accorded to like domestic products in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[15] The net effect of these provisions is to lock all avenues of likely discrimination between imported and domestic products. This leads to more liberalised international trade and less barriers to trade.

The GATT Panel had occasion to make pronouncements on the NTP. In the *Italian Discrimination Against Imported Agricultural Machinery* case,[16] the United Kingdom (U.K.) Government complained that certain provisions of chapter III of the Italian Law No: 949 of 25th July 1952 which provided special credit facilities to some categories of farmers or farmers' co-operatives for the purchase of agricultural machinery made in Italy were inconsistent with the NTP as espoused at Article III of GATT. It argued (U.K.) that this particular law impaired the benefits that would accrue to the United Kingdom under GATT. The loans were granted at 3% while purchasers of foreign machinery on credit would receive less favourable terms. The U.K. argued that since the Italian law did not avail to the other purchasers credit facilities, there was no equivalence in treatment of

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[15] Id. at Article III (4).

[16] *Italian Discrimination Against Imported Agricultural Machinery*, GATT Panel Report, 7th Supp. BISD 60, 1959 (October 23, 1958)

the products thus offending Article III (4) of GATT. The Italian delegation argued that the text of paragraph 4 of Article III of GATT applied only to such laws, regulations, and requirements that are concerned with the actual conditions for sale, transportation etc. and should not be interpreted in an extensive way.

The Panel observed that the drafters of GATT Article III intended to provide equal conditions of competition once goods had been cleared through customs. The Panel also noted that if the Italian contention were correct, and if the scope of Article III were limited in the way the Italian delegation suggested to a specific type of laws and regulations, the value of the bindings under Article III of GATT and the general rules of non-discrimination would be evaded. The Panel observed that it was not the intention of the GATT to limit the right of a Contracting Party to adopt measures that appeared necessary to foster its economic development or to protect a domestic industry provided that such measures were permitted by the terms of GATT. The Panel suggested to the Contracting Parties that it would be appropriate for them to recommend to the Italian government and draw to its attention the adverse effects of Law No: 949 to UK's exports of agricultural machinery particularly tractors. The Italian government would be impressed upon to consider the desirability of eliminating within a reasonable time frame the adverse effects of the law on import of trade of agricultural machinery by modifying the law. The Panel concluded that the difference, in terms of interest on credit, favoured domestic over imported machinery thus offending the NTP.

In the matter of *Canada's Landing Requirement for Pacific Coast Salmon and Herring*[17] Canada promulgated regulations that required all Salmon and Herring caught in Canadian waters to be landed. Under the United States-Canada Free Trade Agreement a constituted dispute resolution panel held that the Canadian regulations amounted to an export restriction because its primary effect was to regulate export transactions. The Panel went on to hold that where a measure visits upon "a materially greater commercial burden on exports than on domestic sales" the measure is best characterised as a restriction on trade. As the foregoing jurisprudence from the Panels indicate, the NTP seeks to eliminate discrimination between domestic products and imports. Equal treatment leaves market forces to allocate and utilize resources at their most optimal.

NAFTA takes up the NTP Principle in strikingly similar terms as the GATT. It incorporates GATT Article III provision by stating at Article 301 (1) that;

> Each Party shall accord national treatment to the goods of another party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretative notes, or any equivalent provision of a successor agreement to which all parties are party, are incorporated into and made part of this agreement.

NAFTA leaves no doubt that Contracting Parties' intention was to be bound in non discriminative trade as stipulated by GATT.

Having discussed free trade obligations, we now proceed to discuss actual and potential disputes between environment and trade as played out on the MFN and NTP.

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[17] *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268 (Mar. 22, 1988).

2.4: PROCESS AND PRODUCTION METHODS

2.4.1 GATT

Varying process and production methods are a major challenge to environmental conservation efforts in view of GATT's MFN and NTP. GATT's MFN and NTP seek uniform treatment by members of like products originating from other member's without regard to PPMs. On the other hand, some environmental conservation rules distinguish products on the basis of PPMs. A product produced through environmentally injurious processes may be distinguished and treated differently from a like product produced in an environmentally friendly manner. The product that is produced in an environmentally injurious way may be denied access to a particular country's territory on grounds that it is different from the one produced in an environmentally friendly manner. Alternatively, countervailing taxes may be imposed on the environmentally injuriously produced product on grounds that clean production processes are costly. Countervailing taxes would be expected to iron out the comparative advantage enjoyed by injuriously produced like products. Such a move would be in contravention of the WTO, MFN and NTP thereby opening a front for dispute.

What then are like products? Questions that one may ask includes for example if motorcycles of equal size and horsepower but different in their tendency to pollute the air are like products. How about genetically modified cotton versus its natural counterpart? In the *Japan-Alcoholic Beverages Case*[18] GATT's AB observed that the term must be interpreted in light of the context, and of the object and purpose of the provision at issue,

[18] *Japan – alcoholic Beverages*, Appellate Body Report, WT/DS10/AR/R (December 1st 1996).

and of the object and purpose of the covered agreement in which the provision appears. While referring to its previous ruling on the term 'like products' the AB said:

> ... there can be no precise and absolute definition of what is like. The concept of 'likeness' is a relative one that evoked the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision apply.[19]

It means that the interpretation of the term 'like' has to be contextualised in the respective agreement's provision and the attendant circumstances. In the *European Community-Measures Affecting Asbestos and Asbestos Containing Products Case*[20] the AB held that product likeness is determined by nature and quality of products, end use of products; consumer tastes and habits and tariff classification.

In the trail blazing *Tuna-Dolphin Case,*[21] the question before the panel for determination arose from a challenge by Mexico to U.S. restrictions on imports of tuna caught in a way that harmed dolphins. Under the U.S. Marine Mammal Protection Act (MMPA),[22] countries exporting tuna to the U.S. were required to illustrate that they had a regulatory regime comparable to the U.S. regime and that their incidental taking of dolphin during tuna fishing was not greater than 1.25 times the U.S. rate. Alternatively, they could agree to formally ban setting purse seine nets in the Eastern Tropical Pacific and reduce dolphin

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[19] Id.

[20] *European Communitys-Measures Affecting Asbestos and Asbestos Containing Products*, (March 12, 2001) WT/DS135/R.

[21] United States-Restrictions on Import of Tuna, Aug., 16, 1991, 330 I.L.M. 1594.

[22] 16 U.S.C. $ 1361 – 1407 (1988 & Supp. 11 1990).

mortality. The U.S. contended that its ban was necessary to protect animal life and to conserve exhaustible natural resources hence permissible under GATT Article XX (b) and (g). It also argued that tuna caught with a higher mortality incidence of dolphin were different from the ones caught in compliance with MMPA. Mexico submitted that its tuna and tuna caught by complying with U.S. fleet requirements were like products under GATT and that the ban violated GATT's Article III and was also an illegal quantative restriction in violation of Article XI. In upholding Mexican submissions, the panel Stated:-

> Article 111.4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article 111.4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.[23]

The panel observed that a regulation that distinguishes between products based on any factor other than physical characteristics was inconsistent with the 'like product' phraseology of Article III. The Panel's view was that what mattered was the product itself and not the process of production. GATT Panel jurisprudence illustrate the fact that PPMs are not given primacy.

If environmental consequences of production were to be taken into account in determining product likeness, then tuna caught without appropriate safeguards as prescribed by the MMPA would be treated as different from that caught in compliance.

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[23] United States-Restrictions on Import of Tuna, *supra* note 21.

Tuna of Mexican origin would be subjected to different treatment, which would include restriction of entry to the U.S. market. To access the U.S. market, Mexico would have been required to take necessary measures that would include banning of use of purse seine nets in the Eastern Tropical Pacific thereby reducing dolphin mortality. In the *Tuna Dolphin Case*[24] the ban's Stated objective was to conserve dolphins.

The U.S. approach distinguished MMPA compliant tuna from non-compliant. The basic point of distinction, process and production method, was the incidental dolphin taking. Had the panel upheld the U.S. position and perhaps took solace in GATT Article XX (g), protection of exhaustible natural resources, it would have been a big boost to environmental conservation.

Article 8(g) of the CBD[25] provides that each contracting party shall, as far as possible and as appropriate

> establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organism resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health.[26]

This provision distinguishes biotechnologically produced organisms from their natural counterparts. The distinction of like products in management, regulation and control of risk on the basis of genetic composition implicitly recognizes PPMs as a basis of product

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[24] United States-Restrictions on Import of Tuna, *supra* note 21.
[25] Cartagena Protocol on Biosafety, *supra* note 3.
[26] Id.

differentiation. GATT's view as established in the *Tuna-Dolphin Case* is that product differention is based on physical characteristics as opposed to genetic or indeed any other consideration. Since PPMs are excluded then products produced in a way harmful to the environment are treated as like with products produced by environmentally friendly processes. GATT's approach to PPMs works to defeat environmental conservation efforts and sets up conditions for dispute between environment and trade.

2.4.2: NAFTA

NAFTA[27] tacitly incorporates the GATT approach discussed hereinabove. Article 103(1) thereof provides that:-

> ... the parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such parties are party.

Faced with an interpretative scenario regarding product likeness, NAFTA would rely on GATT jurisprudence to the extent that it is not inconsistent with its express terms. As discussed above, GATT does not take into account process and production methods as a basis for product differentiation. However, Article 104(1) of NAFTA and its annex makes reference to three MEAs. It provides that:-

> In the event of any consistency between this Agreement and the specific trade obligations set out in:-
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> (i) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter referred to as CITES);[28]

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[27] North American Free Trade Agreement, *supra* note 10.

(ii) The Montreal Protocol on Substances that Deplete the Ozone Layer;[29]

(iii) The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal;[30]

(iv) The Agreements set out in Annex 104.

(v) Such obligations shall prevail to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

Annex 104.1 is christened Environmental and Conservation Agreements and includes the Agreement between the Government of Canada and the Government of the United States of America concerning the Transboundary Movement of Hazardous Waste and the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment on the Border Area. It is worthwhile to note that reference to the "least inconsistent" alternative implementing MEAs and the requirement of unanimous consent raises serious concerns that may militate against the realization of NAFTA's environmental objectives.

Article 114 of NAFTA encourages parties to undertake appropriate environmental measures. It provides that:-

(i) ... Nothing in this Chapter shall be construed to prevent a party from adopting, maintaining or enforcing any

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[28] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2.

[29] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 1.

[30] Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, March 22, 1989, 28 I.L.M. 657 (1989).

measures otherwise it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

(ii) ... Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures ... a party should not waive or otherwise derogate from such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

Reference to MEAs set out at Article 104(1) of NAFTA gives treatment of PPMs serious prominence unknown to GATT. The listed MEAs call for the application of PPMs for the protection of the environment. For example, under the Montreal Protocol, Article 4(1) bans imports of controlled substances from States not party to it. Controlled substances are defined by Article 1(4) as substances listed in Annex A to the Protocol. The listed substances are basically Chloroflorocarbons, Halons, Carbon Tetrachloride and Trichloroethane. The listed and banned substances are believed to be the cause of ozone layer depletion. Parties to the Montreal Protocol are expected to ban trade in these products. The basis of the ban is the difference in PPM. Consequently if a product contains a controlled substance, it does not matter whether or not its end use, nature and quality, consumer tastes and habits and tariff classification qualifies it to be treated as like to a non-controlled substance. It has to be banned. NAFTA accords ETMs provisions (of the Montreal Protocol) greater recognition thus overriding and setting the stage for a potential dispute between MFN and NTP principles as contained therein.

CITES[31] regulates trade in endangered species. At Article 11(4) thereof, it provides that:

> parties shall not trade in specimens of species included in Appendices I, II, and III except in accordance with the provisions of the convention.

Specimen is defined at Article 1(b) to include any animal or plant, whether alive or dead and

> in the case of an animal: for species included in appendices I and II any readily recognizable part or derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species, and
>
> In the case of a plant: for species included in Appendix I, any readily recognizable part or derivative thereof; and for species included in Appendices II and III, any readily recognizable part or derivative thereof specified in Appendices II and III in relation to the species.

