# Trade and Environment in APEC: Assessing the Potential of APEC's Dispute Mediation Service for Resolving Trade and Environment Disputes in the Asia-Pacific Rim

by

Phuchphop Mongkolnavin

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Department of Law
School of Oriental and African Studies
University of London

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ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

# Abstract

In the1990s, the relationship between trade liberalisation and environmental protection was widely discussed in several fora around the world. At the 1992 Earth Summit, it was acknowledged that, in order to achieve the long-term goal of sustainable development, trade liberalisation and environmental protection should be made mutually supportive. However, integrating trade and environment paradigms is an arduous task. Conflicts have already manifested themselves, leading to trade and environment disputes. These disputes often arise because one party uses trade measures, sometimes with a protectionist intent, to pursue its environmental goals. Unless settled in a balanced fashion, these disputes will prolong the trade and environment tension. As a result, both economic and ecological interests would be impaired.

This thesis has set out to assess the potential of the dispute resolution mechanism of the Asia-Pacific Economic Cooperation (APEC) - the Dispute Mediation Service (DMS) - for resolving trade and environment disputes between APEC members in the balanced fashion. It was found that while the quasi-judicial dispute resolution mechanism of the World Trade Organization has often been used for resolving trade and environment disputes, it could be argued that APEC could potentially succeed in resolving such disputes while maintaining the trade-environment equilibrium by using the mediation technique. Two main factors have made this possible: APEC's distinctive features and the unique characteristics of trade and environment disputes themselves. It was also found in this thesis that the APEC's DMS would be particularly useful when used as a dispute avoidance mechanism, preventing a conflict from escalating into a full blown dispute.

Despite its promising future, the present form of the APEC's DMS could be further improved with a view to enhancing its potential for resolving trade and environment disputes in the balanced fashion if some recommendations, developed along the line of the North American Free Trade Agreement model, could be implemented.

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# Contents

# List of Abbreviations

| | |
|---|---|
| ABAC | APEC Business Advisory Council |
| ADB | Asian Development Bank |
| APEC | Asia-Pacific Economic Cooperation |
| ASEAN | Association of South-East Asian Nations |
| AFTA | ASEAN Free Trade Agreement |
| BAC | Budget and Administrative Committee |
| CAP | Common Agricultural Policy |
| CEC | Commission for Environmental Cooperation |
| CEPT | Common Effective Preferential Tariff |
| CER | Closer Economic Relations Agreement between Australia and New Zealand |
| CFCs | Chlorofluorocarbons |
| CFI | Court of First Instance |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| CTE | Commission on Trade and Environment |
| CTI | Committee on Trade and Investment |
| DMEG | Dispute Mediation Experts Group |
| DMS | Dispute Mediation Service |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) |
| EAEC | East Asian Economic Caucus |
| EC | European Community |
| ECJ | European Court of Justice |
| ECOTECH | Economic and Technical Co-operation |
| ECR | European Court Reports |
| ECSC | European Coal and Steel Community |
| EEC | European Economic Community |
| EPG | Eminent Persons Group |
| ERTMs | Environment-Related Trade Measures |

| | |
|---|---|
| ESCAP | Economic and Social Commission for Asia and the Pacific |
| EU | European Union |
| EVSL | Early Voluntary Sectoral Liberalization |
| FAO | Food and Agriculture Organization |
| FEEEP | Food, Energy, Environment, Economic Growth and Population |
| FTA | Free Trade Agreement |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross Domestic Product |
| GEO | Global Environmental Organization |
| GETS | Global Environment & Trade Study |
| GMOs | Genetically Modified Organisms |
| ICSID | International Convention on the Settlement of Investment Disputes |
| IISD | Institute for International Sustainable Development |
| ILM | International Legal Materials |
| IMF | International Monetary Fund |
| ISO | International Standards Organization |
| ITO | International Trade Organization |
| MAPA | Manila Action Plan for APEC |
| MEAs | Multilateral Environmental Agreements |
| MEQR | Measure Having Equivalent Effect to the Quantitative Restriction |
| MFN | Most-Favoured Nation |
| MMPA | Marine Mammal Protection Act |
| NAFTA | North American Free Trade Agreement |
| NAAEC | North American Agreement on Environmental Cooperation |
| N.d. | No Date |
| NGO | Non-Governmental Organisation |
| NICs | Newly Industrialised Countries |
| N.p. | No Publisher |
| NTB | Non-Tariff Barrier |
| OECD | Organization for Economic Cooperation and Development |
| OJ | Official Journal of the European Communities |

| | |
|---|---|
| PBF | Pacific Business Forum |
| PECC | Pacific Economic Co-operation Council |
| PPMs | Processes and Production Methods |
| PPP | Polluter-Pays-Principle |
| RECIEL