Derivatives or recognizable part of specimens readily leads us to animal or plant products. In keeping with Article 11(4), trade in such plant or animal products is disallowed. The ban extends to products that come into being as a result of being a derivative of banned specimen or a recognizable part thereof. Such products, although meeting the basic parameters of product likeness under GATT, cannot be treated as like products for purposes of NAFTA. This is because the process of production of those products will have incorporated recognizable portions of specimens that are not tradeable under CITES. It will explicitly result to the understanding that although the product is of the same nature and quality, end use, consumer tastes and habits and tariff classification

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[31] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2.

as the other products, they are distinguishable from the other products and are not 'like' the other products by virtue of their processing and production methods. This approach would certainly set conditions for a potential dispute.

2.5: MULTILATERAL ENVIRONMENTAL AGREEMENTS

2.5.1: THE MONTREAL PROTOCOL

Article 4 of the Montreal Protocol projects trade measures that target ozone depleting chemicals, products containing ozone depleting chemicals and products manufactured with but not containing ozone-depleting substances. These restrictions are aimed at the so-called "free-riders" countries, which would enjoy the environmental benefits of the Montreal Protocol without sharing costs of implementation. Article 4(1) of the Montreal Protocol provides that within one year of entry into force, each party was expected to ban the import of controlled substances from any State not party to it. With effect from 1st January 1993, exports of controlled substances to non-parties were banned. In addition, within three years of entry into force, parties were required to elaborate a list of products containing ozone-depleting substances. Parties that did not object to the elaborated list were obliged to ban their import within one year. Within five years of entry into force, parties would determine the feasibility of banning or restricting from non-party States import of products produced with but not containing controlled substances.[32] This provision did not take into account parties obligations under trade rules.

[32] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 1.

Article 4(8) is *sui generis*. It permits the import and export of controlled substances to and from non-parties on condition that the non-party is in compliance with the provisions of the Protocol. It provides that:

> notwithstanding the provisions of this Article, imports referred to in paragraphs 1, 3 and 4 may be permitted from any State not party to this Protocol if that State is determined, by a meeting of the parties, to be in full compliance with Article 2 and this Article, and has submitted data to that effect as specified in Article 7.

Article 4(7) discourages parties to the fullest extent practicable from exporting to any non-party any technology for producing or utilizing controlled substances.

GATT's MFN principle requires members not to apply discriminatory policies towards each other. As discussed above, the MFN obligation applies to rules, regulations, duties and charges in relation to import and export. The Montreal Protocol's Article 2 is laid out in such a manner as to lead to possible restrictions being imposed on GATT members not party to the Montreal Protocol. Consumption related control measures in the context of import and export of controlled substances would *prima facie* contravene the MFN Principle if they are not applied against imports from all GATT Contracting Parties who are not parties to the Montreal Protocol.

Article 5 of the Protocol permitted developing countries whose annual calculated level of consumption of controlled substances was less than 0.3 Kilograms per capita on the date of entry into force to delay their compliance for 10 years from the date of entry into force. Lack of compliance was meant to enable developing countries meet their basic domestic

needs. It therefore means that even after phase-out of ozone-depleting substances under Article 5 of the Protocol, countries not classified as developing countries but nevertheless parties to the Protocol would continue exporting controlled substances to developing countries for the latter to meet their domestic needs. Non-parties to the Protocol would not be entitled at all to export controlled substances to developing countries under Article 4(1). The ban against non-parties, who are members of GATT or NAFTA, certainly contravenes Article 1 of GATT. Developing countries of import are charged with the duty of enforcement of the ban. It is incumbent on the developing States imposing the ban to justify it under Article XX of the GATT.

The MFN Principle is also breached in the sense that parties to the Protocol have a free hand to export to each other controlled substances as listed in the annex while non-parties are outrightly excluded. This provision sets the stage for a potential dispute between the Protocol on one hand and GATT and NAFTA on the other hand.

The Protocol at Article 4(5) provides that:-

> Each party shall discourage the export, to any State not party to this Protocol, of technology for producing and for utilizing controlled substances.

This provision directly impacts on MFN principle and certainly offends GATT and NAFTA.

If States A, B and C are all GATT and NAFTA Contracting parties while State B and C are Montreal Protocol Contracting parties, B can discourage export of technology for producing and utilizing controlled substances to State A while encouraging exports to State C. The text of the protocol leaves it to individual State parties to adopt measures to discourage export of technology to non-parties. Such measures would include but not limited to failure to provide subsidies, aid, credit guarantees or insurance programmes to exporters. They can also take the form of an outright ban of export of such technology. Such actions will be in contravention of the MFN Principle. The provision's primary objective is to restrict transfer of technology for producing and utilizing controlled substances to non-protocol parties. This is oblivious of the fact that non-protocol party that is nevertheless a GATT and/or NAFTA Contracting Party may challenge such restrictions as being in breach of Article 1 of GATT and unjustifiable under Article XX thereof and/or Article 102 of NAFTA.

Article 4(6) of the Protocol provides that:-

> Each party shall refrain from providing new subsidies, aid, credit, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances.[33]

To the extent that this provision targets products, equipment, plants or technology due for export to non-Protocol parties, it has the potential of breaching the MFN Principle of GATT. This would happen in instances where two States A, B and C are members of

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[33] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 1.

GATT but State A is not a party to the Protocol while State B and C are. The MFN Principle will be breached if State B in compliance with the Protocol, provides new subsidies, aid, credit, guarantees or insurance programmes for export to State C and declines to avail similar facilities to exports to State A. There will be a conflict between State B's obligations under GATT's article 1 and Article 4(6) of the Montreal Protocol. It is worth noting that the Protocol's Article 4(5) and (6) are not applicable in instances where the products, equipment, plants or technology improve the containment, recovery, recycling or destruction of controlled substances, promote the development of alternative substances or otherwise contribute to the reduction of emissions of controlled substances.[34]

With respect to NTP, the GATT and NAFTA require taxes and regulations not to be imposed so as to afford protection to domestic industries of the importing State. The rule presupposes equal treatment of domestic and like imported products. Under the Protocol, before the phase out period lapsed, States would be allowed to produce and use controlled substances within their territories. States not party to the Protocol would be disallowed from exporting to a State party a controlled substance. Article 4(1) that out rightly bans importation of controlled substances from any State not party to the Protocol denies market access of like products from non-parties. It means that controlled domestic substances enjoy an undisputed advantage over controlled substances from non parties. This scenario certainly offends GATT's NTP in instances where the exporting non-State party and the importing State party are both GATT members. It would similarly offend NAFTA's NTP principle were it not for its saving power.

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[34] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 1 at Article 4(7).

Article 4(3) of the Protocol require parties, within three years of the date of entry into force, to elaborate in an annex a list of products containing controlled substances. Within one year of the annex having become effective parties that do not have any objection to the annex would ban the importation of like controlled products from any State not party to the Protocol. This provision poses a challenge to GATT members in relation to their obligations under the NTP. In instances where one GATT member is a party to the Protocol and another GATT member is not party to the Protocol the party to the Protocol is required to ban imports of the controlled substance from the other GATT member as contained in the annex. The discriminated GATT member can lodge a complaint with GATT's DSB on grounds that NTP has been breached. NTP is undoubtedly breached because non-Protocol party's products are excluded from the territory of State parties that have no objection to the annex. Protocol party controlled like products are nevertheless available on its domestic market.

The NTP is also breached by virtue of the fact that controlled substances appearing in the annex are treated differently from the like products that are not controlled. Likeness in the latter context of breach connotes end use and tariff classification.

Article 4(4) of the Protocol provides that:-

> Within five years of the entry into force of this Protocol, the parties shall determine the feasibility of banning or restricting from States not party to this Protocol, the import of products produced with, but not containing, controlled substances.

This provision gives importing States power to distinguish between like imported products produced with but not containing ozone-depleting substances and like domestic products from State parties produced with but not containing ozone-depleting substances. It certainly sets the stage for dispute and is in obvious contradiction of the NTP. In case parties ban or restrict the import of like products from non-parties that are nevertheless GATT members on the basis that they were produced using controlled substances, the NTP would have been contravened. The offended party would have a right to mount a challenge at GATT's DSB citing lack of justification for the ban or restriction under GATT Article XX.

From the aforegoing, it is apparent that the Montreal Protocol[35] projects ETMs to control consumption of ozone depleting substances, otherwise called controlled substances. On the other hand, GATT[36] would not approve of the Montreal Protocol's ETMs. The *chapeau* to GATT Article XX does not contemplate and prescribe the Protocol's measures as being justifiable discrimination. A Montreal protocol party that is also a GATT contracting party is under obligation to prove that measures adopted under it are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Article XX (b) and (g) allows derogation from GATT obligations for environmental conservation purposes. **The Sub-Group on Free Trade Issues** established by the **Ad Hoc Working Group of Legal and Technical Experts** concluded that provided it was clearly demonstrated that the measures were not arbitrary

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[35] Montreal Protocol on Substances that Deplete the Ozone Layer, *supra* note 1.
[36] Protocol of Provisional Application, *supra* note 4.

or unjustifiable any discrimination in the treatment between parties and non-parties would be permissible under the exceptions in Article XX (b) and (g) of GATT.[37] **The Open-Ended Working Group of the Parties to the Montreal Protocol** examined issues arising from the implementation of the Montreal Protocol's Article 4 within the context of GATT. The group concluded that possible restrictions on products produced with but not containing controlled substances might be hard to justify under GATT Article XX.[38]

On the other hand it can be argued that the Montreal Protocol's trade provisions do not constitute arbitrary or justifiable discrimination among countries where same conditions prevail. This is because parties to the Montreal Protocol can be said to be under different legal conditions from non parties. All parties are required by the Montreal Protocol to take prescribed measures in reduction of their consumption and production of ozone depleting substances. Non-parties are not under equivalent obligation. Lack of equivalent obligations would imply that conditions between parties and non-parties to the Montreal Protocol are not the same. Indeed Article 4(8) of the Montreal Protocol permits imports from non-parties that have complied with it. From this perspective it can be argued that the Montreal Protocol is not discriminative.

One needs to ask if the Montreal Protocol's provisions are necessary for the protection of health and life under GATT's Article XX (b) by preventing ozone layer depletion. The

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[37] Lawrence Peter M., *International Legal Regulation for Protection of the Ozone Layer: Some Problems of Implementation*, 2 Journal of Environmental Law, No. 38, 22 (1991)

[38] Report of the Meeting of the Open-Ended Working Group of the Parties to the Montreal Protocol, UNEP/OZL/RrO/WG.1/5/3, December 5, 1990 at 4

measure of necessity of trade measures under GATT was set out in the *Thai Cigarette Case.*[39] There has to be no other reasonably available alternative measure compatible with GATT. If there is an alternative for mitigating ozone layer depletion other than as provided for by the Montreal Protocol, then GATT requires parties to resort to that alternative. The question that needs to be addressed before making use of the alternative is whether or not the alternative will command broad international support for the attainment of the Montreal protocol's objectives. The alternative measure to trade restrictions would be imposition of countervailing taxes on consumption of controlled substances. This option presupposes that large consumer countries of controlled substances would all participate in imposing the tax. However, due to the fact that the number of controlled substances is big and the difficulties involved in detecting emissions, tax would be costly to implement.[40]

The other question one has to address under GATT's article XX (g) in relation to the Montreal Protocol is whether or not the ozone layer is an exhaustible natural resource. The issue to be addressed is whether the available scientific evidence qualifies the categorization of the ozone layer as an exhaustible natural resource. Ozone depletion and climate change are, no doubt, serious threats to the global environment. The rise in ultra violet radiation is known to cause skin cancer, cataracts, suppression of the human immune response system, adverse effects on crops and ocean phytoplankton's resulting to

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[39] *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/r 208 – 09 (Nov. 7, 1990)

[40] Enders A., and Pagers, A., Successful Conventions and Conventional Success: Saving the Ozone Layer 134 (K. Anderson and R. Blackhurst ed.)

disastrous ecological reactions.[41] The rise in ultra violet radiation is attributable to the depletion of the ozone layer. Although it has been argued elsewhere that Article XX (g)'s drafting history refers to resources of economic value rather than resources that cannot be exploited economically,[42] for its intrinsic value as an integral part of the ecosystem, the ozone layer is an exhaustible resource. Besides the catastrophic consequences associated with its possible depletion, it has gigantic economic implications. To this end, the ozone layer is indeed an exhaustible natural resource that should be protected under GATT's Article XX (g). However due to GATT's traditional approach to environment versus trade disputes, it is unlikely that the panel would be sympathetic to environmental concerns. From the foregoing, there is an actual and potential conflict between the Montreal Protocol and GATT.

2.5.2: THE CITES

The objective of CITES[43] is to conserve endangered species. It focuses on protection of individual species threatened with extinction by international trade. Species are protected for their aesthetic, scientific, cultural, recreational and economic benefits. Loss of biodiversity has the potential of disrupting the ecosystem. In order to maintain a stable ecosystem and protect endangered species of fauna and flora, CITES was negotiated to control trade by way of ETMs.

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41 Id.

42 Lawrence P. M., International Legal Regulation for the Protection of the Ozone Layer: Some Problems of Implementation, 2 Journal of Environmental Law, No. 1, 17, 39 (1990).

43 United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2.

Trade is defined by CITES to mean export, re-export, import and introduction from the sea of any animal or plant, whether alive or dead.[44] CITES provides for the listing of species under three appendices. Appendix I include all species threatened with extinction, which are or may be affected by trade.[45] Trade in Appendix I species is subject to strict regulation. Trade is only authorized in exceptional circumstances. Appendix II species are species which although not necessarily threatened with extinction may become threatened unless trade in them is subject to strict regulation in order to avoid utilization incompatible with species' survival.[46] Appendix III encompasses all species that any party to CITES identifies as being subject to regulation within its jurisdiction for purposes of preventing or restricting exploitation and as requiring cooperation of other parties in controlling trade.

Before the export of any specimen of species included in Appendix I, an export permit by the State of export has to be produced. An export permit shall only be granted when the following conditions have been met:-

(i) A Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(ii) A Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;

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[44] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2.

[45] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article II (i).

[46] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article II 2(a).

(iii) A Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped to minimize the risk of injury, damage to health or cruel treatment; and

(iv) A Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.[47]

Before the export permit is issued there has to be an import permit from the importing State. An import permit shall only be granted when the following conditions have been met:-

(i) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

(ii) A Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(iii) A Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.[48]

Thus if the State of import denies the importer an import permit, an export permit will not issue. Trade under CITES contemplates cross border transactions. The need for an import permit raises the possibility of the importing State failing or declining to issue an import licence with the result that the exporting State cannot even be approached for an export permit. The refusal may not necessarily be for purposes of conserving the particular species. The State of import may refuse to grant the import licence with a view to promoting its domestic specimen's market dominance. Such refusal could be

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[47] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article III (2).

[48] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article 111 (3).

challenged under GATT as being a prohibition and therefore in contravention of Article XI. The requirement for an import licence conflicts with GATT's Article XI, which provides as follows:-

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

In instances where the State of import is not party to CITES, the requirement for an import licence would not apply to it. In contradistinction, the exporting State party to CITES would be bound by Article II (4) to conduct trade in accordance with CITES. If both States are GATT members, there is bound to be a dispute as the State of import is under no obligation to comply with CITES's requirements. There is also bound to be a dispute where both States are GATT members but the State of export is not a party to CITES while the State of import is a party to CITES. The former is not bound to have an import licence from the latter for it to authorize export while the latter is bound to ask for the licence.

For the re-export of any specimen in Appendix I, a prior grant and presentation of a re-export certificate is a prerequisite. A re-export certificate is granted on following conditions: -

> (a) A Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present convention;

(b) A Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(c) A Management Authority of the State of re-export is satisfied that an import permit has been granted for any living specimen.[49]

By requiring the Management Authority of the State of re-export to satisfy itself that importation into that State complies with the requirements of CITES, the Management Authority of the State of re-export has an opportunity to control trade in specimens by issuance or denial of a re-export certificate. This requirement certainly conflicts with Article XI of GATT that prohibits restrictions. The requirement for satisfaction of the Management Authority of preparation and shipping to minimize risk of injury, damage to health or cruel treatment and the inquiry into presence of an import permit further sets the stage for contravention of Article XI of the GATT. If the above conditions are not met then the re-export certificate shall not ordinarily be issued thereby restricting trade in fauna and flora.

Before an Appendix I species is introduced, prior grant of a certificate from a Management Authority of the State of introduction is mandatory. Before the certificate is granted, a Scientific Authority of the State of introduction has to advise that the introduction of the species will not be detrimental to the survival of the species. Secondly, the State of introduction's Management Authority has to be satisfied that the proposed recipient of the living specimen is suitably equipped to house and care for it.

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[49] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article 111 (4).

Thirdly, the Management Authority has to be satisfied that the specimen is not to be used for primarily commercial purposes.[50] Under this provision, denial of the Certificate by the Management Authority of the State of introduction effectively bars trade in the specimen. This provision potentially conflicts with Article XI of GATT that prohibits the use of import or export licences or other measures to restrict trade. Similarly advice from the Scientific Authority of the State of import declaring that introduction of specimen is detrimental to the survival of the species will be restrictive of trade and in contravention of GATT's Article XI.

Trade in Appendix II specimens of species is regulated by Article 4 of CITES. The export of specimen under this appendix require prior grant and presentation of an export permit. The conditions under which the permit is granted are varied but principally similar to Appendix 1. The export permit shall be granted only when the Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species. If in the opinion of the Scientific Authority the export of the specimen would be detrimental to the survival of that species then the export permit will not be granted.[51] Secondly, the Management Authority of the State of export has to be satisfied that the specimen was not obtained in contravention of its laws for the protection of fauna and flora. If the Management Authority is of the view that the specimen was obtained in contravention of laws of State of export then the export permit will not be

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[50] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 *at* Article 111 (5).

[51] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at, Article IV (2) (a).

granted.[52] In addition the Management Authority of the State of export has to be satisfied that any living specimen will be so prepared and shipped so as to minimize the risk of injury, damage to health or cruel treatment. If the Management Authority is of the view that the foregoing conditions have not been met it will not issue an export permit. Denial of the export permit offends GATT's prohibition of restrictions under Article XI.

Article 4 (3) empowers the Scientific Authority in each State party to monitor export permits granted by that State for specimens included in Appendix II and the actual exports of such specimens. In the event that the Scientific Authority determines that the specimen is likely to be depleted and thus eligible for inclusion in Appendix I, then the Management Authority shall be advised of *suitable measures* to be taken to limit the grant of export permits for specimens of that species. The suitable measures would invariably lead to limitation of trade in that particular specimen. Such limitation would be in contravention of Article XI of GATT which prohibits use of import or export licences or *other measures* to quantitatively restrict trade.

Import of Appendix II specimen requires prior presentation of either an export permit or a re-export certificate.[53] Without the export permit or a re-export certificate, trade in Appendix II specimen will not be allowed. Before a re-export certificate is granted there are basic requirements that have to be met. The Management Authority of the State of re-export has to be satisfied that the specimen was imported into that State in accordance

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[52] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article IV (2) (b).

[53] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at *Article* IV (4).

with the provisions of CITES. If the Management Authority establishes that there was breach of CITES while importing the specimen into that State, it will not grant the re-export certificate. The Management Authority of the State of re-export has to be satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment. If the Management Authority of the State of re-export has misgivings as to the safety or health or cruel treatment of the living specimen while being shipped, a re-export certificate would not issue.[54] The requirement for a re-export certificate and the attendant conditions control re-export trade in Appendix II specimen. The control is similarly not compatible with GATT Article XI as licences of whatever form and nature are not contemplated under GATT.

Trade in Appendix III specimens is also regulated. Before Appendix III specimen are exported, a prior grant and presentation of an export permit is mandatory. The export permit is granted upon fulfillment of two conditions. The Management Authority of the State of export has to be satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora. If the Management Authority is of the view that the specimen was obtained in contravention of the State of export's laws for the protection of fauna and flora then it will not issue the export permit. The Management Authority of the State of export has to be satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.[55] If the Management Authority is of the view that the living specimen's

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[54] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at *Article* IV (5).

[55] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at *Article* IV (2).

preparation and shipment exposes it to risk of injury, damage to its health, or amounts to cruel treatment, then the export permit will be denied. Import of Appendix III specimens also require a certificate of origin save for instances of re-export. The requirement of export permit and import licence amounts to restrictions under GATT Article XI.

It is noteworthy that CITES permits trade with non-parties on condition that documentation similar to documentation under CITES is issued by competent authorities. It provides:-

> where export or re-export is to, or import is from, a State not party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in view thereof by any party.[56]

This provision is mindful of the MFN principle to the extent that similar treatment is meted out to States that comply with CITES documentation. In the event that a non-CITES State trades with a CITES State where both are GATT members then the non-CITES party will be required to comply with documentation. This treatment complies with GATT Article XX that prohibits application of measures in an unjustifiably discriminatory way between countries where the same conditions prevail. Article X of CITES may be used to neutralize any perceived discrimination. It compares favourably, in its functional approach, with Article 4(8) of the Montreal Protocol in abating discrimination between parties and non-parties.

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[56] United Nations Convention on International Trade in Endangered Species of Fauna and Flora, *supra* note 2 at Article X.

The requirement by CITES for prior grant of certificates, licences and permits for exports, re-export and import is in contravention of Article XI of GATT. It sets up conditions for dispute between CITES and GATT.

2.5.3: THE CARTAGENA PROTOCOL

The CBD[57] is the leading international legal instrument on biodiversity. Biosafety is one of the issues that the CBD has addressed. Biosafety refers to the need to protect human health and the environment from likely adverse effects of biotechnology products. In recognizing the importance of biotechnology, the CBD provides for access to and transfer of technology that is relevant to the conservation and sustainable use of biological diversity.[58] Article 19 (3) of the CBD provides that:-

> The parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including in particular, advance informed agreement, in the field of the safe transfer handling and use of biological diversity.

During the 1995 Conference of the Parties to the Convention, an Ad Hoc Working Group on Biosafety was established. The Working Group was required to develop a draft protocol on biosafety with focus on transboundary movement of any living modified organism resulting from biotechnology. After several years of negotiations, the Cartagena

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[57] Convention on Biological Diversity, opened for signature June 5, 1992, 1760 U.N.T.S (entered into force on December 29, 1992).

[58] Id. at Article 16(1) and 19(1) and (2).

Protocol[59] was finalized and adopted in Montreal on 29th January 2000 at an extraordinary meeting of the conference of the parties. It came into force on 11th September 2003.

The Cartagena Protocol provides an international regulatory framework for trade in biotechnology products and environmental protection. It seeks to strike a balance between environmental protection on one hand and trade on the other. Cartagena Protocol applies the precautionary principle to biotechnology as contained in Principle 15 of the Rio Declaration on Environment and Development.[60] This principle is captured in Cartagena Protocol's preamble and affirmed at Article 1 thereof. The precautionary principle evolved from the realization that scientific certainty often comes too late to design effective legal and policy responses for preventing potential environmental threats. Matters affecting the environment require complex analyses of scientific, technical and economic factors. The Principle provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This principle is more useful in instances where the likely harm is irreversible in nature. Cartagena Protocol's incorporation of the precautionary principle and how it relates to WTO Agreements raises serious issues of conflict. WTO's Agreement on the

[59] Cartagena Protocol on Biosafety, Jan. 29,2000, Australian Treaty Series 1993 No. 32 (entered into force Sept. 11, 2003).
[60] U.N. Doc. A/CONF.151/26 (vol. 1) 1992.

Application of Sanitary and Phytosanitary Measures[61] (hereinafter referred to as the SPS) in its preambular provisions provide that:

> No member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail or a disguised restriction on international trade.

The basic objective of the SPS is to improve human health, animal health and phytosanitary conditions in all member countries while minimizing their negative effects on trade. WTO's preamble permit members to apply the precautionary principle without breaching the SPS.

However Article 2(4) of SPS shifts the position. It requires members to take sanitary and phyto-sanitary measures based on scientific principles.[62] Members are required to ensure that their sanitary or phytosanitary measures are based on an assessment of risk that shall take into account available scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, prevalence of specific diseases or pests, existence of pest or disease-free areas; relevant ecological and environmental conditions and quarantine or other treatment.[63] The SPS require members to take into account the objective of minimizing negative trade effects when determining the appropriate level of sanitary or phytosanitary protection. While establishing or

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[61] John H. Jackson, Documents Supplement to Legal Problems of International Economic Relations, 121 (3d ed. 1995)

[62] Agreement on the Application of Sanitary and Phytosanitary Measures, supra note 61 at Article 2(4).

[63] Agreement on the Application of Sanitary and Phytosanitary Measures, supra note 61 at Article 5 (1) and (2).

maintaining sanitary or phytosanitary protection, members are required by the SPS to ensure that such measures are not more trade-restrictive than is required to achieve desired protection, taking into account technical and economic feasibility.[64]

Precautionary sanitary or phytosanitary measures are not allowed. WTO members may provisionally adopt sanitary or phytosanitary measures on the basis of available and sufficient pertinent information, including that from relevant international organizations as well as those applied by other members.[65] Emphasis is placed on scientific data before protective sanitary or phytosanitary measures are taken. In the European Communities-Measures Affecting the Approval and Marketing of Biotechnology Products[66] the WTO Panel observed that with regard to the EC member State safeguard measures, it acted inconsistently with its obligations under Articles 5.1 and 2.2 of the SPS Agreement with regard to all of the safeguard measures at issue, because these measures were not based on risk assessments satisfying the definition of the SPS Agreement and hence could be presumed to be maintained without sufficient scientific evidence.

Risk assessment, being the evaluation of the likelihood of entry, establishment or spread of a pest or disease, has to be conducted. It entails various steps. It includes identification of any novel genotypic and phenotypic characteristics associated with living modified organism that may have adverse effects on biological diversity in the likely potential receiving environment, taking also into account risks to human health. It also entails an

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[64] Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* note 61 at,Article 5 (6).
[65] Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* note 61 at Article 5 (7).
[66] *European Communitys-Measures Affecting Asbestos and Asbestos Containing Products, supra* note *20.*

evaluation of the likely adverse effects on the receiving environment by the living modified organisms; an evaluation of the consequences should these adverse effects be realized; an estimation of the overall risk posed by living modified organisms based on the evaluation of the likelihood and consequences of the identified adverse effects being realized; a recommendation as to whether or not the risks are acceptable or manageable, including where necessary, identification of strategies to manage these risks; and where there is uncertainty regarding the level of risk, it may be addressed by requesting further information on the specific issues of concern or by implementing appropriate risk management strategies and/or monitoring the living modified organism in the receiving environment.[67]

Conflicting risk assessment results, under the Cartagena Protocol, does not preclude a State from taking a decision on living modified organisms. In addition, the Cartagena Protocol provides that lack of scientific certainty due to insufficient scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the party of import, taking also into account risks to human health, shall not prevent that party from taking a decision, as appropriate with regard to the import of the living modified organism in order to prevent or minimize such potential adverse effects.[68]

The leeway to make a decision by the party of import on living modified organisms is reinforced by Article 11(8) of the protocol, which also provides: -

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[67] Cartagena Protocol on Biosafety, *supra* note 59.
[68] Cartagena Protocol on Biosafety, *supra* note 59 at Article 10(6).

> Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the party of import, taking also into account risks to human health, shall not prevent that party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing in order to avoid or minimize such potential adverse effects.

The Cartagena Protocol is focused on potential adverse effects of living modified organisms on the conservation and sustainable use of biological diversity taking into account risks to human health. In as far as risk assessment measures are taken, Cartagena Protocol is GATT compliant. However it departs from GATT by permitting members to employ the precautionary principle. In the absence of risk assessment, the SPS would treat sanitary or phytosanitary measures as being arbitrary or unjustifiable discrimination, negative to trade and therefore liable to be struck down.

On the other hand, Article 1 of Cartagena Protocol embraces the precautionary principle as captured at Principle 15 of the Rio Declaration on Environment and Development.[69] In the realm of international environmental practice, there is so much uncertainty that the precautionary principle becomes an indispensable tool of environmental conservation. Annex III (4) of the Protocol States: -

> Lack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk.

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[69] Principle 15 of the Rio Declaration on Environment and Development, *supra* note 60.

Although the Cartagena Protocol heavily relies on risk assessment in decision-making, Annex III (4) re-establishes the fact that science is not limitless. It recognizes the fact that regulators may make decisions to protect human and plant health and the environment without adequate risk assessment. In the *Hormones Case*[70] GATT's AB recognized that there are instances when there could be conflicting scientific opinion and therefore governments can make decisions basing SPS measures on divergent opinion coming from qualified and respected sources.

The CBD also emphasizes States' sovereign right to determine and regulate the use of their biodiversity as long as undue and unreasonable restrictions are not imposed on access to biological resources. Article 3 of the CBD provides: -

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.[71]

The question that arises therefore is to what extent does the CBD protect import decisions that are taken to protect biological diversity against WTO requirements? The Cartagena Protocol at Article 2(3) equally preserves States' sovereignty in keeping with the CBD. The precautionary principle is, to a large extent, informed by the exercise of State sovereignty. A State will be at liberty to take appropriate measures to exclude from its territory biotechnology products as it deems fit. Exercise of State sovereignty includes a

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[70] European Community Measures concerning Meat and Meat Products (Hormones) WT/DS26/AB/R.
[71] Convention on Biological Diversity, *supra* note 57.

State's right to apply the precautionary principle. Exercise of this power is bound to lead to disputes between Cartagena Protocol and WTO.

2.6: TRADE AND EXTRA JURISDICTIONAL APPLICATION OF ENVIRONMENTAL MEASURES

Territorial sovereignty has a positive and negative aspect. The positive aspect entails exclusivity of competence of the State regarding its own territory.[72] The negative aspect refers to the obligation of the State to protect the rights of other States. Territorial sovereignty refers to the existence of those facts required under international law to entail the legal consequences of a change in the juridical status of a territory.[73] One critical indicia of sovereignty is the doctrine of domestic jurisdiction. A State is ideally supposed to have exclusive domestic jurisdiction. A State is not expected to legislate within another State's territory but its own. Additionally, a State should not legislate within its territory and then seek to impose that legislation on other States whether directly or indirectly. States may be tempted to legislate extra jurisdictionally, especially in instances where they seek to address transboundary issues or environmental matters affecting global commons. The question that needs to be addressed is whether or not environmental conservation measures with extra jurisdictional effect are permitted by trade rules. It is worth noting that such measures are commonly unilateral in nature although the goal sought to be achieved may be multilateral.

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[72] Shaw M. N., International Law, 241 (4th ed. 1997).
[73] Id.

For a unilateral measure to be GATT compliant, it has to fall within the general exceptions of GATT Article XX. GATT Article XX can only be invoked if trade in, consumption or production of the traded goods leads to or occurs in certain defined circumstances. Under GATT *Article XX chapeau,* trade restrictive measures contemplated have to be necessary for them to be said to be GATT compliant. In the *Tuna-Dolphin Case II*[74] the panel found the measures imposed by the U.S. on Mexican tuna regarding incidental taking of Dolphins in the Eastern Tropical Region were extra jurisdictional and not necessary. The Panel did not, however, define what it perceived to be extra jurisdictional trade measures.

In the *Shrimp/Turtle Case*[75] facts of the case were that pursuant to the U.S. Endangered Species Act; all sea turtles found in U.S. waters are listed as endangered or threatened species. In 1989, after issuing regulations on use of turtle excluder devices (TEDs) or tow time restrictions, Section 609 of Public Law No. 101 – 162 was enacted. Section 609 prohibited the import of shrimp and shrimp products from countries that had not been certified by the U.S. President as having adopted a regulatory program governing the incidental taking of sea turtles comparable to that of the U.S. India, Pakistan, Thailand and Malaysia claimed that Section 609 import ban was in violation of Article XI:1 of GATT. The claimants, in response to U.S. defense, contended that Article XX (b) and (g) of GATT cannot be invoked to justify a measure which applies to animals outside U.S. jurisdiction. Malaysia argued that Section 609 was in breach of the sovereignty principle under international law. The U.S. argued that under general principles of

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[74] United States-Restrictions on Import of Tuna, *supra* note 21.

[75] United States — Import prohibition of certain shrimp and shrimp products (May 15, 1998), WT/D558/R.

international law relating to sovereignty, States have the right to regulate imports within their jurisdiction. The Appellate Body turned its attention on to the scope of Article XX with a view to determining whether or not it permits a member to condition access to its market for a given product. The AB observed that the *Chapeau* of Article XX interpreted within its context and in the light of the objects and purpose of GATT and WTO Agreement, only allows members to derogate from GATT provisions so long as in doing so, they do not undermine the WTO's multilateral trading system.

In considering a measure under Article XX of GATT, the AB observed that it must determine not only whether the measure on its own undermines WTO's multilateral trading system but also whether it would threaten the security and predictability of the multilateral trading system. It found that if *Article XX Chapeau* were to be interpreted to allow a member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among members as security and predictability of trade relations under those agreements would be threatened. The panel noted that market access for goods could become subject to an increasing number of conflicting policy requirements for the same product leading to the rapid end of the WTO multilateral trading system.

It is clear that the scope of GATT Article XX as interpreted by the AB cannot be considered to include measures that operate so as to affect other governments' policies in a way that threaten the multilateral trading system. This approach effectively gives

members a large measure of autonomy to determine their own domestic policies on the environment, environmental objectives and environmental legislation without external influence. The WTO's preamble was considered by the AB in the *Shrimp/Turtle Case*[76] as not justifying interpreting Article XX of GATT to allow a member to condition access to its market for a given product on the adoption of certain conservation policies by exporting members in order to bring them into line with those of the importing member.

It is evident therefore that an attempt to impose either directly or indirectly, on other GATT members, home grown environmental conservation standards would spark a dispute. GATT Members are expected to negotiate as opposed to imposing unilateral measures that constrain member's sovereignty and destabilize WTO's multilateral trading system.

[76] Id.

CHAPTER THREE

3.0 ENVIRONMENTAL DISPUTE AVOIDANCE AND RESOLUTION IN WTO AND NAFTA

3.1.: INTRODUCTION

Trade and environment disputes are better avoided than resolved. The green helmet concept posits that states should broaden and strengthen their capacity to identify and prevent potential environmental disputes. Prevention is achieved through bilateral and multilateral effort. However in instances where dispute prevention is ineffective, dispute resolution processes are resorted to. Various trade regimes have inbuilt dispute prevention and resolution mechanisms. When trade versus environment disputes arise, they are referred to institutions set out in relevant legal instruments for resolution. Most trade regimes are tailored to meet trade liberalisation objectives. Their dispute resolution organs and processes are primarily a trade affair.

The WTO agreement, as negotiated, pays more attention to dispute resolution as opposed to NAFTA[1] and NAAEC that focuses on dispute avoidance with comprehensive dispute resolution provisions. This chapter discusses WTO's and NAFTA's dispute avoidance and resolution provisions and how they have impacted on the green helmet concept.

3.2: THE WTO DISPUTE SETTLEMENT UNDERSTANDING

The WTO Agreement focuses on dispute settlement as opposed to avoidance. Unlike NAFTA, the WTO has no Side Agreement equivalent to NAAEC. It lacks dispute prevention

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[1] North American Free Trade Agreement, December 8, 1993, 32 I.L.M. (1993)) (entered into force on 1st January 1994).).

institutions and mechanisms. It has, as its Annex, the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the DSU). The WTO Agreement's principal function at Article III is the administration of the DSU. The DSU introduced a radical shift in dispute resolution. It replaced the system of panels that had emerged under GATT that made non-binding recommendations. It (the DSU) builds on past dispute settlement practices but at the same time puts in place pragmatic measures to enhance the dispute settlement mechanism as opposed to avoidance. The DSU regulates dispute settlement under all covered agreements.[2] The DSU has two bodies that are used in dispute settlement. They include the Dispute Settlement Body's (DSB) *ad hoc* panels and the Appellate Body (AB). The DSB is established to facilitate consultation, administer the DSU, and dispute settlement provisions of covered agreements.[3] The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under covered agreements.[4]

Whenever a dispute arises under WTO, there are ten key stages that appear in the proceedings. These are consultations; conciliation or mediation services; panel establishment; selection of panel members; setting of panel's terms of reference; hearing of disputes and issuance of panel report; adoption of the report; appeal by any party to the Appellate Body; monitoring of the recommendations.

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2 D.S.U provides that the DSB Chairman may decide what rules and procedures to follow when there is a dispute.

3 John H. Jackson, Documents Supplement to Legal Problems of International Economic Relations, 36 (3d ed. 1995).

4 Id.

3.2.1: CONSULTATION

The need to consult is contained in Article XXII of GATT and Article 4 of the DSU. Consultation arises when there already subsists a dispute. Each member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another member.[5] Requests for consultations are notified to the DSB and the relevant councils and committees by the requesting member. Consultations were exemplified in the case of *United States – Standards for Reformulated and Conventional Gasoline*.[6] On 23rd January 1995 the United States received a request from Venezuela to hold consultations under Article XXII:1 of GATT 1994, Article 4.1 of the Agreement on Technical Barriers to Trade (TBT) and Article 4 of the DSU on the rule issued by the Environmental Protection Agency on 15th December 1993 entitled "Regulation of Fuels and Additives – Standards for Reformulated and Conventional Gasoline." Consultations took place on 24th February 1995. The consultations did not result in a satisfactory resolution of the dispute. Venezuela, in a communication dated 25th March 1995 requested the DSB to establish a panel to examine the matter.

On 19th April 1995 Brazil similarly requested for consultations over the same rules. Similarly, the consultations were not satisfactory. Brazil also requested the DSB to establish a panel.[7] The *raison detre* for consultations is that parties would resolve their dispute without having to invoke the formal dispute settlement procedures. If parties do not resolve their differences, they may make use of good offices, conciliation and mediation.

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5 Id. at Article 4(2)

6 *United States-Standards for Reformulated and Conventional Gasoline,* Appellate Report, (May 20, 1996) AB-1996-1, WT/DS2/AB

7 Id. at 2.

3.2.2: PANEL ESTABLISHMENT

The right to establish a panel is enshrined at Article 6(1) of the DSU. It provides that if the complaining party so requests, a panel shall be established, at the latest, at the DSB meeting following that at which the request first appears as an item on the DSB's agenda. In the *U.S. Gasoline Case*[8] Venezuela's request of 25th March 1995 for a panel was acted on on 10th April 1995 by the DSB. Similarly, Brazil's request for a panel dated 10th April 1995 was acted on, on 31st May 1995. On the same day, 31st May 1995, pursuant to Article 9 of the DSU, in respect of multiple complainants and with agreement of all parties, the DSB decided that the matter be examined by the panel already established at the request of Venezuela.[9] The complaining party requests, in writing, for the establishment of a panel. It will indicate whether consultations were held, identify specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Where the request for establishment of a panel is made without the standard terms of reference, the request would be accompanied by a text of the proposed terms of reference.

Constitution of the Panel is governed by Article 8 of the DSU. It provides that the Panel shall be composed of well-qualified governmental and/or non-governmental individuals. The individuals should be persons who have served on or presented a case to a Panel, served as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or taught or published on international trade law or policy.[10] The DSU empowers the Secretariat to propose Panel members in the event of disagreement by and between the parties as to the composition of the Panel. The WTO Director General may appoint the panel on his or her own authority in consultation with the chairperson of the DSB and of the

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8 *United States-Standards for Reformulated and Conventional Gasoline, supra* note 6.

9 John H. Jackson, *supra* note 3

10 Id. at Article 8(1)

relevant council or committee.[11] There is no requirement for the appointment of a specialist on the Panel, in case of an environmental dispute. In the *U.S. Gasoline Case,*[12] the parties, on 28th April 1995, agreed on the composition of the panel as Mr. Joseph Wong, Mr. Crawford Falconer and Mr. Kim Luotonen.[13]

The DSU makes provision for standard terms of reference. Terms of reference delineate the scope of disputes. It provides that panels shall have the following terms of reference unless the parties to the dispute agree otherwise within twenty days of the establishment of the panel:

> To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document and to make such findings as will assist the DSB in making the recommendations or in giving rulings provided for in that/ those agreement(s).[14]

In the alternative, the DSB has power to authorise its chairman to draw up terms of reference of the Panel in consultation with parties to the dispute.[15] However the chairman's powers to draw the terms of reference are subject to the contents of the standard terms. In the *U.S. Gasoline Case,*[16] the DSB, in agreement with parties, put forward the following terms:-

> to examine, in the light of the relevant provisions of the covered agreements cited by Venezuela in document WT/DS2/2 and by Brazil in document WT/DS4/2, the matters referred to the DSB by Venezuela and Brazil in those documents and to make such

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11 Id. Article 8(7)
12 *United States-Standards for Reformulated and Conventional Gasoline, supra* note 6.
13 Id.
14 John H. Jackson, *supra* note 3 at Article 7(1).
15 Id. at Article 7(3).
16 *United States-Standards for Reformulated and Conventional Gasoline, supra* note 6.

findings as will assist the DSB in making the recommendations or in giving rulings provided for in these agreements.[17]

The panel met and proceeded to deal with the dispute on the basis of these terms.

Under this provision, there is room for parties to adopt terms of reference that gives environmental concerns more attention. The draw back is that terms that are at variance with those provided for in the agreement must be drawn by the consent of all parties. It is unlikely that the party breaching environmental regulations will be willing to give environmental concerns prominence in the terms of reference.

3.2.3: PANEL PROCEDURES

The Panel procedures are outlined at Appendix 3 of the DSU.[18] It provides that proceedings of the panel shall be held in camera. Parties to the dispute and interested parties attend the panel only when invited by the Panel to appear. The cloak of mystery and secrecy engulfing proceedings leave a lot to be desired. Lack of ventilation of Panel proceedings in open session denies genuinely interested parties an opportunity to examine proceedings and enrich them by way of comments. Views relating to environmental conservation are no exception to these exclusionary requirements. As a general rule, all documents submitted to the Panel are confidential. However parties may disclose to the public contents of their own statements. Information that comes to a party's knowledge from and designated by a member as confidential shall be treated as such. The need for confidentiality, while maintaining free flow of thought, may permit injurious positions to end up in the final report without the benefit of

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17 Id.

18 Jackson, *supra* note 3 at Article 12.

public scrutiny.

Prior to the first substantive meeting of the Panel, parties to the dispute are required to transmit to it written briefs. The brief sets out facts of the case and parties' respective arguments. At the first meeting with parties, the complainant is given an opportunity to present its case whereafter the respondent would be afforded an opportunity to present its view.

Third parties have to notify the DSB of their interest in the matter. At a session of the first substantive meeting of the Panel, third parties will be invited to make written presentations of their views. Third parties may be allowed to stay in during the entirety of the session. The Panel also reserves the right to exclude them from the rest of the session. Third parties may be environmental non-governmental organisations or members articulating important environmental conservation views. In the *United States – Restrictions on Imports of Tuna case*[19] Australia, the European Community, Indonesia, Japan, Korea, The Philippines, Senegal, Thailand and Venezuela made oral presentations to the panel on 15th May 1991 while Canada and Norway submitted their separate views in writing as third parties.[20] In the *U.S. Gasoline Case*,[21] Australia, Canada, the European Community and Norway reserved their rights to participate in the panel proceedings as third parties.[22] By allowing third parties to be present for only a session with the possibility of excluding them before the session ends, it presents a scenario where third parties are unable to concisely follow up on presentation of

19 United States-Restrictions on Import of Tuna, Aug., 16, 1991, 330 I.L.M. 1594.
20 Id. at 1.
21 United States-Standards for Reformulated and Conventional Gasoline, *supra,* note 6.
22 Id.

arguments and accordingly fail to adequately reply to them. This would negatively impact on incorporation of environmental views articulated by third parties.

At the second substantive meeting of the Panel, the party complained against is afforded the right to rebut followed by the complainant. At this stage, it seems third parties have no role in shaping the outcome of the proceedings. Exclusion of third parties, possibly with environmental issues, would tilt the final report against addressing and protecting the environment.

3.2.4: CONSIDERATION AND ADOPTION OF PANEL REPORTS

After consideration of submissions in rebuttal and oral arguments, the Panel would issue the descriptive sections of the draft report to disputing parties. Within a period of time set by the Panel, the parties are expected to submit their comments in writing.[23] After expiration of the set period of time, the Panel issues an interim report which includes the descriptive sections and the Panel's findings and conclusions. If no comments are received from any party within the comment period, the interim report shall be considered the final Panel report and circulated promptly to the members. Third parties are not given the draft for comments. The draft is restricted to the main parties. Again, this approach limits and indeed excludes possible enrichment by third parties of the final report. It may leave out of the report useful comments that may help in environmental conservation.

The DSU eliminates the possibility of blockage by a losing party. It provides that within sixty

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23 Jackson, *supra* note 3 at Article 15(1).

days after the date of circulation of a Panel report to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[24] The change in adoption procedures addressed inherent weaknesses of GATT where a losing party could block adoption of the report. If a party has expressed its intention to appeal, then the DSB does not consider the report for adoption until after the appeal is completed.

3.2.5: APPELLATE BODY

The DSB has established a standing seven member Appellate Body whose primary responsibility is to hear appeals from the Panel. At any given moment three members would serve on the panel. Persons to be appointed are supposed to be of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreement.[25] While there is provision for appointment of persons with general competence in covered agreements, none of the covered agreements is environmental conservation specific. As such it is unlikely that among the seven members, one of them would have expertise in environmental matters that may be in dispute. Since the Appellate Body members cannot exceed seven, while constituting members to serve on any case, the DSB has no leeway to choose outside the seven members to serve on the Panel.

The Appellate Body's responsibility is limited to examining issues of law covered in the Panel report and the Panel developed legal interpretations.[26] Like the Panel, proceedings of the Appellate Body are confidential and its report is unconditionally adopted by the DSB

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24 Id. at Article 16(4).
25 Id. at Article 17(3).
26 Id. at Article 17(6).

unless the DSB decides by consensus not to adopt it within 30 days of circulation. Again, at this stage environmental concerns are not given any preferential treatment.

3.2.6: IMPLEMENTATION AND SUSPENSION OF CONCESSIONS

In cases where a Panel or the AB concludes that a measure is inconsistent with a covered agreement, it would ordinarily recommend that the measure be brought in conformity with the covered agreement. Additionally, the Panel or AB may suggest ways in which the member concerned member could implement the recommendations.[27] After adoption of the report the DSB monitors implementation of the recommendations and or suggestions. The losing respondent would indicate to the DSB its action plan in the implementation of the report. If it is impracticable to immediately comply with the recommendations and rulings, the losing respondent will be afforded a reasonable period of time to comply.

If the recommendations are not implemented, then the prevailing party may be entitled to seek compensation from the losing respondent or seek authority from the DSB to suspend concessions previously available.[28] Under GATT such authorisation was granted in 1955 to the Netherlands to suspend concessions made to the United States as a result of U.S quotas on Dutch agricultural products. The Netherlands did not make use of the authority. In later years authorisations failed because of the consensus rule. The losing respondent would ordinarily oppose such authorisation.

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27 Id. at Article 19.

28 Id. at, Article 22(2).

3.3: NAAEC'S AND NAFTA'S DISPUTE AVOIDANCE

The NAAEC[29] was negotiated in response to environmental inadequacies of NAFTA. The NAAEC provides a comprehensive effort at environmental dispute avoidance and cooperation among member states. Article 8 creates the Commission for Environmental Cooperation (CEC), which has three organs, namely the Council, a Secretariat and a Joint Public Advisory Committee. The Council's functions include providing a forum for member states to discuss environmental matters, facilitate and promote cooperation. Parties' interaction, specifically on environmental issues, provide data for comparison and possible synchronised effort in tackling environmental challenges. Synchronisation of effort can be achieved through comparability of techniques and methodologies for data gathering and analysis, management and electronic data communication on covered matters and implementation of common transboundary conservation strategies.

NAAEC parties also benefit from the Council's recommendations on the use of economic instruments to pursue domestic and internationally recognised environmental objectives. The Council may also make recommendations on transboundary and border environmental issues.[30] The Council's function aids dispute avoidance by enabling parties to exchange information.[31] By setting up the Council and giving it such vast powers and responsibilities, with respect to environmental issues, NAAEC parties had recognized the need to work towards common environmental standards thereby reducing chances of environmental disputes.

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29 North American Agreement on Environmental Co-operation, December 8, 1993, 32 I.L.M. (1993) (entered into force on 1st January 1994).

30 North American Agreement on Environmental Co-operation, *supra* at Article 10(2).

31 A. O. Adede, The System for Settlement of Disputes under the United Nations Convention of the Law of the Sea (Martinus Nijhoff), 1987.

The Secretariat, on council's instructions, prepares an annual report on parties' activities around the NAAEC. The report covers, among other issues, action taken by each party in connection with its obligations under NAAEC. It includes data on parties' environmental enforcement activities. The report periodically addresses the state of environment in territories of the parties.[32] The report is released to the public. Public release of the report is geared towards placing parties' activities under NAAEC squarely in the court of public opinion. In case a party's activity is not consistent with NAAEC, the public moral force will impose on it rectitude of conduct which will encourage compliance and lead to a harmonious co-existence and prevent environmental disputes.

The Secretariat may also prepare a report for the Council in any other environmental matter related to the cooperative functions of the NAAEC. In 1995, pursuant to Article 13 of the NAAEC and complaints by U.S. and Mexican NGOs, the Secretariat prepared a report on the death of migratory birds in the Mexico.[33] The report was prepared pursuant to a petition by the *National Audubon Society, the Grupo de los cien Internacional* and *the Centro Mexicano de Derecho Ambiental* on 6th June 1995. The petitioners, pursuant to Article 13 of NAAEC wanted the report to include an account of action taken by the government of Mexico in connection with the waterbird die-off and measures taken to reduce pollution in the Turbio River Basin where the *Silva Reservoir* is located. The Secretariat established what was dubbed as the International Silva Reservoir Scientific Panel composed of experts of diverse backgrounds. The Panel established that between 20,000 to 40,000 waterbirds died in the Silva Reservoir during the winter of 1994 – 1995 due to exposure to heavy metals. The panel noted the presence of elevated levels of chromium in surface sediment of the Silva Reservoir.

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32 Jackson, *supra* note 3 at Article 12.

33 CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994 – 95).

The panel recommended to Mexico to develop a national programme for wildlife health surveillance and for the investigation of and response to wildlife disease outbreaks. The secretariat endorsed this recommendation and suggested to the council of CEC that the governments of Canada, Mexico and U.S. establish a Task Force of officials with responsibilities for migratory birds and aquatic habitat surveillance. This Secretariat Report gave rise to increased cooperation and surveillance of migratory birds and aquatic habitats by the three member countries. Migratory birds being a resource that transcends boundaries, their death certainly raised concern among NAAEC parties. The joint surveillance and cooperation has gone a long way in preventing environmental disputes. This case illustrates how a trade instrument has been used to address environmental degradation concerns with resultant corrective and preventive measures being undertaken.

Another mechanism of dispute prevention/avoidance under NAAEC is found under Article 14 and 15. The secretariat, under Article 14(1), may consider a submission from any non-governmental organization or person asserting that a party is failing to effectively enforce its environmental law. If the secretariat finds that the submission: (a) is in writing; (b) clearly identifies the person or organisation making the submission; (c) provides sufficient information to allow the Secretariat to review the submission including any documentary evidence on which the submission may be based; (d) appears to be aimed at promoting enforcement rather than harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the party and indicates the party's response, if any; (f) if filed by a person or organization residing or established in the territory of a party, then the secretariat will determine if the submission merits requesting a response from the party. Once a party is requested to make a response, the party will advise the

secretariat within 30 days or, in exceptional circumstances and on notification to the secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the secretariat shall proceed no further; (b) of any other information that the party wishes to submit.

Under Article 15 of NAAEC, the Secretariat may, depending on the submission and response thereof proceed to prepare a factual record. A factual record contains any information furnished by a party and may include any relevant technical, scientific or other information. On 18th January 1996 three non-governmental organizations made submissions alleging that Mexican environmental authorities were failing to effectively enforce environmental laws by not requiring the presentation of an Environmental Impact Assessment (E.I.A.) in connection with the construction and operation of a port terminal and related works in Cozumel, Qyubtaba Roo. The final factual record described, in detail, laws and regulations applicable to the pier project but did not specify whether or not Mexico failed to enforce its environmental laws.[34]

On 2nd April 1997 the Sierra Legal Defence Fund and the Sierra Club Legal Defence Fund (now Earthjustice) jointly filed a submission with the secretariat, pursuant to Article 14 of the NAAEC. The submitters alleged that the Government of Canada was not effectively enforcing S.35 (1) of the Federal Fisheries Act against BC Hydro and Power Authority (BC Hydro) and that this failure 'permits and condones the ongoing destruction of fish and fish habitat in British Columbia. In its response Canada submitted that the concept of 'effective

[34] CEC, Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo.

enforcement' be interpreted broadly, not based solely on the level of prosecutions pursued for alleged violations of S. 35(1) of the Federal Fisheries Act. It submitted that its enforcement efforts constituted enforcement of its environmental laws in full compliance with its obligations under the NAAEC. The Secretariat prepared a factual record, with the assistance of an Expert Group, that identified a series of issues that would facilitate enforcement by Canada.[35]

Also on 6th April 2000 *Academia Sonorense de Derechos Humanos* and *Domingo Gutierrez Mendivil* filed a submission with the secretariat in accordance with Article 14 of the NAAEC. The submission asserted that Mexico had failed to effectively enforce its environmental law in relation to a molybdemum roaster operated by Molymex, S.A. in the municipality of Cumpas, Gonora, Mexico. On 17th May 2002 the council instructed the secretariat to prepare a factual record in relation to the alleged failure to effectively enforce the General Law on Ecological Balance and Environmental Protection and Mexican official standard 1993 with respect to the operation of the Molybdenum production plant by Molynex S.A. to which the submission referred. In the factual record, the secretariat presented facts relevant to whether or not Mexico was failing to effectively enforce, with respect to Molymex, various provisions relating to environmental impact assessment. The information gathered for the factual record did not enable the secretariat to confirm the alleged negative health and environmental effects, although all studies conducted recommended further research and continuous monitoring.[36]

The factual record has no legal force.[37] The submitters have no further recourse to any form of sanction against the offending state. It is hoped that parties, being civilised members of the

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35 See http://www.earthjustice.org/library/Reports.factual record - bc.pdf at p. 116. <accessed on 5th January 2007>.

36 See http://www.cec.org at p. 82. <accessed on 5th January 2007>.

37 Id. at 1264.

international community, would act on the findings of the factual record. It is also hoped that public pressure would come to bear on the offending party to take remedial measures. If a party acts on the conclusions and recommendations of the factual record, the green helmet concept will have been taken a notch higher. Potential disputes between parties will have been prevented.

The most radical dispute avoidance and innovative pro-environmental provisions in NAFTA is found at Article 104(1) and its annexes. It provides that in the event of any inconsistency between NAFTA and the specific trade obligations set out in CITES,[38] Montreal Protocol,[39] the Basel Convention,[40] the 1986 Canada – U.S. Agreement Concerning the Transboundary Movement of Hazardous Wastes[41] and the 1983 U.S. – Mexico Agreement concerning Cooperation for the Protection and Improvement of the Environment in the Border Area,[42] the obligations of a "party under the MEA shall prevail to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party chooses the alternative that is least inconsistent with provisions of NAFTA. Although parties may be apprehensive when it comes to observing their obligations under MEAs due to the 'least inconsistent' clause, the environmental conservation importance of this provision cannot be discounted. It means that a party can justify its activities if they fall within any of its obligations set out in any of the MEAs so as to override NAFTA's MFN and NTP. Aggrieved parties are also expected to

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38 United Nations Convention on International Trade in Endangered Species of Fauna and Flora, March 3, 1973 12 I.L.M. 1085(entered into force July 1, 1975).

39 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

40 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, March 22, 1989, 28 I.L.M. 657 (1989)

41 Canada – U.S. Agreement Concerning the Transboundary Movement of Hazardous Wastes 20 I.L.M. 690 (1981).

42 U.S. – Mexico Agreement concerning Cooperation for the Protection and Improvement of the Environment in the Border Area, 22 I.L.M. 1025 (1983).

take note of the other party's obligations under the listed MEAs. Consequently disputes are prevented due to justification hinged on listed MEA obligations. Compliance and implementation of MEA obligations cited by NAFTA would lead to prevention of environmental disputes.[43] This carries the green helmet concept a notch higher. However there could be instances when disputes are referred to formal dispute settlement processes.

3.4: THE NORTH AMERICAN FREE TRADE AGREEMENT'S DISPUTE SETTLEMENT PROCEDURE

NAFTA's dispute settlement mechanism, as set out at Chapter XX does not radically depart from GATT. Like GATT, it promotes cooperation and consultation among parties for mutually satisfactory settlement of any matter that might affect its operations.[44] Parties are at liberty to invoke NAFTA's dispute settlement procedures to settle all disputes. The procedure may be invoked in interpreting or application whenever a party considers that an actual or proposed measure of another party would be inconsistent with its obligations under the Agreement or cause nullification or impairment contemplated by Article 2004 of NAFTA.[45]

Consultations are mandatory under NAFTA. At consultation, parties can amicably resolve their differences and avoid taking the matter through long arguments in dispute settlement. It offers a friendly forum where parties may discuss and exchange environmental data and views. If parties are unable to resolve the matter by way of consultation in thirty days (or thirty-five days if a third party joins the consultations), any party may call a meeting of the

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43 A. O. Adede, *Management of Environmental Disputes: Avoidance Versus Settlement*, in Sustainable Development and International Law 115 (Boston, MA et al. eds., 1995).

44 North American Free Trade Agreement, *supra* note 1 atArticle 2003.

45 Id. at Article 2004.

Free Trade Commission. In the *Matter of Tariffs Applied by Canada to certain U.S. Origin Agricultural Products,*[46] on 2nd February 1995 the United States requested consultations with Canada pursuant to Article 2006(4) of NAFTA concerning the Government of Canada's application of custom duties higher than those specified by NAFTA. The consultations failed to resolve the matter.

If consultations fail, a party is at liberty to request for a meeting of the The Free Trade Commission that comprises cabinet level representatives of the parties or their designees. This organ is established at Article 2001 to resolve disputes that may arise regarding interpretation of NAFTA. In the *Agricultural Products Case*[47] the United States Trade Representative (USTR) requested for the Free Trade Commission's meeting on 1st June 1995.A party may also request, in writing, for a meeting of the Commission where it has initiated dispute settlement proceedings under GATT regarding any matter subject to the dispute not being environmental in nature. Disputes with environmental issues are restricted to be resolved under NAFTA and not GATT. This position points to the fact that NAFTA has no faith in GATT's ability and objectivity in resolving environmental conflicts. The requesting party, just like under GATT, states in the request the measure or matter complained of and also indicates the provisions of NAFTA that it considers relevant in resolving the dispute. The Commission is expected to convene within ten days of delivery of the request and shall endeavour to resolve the dispute promptly unless it decides otherwise.

If the Commission convenes and the matter is not resolved within thirty days or thirty days lapse since the Commission was convened in respect of the matter most recently referred to it or such other period as the consulting parties may agree, any consulting party may, in writing

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46 *Matter of Tariffs Applied by Canada to certain U.S. Origin Agricultural Products,* Panel Report (Dec., 2 1996),Secretariat File No. CDA-95-2008-01

47 Id.

request for the establishment of an arbitral panel.[48] In the *Agricultural Products Case*[49] the Free Trade Commission was unable to resolve the matter. Consequently, on 14th July 1995 the USTR requested for the establishment of an arbitral panel pursuant to Article 2008 of NAFTA.[50] Once a request is made, the arbitral panel is established as of right. This is in contrast with the GATT procedure at Article 6(1) of the DSU where the Panel establishment may be rejected on a unanimous resolution of the DSB. The mandatory establishment of an arbitral panel side steps the possibility of parties pulling out of disputes after being induced or coerced. Pulling out of disputes by unanimously rejecting to set up an arbitral panel would leave environmental concerns without redress.

3.4.1: SELECTION OF PANEL MEMBERS

There is maintained a roster of up to thirty individuals who have expertise in law, international trade and other matters covered by NAFTA or the resolution of disputes arising under international trade agreements. Members on the roster are expected to be independent of and not affiliated with or take instructions from any party.[51] Where there are two disputing parties, the panel shall comprise five members. In the *Agricultural Product Case*[52] the panel was constituted on 19th January 1996 with the appointment of Prof. Elihu Lauterpacht as Chairperson. The other members of the Panel were Professors Ronald C.C. Cunning, Donald M. Mcrae, Sidney Piker J. G. and Dean Stephen Zamora. The disputing parties are supposed to appoint, by consensus, the chair of the panel within fifteen days of delivery of request failing which a party chosen by lot shall select, within five days, as chair an individual not its

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48 North American Free Trade Agreement, *supra* note 1 at Article 2008(2).
49 *Matter of Tariffs Applied by Canada to certain U.S. Origin Agricultural Products, supra* note 46.
50 Id.at 4.
51 North American Free Trade Agreement, *supra* note 1 at Article 2009(2).
52 *Matter of Tariffs Applied by Canada to certain U.S. Origin Agricultural Products, supra* note 46.

citizen. After the Chairperson has been appointed each party shall, within fifteen days therefrom, select two panellists who are citizens of the other disputing party.[53]

In cases where there are more than two disputing parties, the panel shall comprise five members. In the absence of an agreement on the Chairperson, within fifteen days of delivery of the request, the party or parties on the side of the dispute chosen by lot shall select, within ten days, a chair who is not a citizen of such party or parties. Within fifteen days of selection of the chair, the party complained against selects two panellists who are citizens of each of the complaining parties. The complaining parties shall also select two panellists who should be citizens of the party complained against. Just like GATT, there is no requirement for the appointment of a specialist on environmental matters. However, there is room for appointing such a specialist at Article 2001(3).

Disputing parties are supposed to agree to the Panel's terms of reference, within twenty days of delivery of the request for the establishment of the panel. In the absence of such agreement, NAFTA provides that the Panel's terms of reference shall be:

> To examine in the light of the relevant provisions of the Agreement, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations and recommendations as provided in Article 2016(2).[54]

Unlike GATT's DSB, the Panel's Chairperson has no authority to draw the terms of reference.

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53 North American Free Trade Agreement, *supra* note 1 at Article 2011(1).

54 North American Free Trade Agreement, *supra* note 1 at Article 2023(3).

3.4.2: PANEL PROCEDURES

Parties are entitled to at least one hearing before the Panel as well as the opportunity to provide initial and rebuttal written submissions. Like GATT all written submissions and communications are confidential.[55] Third parties, on delivery of written notice, shall be entitled to attend all hearings, to make written and oral submissions to the Panel and to receive written submissions of the disputing parties. NAFTA's preamble and Article 101 define the word 'party' to refer to state parties to the Agreement, which includes the United States of America, the Government of Canada and the Government of the United Mexican States. It therefore follows that Non-Governmental Organizations cannot participate in panel proceedings as third parties. In the *Agricultural Products Case*[56] the first submission of the United States was filed on 22nd January 1996. The counter-submission of Canada and the first submission of Mexico (third party) were filed on 19th February 1996.

However, a disputing party, or on its own initiative, the panel may seek information and technical advise from any person or body that it deems appropriate subject to the consent of the disputing parties.[57] The panel may also request for a written report of a scientific review board on any issue concerning environmental health, safety or other scientific matters raised by a disputing party on such terms and conditions as parties may agree. The right to get information from experts or scientific boards create an opportunity for environmental conservation experts to infuse their expertise into the final report. In contradistinction, GATT has no provision for experts or reference of any matter to a scientific review board.

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55 North American Free Trade Agreement, *supra* note 1 at Article 2012(1).

56 Matter of Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products, *supra* note 46.

57 North American Free Trade Agreement, *supra* note 1

Unless disputing parties otherwise agree, the panel shall, within ninety days after the last panellist is selected present to the disputing parties an initial report that will contain findings of fact, its determination as to whether the measure at issue is or would be inconsistent with NAFTA's obligations and its recommendations for resolving the dispute.[58] A disputing party may submit written comments to the panel within fourteen days of presentation of the report. The panel shall then present to the disputing parties a final report, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report.

NAFTA's selection and report preparation is open and friendly to environmental conservation. It creates opportunities, especially by inviting NGO's and other related third parties to present their views and make reference to specialized Scientific Review Boards, infusing environmental concerns into the process. Infusion of expertise in the dispute settlement process will improve the factual predictability of future and similar disputes and prevent disputes. This opening is not available to the GATT process.

3.4.3: CONSIDERATION, ADOPTION AND IMPLEMENTATION OF REPORTS

The disputing parties shall agree on the resolution of the dispute that would conform to the determination and recommendations of the panel. If the party complained against does not reach an agreement with any complaining party on a mutually satisfactory resolution within thirty days of receiving the final report, the complaining party may suspend the application to

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58 Id. at Article 2016(2).

the party complained against of benefits of equivalent effect until such time as they have reached agreement on resolution of the dispute.

It is worth noting that unlike GATT, there is no provision for appeal to another body. Under NAFTA, private individuals are encouraged to make use of arbitration and other means of alternative dispute resolution to settle disputes. Under GATT, private individuals have no right of audience and are not recognised by the dispute settlement procedure. It is evident that NAFTA's dispute settlement procedure has better environmental safeguards than GATT.

CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 INTRODUCTION

We have identified and discussed areas in the WTO that require reformulation to incorporate the green helmet concept. We thus recommend the following measures, to make WTO receptive of the green helmet concept and green its dispute prevention and settlement mechanisms. To introduce the green helmet concept in WTO, there should be negotiated a WTO Environmental Agreement with institutions similar to those existing under NAFTA's NAAEC.

4.2: EMBRACING THE GREEN HELMET CONCEPT

The proposed WTO Environmental Agreement should create a Commission for Environmental Cooperation (CEC), which would have three organs, namely the Council, a Secretariat and a Joint Public Advisory Committee. The Council's functions, *inter alia*, would include providing a forum for member states to discuss environmental matters and promote and facilitate cooperation between them. Members' interaction on specific environmental issues would provide data for comparison and a basis for common effort in tackling environmental challenges. Common effort can be achieved through comparison of techniques and methodologies for data gathering and analysis, management and electronic data communications on environmental conservation matters. Members would also benefit from the Council's recommendations on the use of ETMs to

pursue domestic and internationally agreed environmental objectives. The Council may also make recommendations on transboundary and border environmental issues. The Council's function would aid dispute prevention through exchange of information amongst parties.

The Secretariat, on Council's instructions, would prepare annual reports on parties' activities around the proposed WTO Environmental Agreement. The report would cover, among other issues, action taken by each party in connection with its obligations under the proposed WTO Environmental Agreement including data on party's domestic enforcement of environmental laws. The report, to be released to the public, would periodically address the state of the environment in territories of member States. Public release of the report would place members' activities squarely in the court of public opinion. In case a party's activity is not consistent with the proposed WTO Environmental Agreement, the international and national public moral force will impose on the member rectitude of conduct which will lead to prevention of environmental disputes. The secretariat may also prepare a report for the Council in any other environmental matter related to the cooperative functions of the proposed WTO Environmental Agreement.

The secretariat, under the proposed WTO Environmental Agreement just like under NAAEC's Article 14(1), should make provision for consideration of submissions from

any non-governmental organization or person asserting that a party is failing to effectively enforce its environmental laws. If the secretariat finds that the submission: (a) is in writing; (b) clearly identifies the person; or organisation making the submission; (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based; (d) appears to be aimed at promoting enforcement rather than harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the party and indicates the party's response, if any; (f) if filed by a person or organization residing or established in the territory of a party, the secretariat should determine if the submission merits requesting a response from the party. Once a party is requested to make a response, the party should advise the secretariat within 30 days or, in exceptional circumstances and on notification to the secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the secretariat would proceed no further; (b) of any other information that the party wishes to submit.

The Secretariat should, depending on the submission and response thereof, proceed to prepare a factual record. A factual record should contain any information furnished by a member and may include any relevant technical, scientific or other information. Members, being civilized members of the international community, are expected to act on the findings of the factual record. It is also hoped that public pressure would come to bear

on the offending party to take remedial measures. If a member acts on the conclusions and recommendations of the factual record, the green helmet concept will have been taken a notch higher. Environment versus trade disputes between members will have been prevented.

4.3: PROCESS AND PRODUCTION METHODS AND PRODUCT LIKENESS

GATT rules do not permit like products to be discriminated against on the basis of PPMs. In *United States – Restrictions on Imports of Tuna,*[1] the Panel held that in determining product likeness as contemplated by GATT's Article III, it was more concerned with the contents of American and Mexican cans of tuna and not how the tuna got into the can. In contrast, in *the 1997 Auto Taxes case*,[2] the panel held out the possibility of distinguishing products on the basis of PPMs on condition that the measure's primary goal would not afford like domestic products a competitive edge over the discriminated product. This interpretation was disregarded in the subsequent *E.C. Asbestos Case*[3] where totally new parameters of product likeness were set up. While nature and quality of products; end use of products; consumer tastes and habits and tariff classification as enunciated in the *E.C. Asbestos Case*[4] are good bases of product differentiation, process and production methods should be considered as one of the bases of product differentiation.

Differing PPMs implies difference in the cost of production. For example producers in country A with lax environmental PPMs would end up with low cost of production.

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1 United States-Restrictions on Import of Tuna, Aug., 16, 1991, 330 I.L.M. 1594.
2 United States Taxes on Automobiles, Panel Report, (Sept. 29, 1994) DS 31/R39.
3 *European Communitys-Measures Affecting Asbestos and Asbestos Containing Products*, (March 12, 2001) WT/DS135/R.
4 Id.

Conversely, producers in country B operating under stringent environmental PPMs would end up with a comparatively higher cost of production. If country A exports its products to country B, country A's products would enjoy comparative advantage because of low costs of production as against country B's products. Country B will be tempted to impose on country A's products countervailing tax measures to even out the comparative advantage. Countervailing tax will be treated as being discriminatory under GATT and therefore impermissible.

To prevent this potential conflict, it is important for WTO members to harmonize their environmental standards. This can be done by concluding a WTO Environmental Agreement wherein all Contracting Parties will be required to observe agreed common environmental standards in their process and production methods. If WTO members conclude an Environmental Agreement with basic common standards, then the distinction between dirty and clean processes and production methods will be easy to make. Any product processed in breach of the basic common requirements of the proposed WTO Environmental Agreement would be treated as an unlike product and therefore liable to countervailing taxes and other discriminatory practices. WTO members would be expected to domesticate the Environmental Agreement, and in keeping with emerging trends, permit any individual to bring an action to remedy breach without the requirement of *locus standi*.

Standardization and observance of basic common environmental practices by WTO members will advance the green helmet concept. Contracting parties will have no reason to distinguish products by PPMs since PPMs will be standard. Even if different, they will have equivalent environmental costs and related implications. In instances where a member fails to observe basic PPMs thus gaining comparative advantage, other members will have a right to treat the former's product differently.

As an interim measure, before conclusion of the proposed WTO Environmental Agreement, WTO's dispute resolution panel should treat products that have been produced using environmentally injurious processes as different from products processed and produced using eco-friendly processes. Although such differentiation flies in the face of the *Tuna-Dolphin* decision,[5] so long as the discriminating country's primary motive is not to afford competitive advantage to like domestic products but to conserve the environment, differential treatment should be allowed. Such an approach would call for creative interpretation of GATT Article XX (b) and (g) provisions. In addition to the *E. C. Asbestos Case*[6] parameters, PPMs should be made a base of product differentiation.

Implementation of PPMs by WTO as a basis of product differentiation would aid in meeting objectives of most MEAs and prevent disputes between WTO rules and MEAs and lead to sustainable trade and development. Implementation of PPMs by way of the

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5 United States-Restrictions on Import of Tuna, Aug., 16, 1991, 330 I.L.M. 1594.

6 *European Communitys-Measures Affecting Asbestos and Asbestos Containing Products*, *supra* note 3.

proposed WTO Environmental Agreement should take after NAFTA.[7] The proposed WTO Environmental Agreement would recognize MEAs that are considered essential for the protection of the environment and differentiate products on the basis of their content. These would include CITES,[8] the Montreal Protocol[9] and the Cartgena Protocol on Biosafety to the Convention on Biological Diversity.[10] For example if a product is processed so as to include a recognizable portion or a derivative of a specimen that is not tradeable under CITES, it (product) should be treated differently from products without such recognizable portions or derivatives. This is because CITES, at Article 11(4) bans trade in Appendix I, II and III specimen parts or derivatives thereof. Any product that offends CITES in any way should be held to be different from CITES compliant products. In addition products produced or processed using CITES prohibited specimens or their derivatives, although containing the prohibited specimens or derivatives, should be treated differently from like products. This is because the underlying objective of CITES will be defeated if parties were allowed to use Appendix I, II and III specimens or their derivatives and then have their products treated like CITES compliant products. The specimen sought to be protected would face imminent danger of extinction.

Under the Montreal Protocol, the question would be whether products processed by use of CFCs but not containing CFCs are different from like products not processed by CFCs. Due to its comprehensive global membership, the Montreal Protocol, just like CITES, has

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7 North American Free Trade Agreement, December 8, 1993, 32 I.L.M. (1993)) (entered into force on 1st January 1994).

8 United Nations Convention on International Trade in Endangered Species of Fauna and Flora, March 3, 1973, 12 I.L.M. 1085(entered into force July 1, 1975).

9 Montreal Protocol on Substances that Deplete the Ozone Layer , Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1987).

10 Cartagena Protocol on Biosafety, Jan. 29, 2000, Australian Treaty Series 1993 No. 32 (entered into force Sept. 11, 2003).

attained near *jus cogens* status. It is the international community's desire to eliminate the use of CFCs. It is urged that the Ozone Layer, which is targeted by the Protocol for conservation, is an exhaustible natural resource whose depletion is faster than its regeneration. Being of that persuasion, products processed by or containing CFCs should be distinguished from CFCs free products. This is because Montreal's underlying object is the elimination of CFCs. Use of CFC containing products undermines Montreal Protocol.

The approach of Cartagena Protocol in the context of PPMs is similar to the Montreal Protocol. If biotechnology is used to process and produce a genetically modified Organism (GMO) then it is important to distinguish the GMO and its derivatives from the natural organism and its derivative. The first test before differentiation is whether or not the organism is a GMO and or the product is a derivative of a GMO. Once it is ascertained that a product is a GMO the next issue for consideration is the extent of scientific knowledge on its safety. Lack of certainty due to insufficient scientific information and knowledge regarding the extent of potential adverse effects of biotechnology on conservation and sustainable use of biological diversity should not prevent a country of import from differentiating otherwise like products. For example Bt cotton should be differentiated from its natural counterpart if there is no scientific certainty as to the safety of growth of Bt cotton. The country of import should be allowed to restrict import of those products (GMOs) whose impact on biological

diversity, animal, human or plant health is uncertain. It should apply the precautionary principle. This is because Cartagena Protocol's core objective is to attain biosafety with or without full scientific knowledge.

4.4: WTO AND MEAS

Without putting MEAs in the context of PPMs, trade in products prohibited by multilateral treaties should not be permitted. The proposed WTO Environmental Agreement's recognition of MEAs would promote multilateralism as opposed to unilateralism. Multilateral effort through ETMs in MEAs is the best way to prevent transboundary pollution, disputes and degradation of global commons. It would be self-defeating for WTO's legal framework not to recognize MEAs, as their very conclusion is an act of recognition of a global problem that could threaten the fabric of global trade. In addition, MEAs avert unilateralism that could be used to clog up trade in the spirit of environmental protection. Since multilateralism is founded on consensus, the green helmet concept will have been taken a notch higher if MEAs that meet certain benchmarks are incorporated in WTO.

After effecting the proposed amendments, in case of a conflict between WTO and an MEA, that is not listed nor recognized by the WTO, principles of The Vienna Convention on the Law of Treaties[11] and customary international law should be applied. Such an approach would be appropriate since WTO Agreements are treaties, like any other treaty.

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11 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

In case of a conflict between any WTO agreement and an MEA that is not recognized under the proposed WTO Environmental Agreement, where disputants are parties to both treaties, then Article 30(1) of the Vienna Convention on the Law of Treaties provides that the treaty early in time will apply, in so far as its provisions are not incompatible with the later treaty. If the MEA was concluded after the WTO Agreement in issue, then provisions of the WTO Agreement should prevail to the extent of the inconsistency and vice versa. However in instances where WTO member A is also a party to an MEA while state B is only a party to WTO and not the MEA, Article 30(2) of the Vienna Convention provides that the two states' mutual rights and obligations be determined by the treaty to which both are parties.

In instances of dispute, where WTO and the MEA do not fall into any of the foregoing categories as laid out by the Vienna Convention on the Law of Treaties, relevant rules of customary international law applicable in relations between the parties should be taken into account.[12] For instance where the matter in issue is of a specialized nature, then the treaty that is more specific on the issue should govern it as opposed to a general treaty. It is common knowledge that most MEAs are concluded in response to specific or definite environmental concerns. On the other hand, WTO Agreements are general in nature with the primary objective of liberalizing trade. Consequently, in case of an environmental issue arising, the MEA would be a better specialized tool to govern the situation than WTO, which is general in nature. The use of the Vienna Convention on the Law of

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[12] Id. at Article 31 (3) (C).

Treaties is a universally accepted and predictable way of handling potential environmental disputes and advancing the green helmet concept. It would indeed meet WTO's objectives of trading in a predictable and sustainable environment as opposed to subordinating MEAs to WTO irrespective of universally accepted and recognized treaty interpretation rules and principles. Such predictability will go a long way in promoting trade and preventing disputes as parties will know their rights and obligation beforehand.

4.5: GREENING WTO'S DISPUTE RESOLUTION PROCEDURES

Most of the highlighted disputes arose out of structural inadequacies of the WTO's dispute resolution mechanism. The inadequacies persisted because of WTO's ambiguity in dealing with environmental concerns. These inadequacies could be addressed by re-engineering the dispute resolution mechanism at the consultation stage. WTO's Consultations, as structured, does not facilitate environmental conservation. Article XXII of GATT does not set out basic qualifications of persons that constitute consulting teams. It does not set out the substance of dispute by way of terms of reference to guide members in assembling a knowledgeable team to oversee consultation. Consulting WTO members are given latitude to constitute their own teams. It is presumed that members will assemble knowledgeable teams to lead consultations. This may not necessarily be the case.

At consultation, the subject matter of dispute should be clearly determined to guide

parties in determining the kind of expertise to be included in their consulting teams. Parties should be encouraged to have a multi-disciplinary team that would include trade and other technical experts on matters at hand. Where the dispute relates to environmental conservation, consulting teams should be composed of trade and environment experts. Such an arrangement would result in exhaustive, expeditious and informed consultations that may prevent protracted disputes. If, for instance, the dispute involves trade in endangered species of tuna, then it will be necessary to involve tuna conservation experts in consultations. To this end, GATT Article XXII and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[13] should be amended to accommodate mandatory expert input.

Good offices, conciliation and mediation as offered by the WTO Director General's office and provided for under Article 5 (1) of the DSU do not provide the framework within which environmental issues can be adequately articulated. The provision is silent on involvement of environmental conservation experts at this stage as well. As much as this stage of negotiations is purely voluntary, it can be aided by including relevant experts. The DSU should be amended to require, as much as possible, inclusion of environmental conservation experts in conciliation and mediation for exhaustive, expeditious and informed amicable resolution of disputes.

If good offices, conciliation and mediation are not successful then a DSB panel is

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[13] John H. Jackson, Documents Supplement to Legal Problems of International Economic Relations, 36 (3d ed. 1995)

established. While constituting the Panel, the DSU requires Panel members to be selected with a view to ensuring their independence, a sufficiently diverse background and a wide spectrum of experience.[14]The experience contemplated under Article 8(1)[15] is principally in the area of international trade law and policy. Panelists are to be chosen by the Director General in consultation with the Chairman of the DSB and, in the absence of an agreement on the contrary, in accordance with any relevant or special or additional rules or procedures of the covered agreement(s) that are in issue.

Under WTO, none of the agreements specifically cover environmental conservation. Consequently chances of the Director-General appointing an environmental conservation expert on the panel is very minimal. To address this lacuna, we need not primarily train our attention on covered agreements. The Director General, while appointing panelists, should be guided by the terms of reference drawn pursuant to Article 7 of the DSU. If environmental conservation concerns are present, they would come to the fore in the terms of reference on the basis of which conservation experts would be appointed on the three member panel. However, should WTO negotiate the proposed WTO Environmental Agreement, the Director General will be expected to appoint panelists knowledgeable in WTO Environmental Agreement. Such appointment(s) will infuse environmental conservation expertise in the dispute resolution procedure.

The Panel's hearing procedure is another area that requires drastic green reforms. Panel

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14 Id. at Article 8(2).
15 Id.

proceedings are held in camera. Attendance is strictly by invitation. The cloak of secrecy and mystery surrounding Panel proceedings need to be unveiled and the procedure demystified. There is no stated harm in holding open panel sessions. If panel proceedings were held in the open, interested parties, especially conservation groups would attend and lobby for changes that would enrich and enhance environmental conservation not only in the proceedings but other sectors of conservation. Briefs submitted by parties to the dispute should be open to scrutiny by the public with a view to shedding light on environmental positions taken by parties. In addition the DSU should be amended to allow WTO members, without exception, to attend and participate in all hearings and to make written and oral submissions to the panel. Currently the DSU permits third parties to attend a session of the first substantive meeting of the panel with the power to exclude them before the session ends. Third parties cannot concisely follow up on parties' presentations as they sit in for only one session with the possibility of exclusion before the session ends. They cannot react to parties' submissions and rebuttals. Environmental conservation ideas cannot be sufficiently and broadly articulated by exclusionary rules. Exclusionary rules should be done away with to permit third parties to sit in throughout the proceedings.

The Panel should be mandated, by an amendment to the DSU, to request for written reports from Scientific Review Boards, as and when need arises, on any issue concerning human, animal or plant health or other specific matters raised by a party. The right to get

information from experts or Scientific Review Boards would give the Panel an opportunity to broaden and infuse into the process technical environmental conservation ideas that would ordinarily be unavailable. Alongside the Scientific Review Board, the DSU should also make provision for *amicus curiae,* in environment versus trade cases, whose primary responsibility would be to advise the panel on environmental questions. The *amicus curiae* could be an independent expert picked from a prequalified list of experts or from the private sector.

Like constitution of the Panel, the Appellate Body's (AB) composition is heavily tilted in favor of trade expertise. It is proposed that instead of having seven members, the DSU should be amended to allow the AB to have a roster of at least 30 members, just like NAFTA. These individuals should be persons of diverse and proven experience in international law, trade, international environmental law and policy and WTO covered agreements (which shall include the proposed WTO Environmental Agreement). At any given time, while constituting the AB to hear an appeal, the Panel's terms of reference should offer guidance. If there are environmental questions, at least one of the members must have competence in the proposed WTO Environmental Agreement and international environmental law and policy. The DSB should be given a free hand, by amendments to the DSU, to make appointments outside the AB membership depending on the technical needs of the moment. This will ensure better resolution and understanding of technical environmental conservation issues in trade.

The AB's report is final and not subject to appeal. Institutional reforms at this level are necessary. The DSU should provide for a second appeal from the AB's decision to the International Court of Justice (ICJ) on environmental matters. The ICJ's (Chamber of Environmental Affairs) would take in the appeal (with environmental issues) and render an advisory opinion that would be final and not subject to any further appeal. The ICJ should be incorporated in the GATT dispute settlement process as a forum of final adjudication after the AB. Due to its specialized and near universal membership, it is more likely to render an objective opinion than the heavily trade leaning AB. The ICJ's advisory opinion would then be adopted by the DSB and implemented.

If and when these reforms are implemented, the international trade scene will have few trade disputes predicated on environmental concerns. Environmental standards will be relatively clear and devoid of confusion. The WTO should negotiate an Environmental Agreement setting forth irreducible minimum environmental standards to reign in disputes. In the end humanity will benefit because global trade will be secure sustainable and predictable while maintaining our planet's robust health. The green helmet concept is a bulwark to a predictable global trading system.

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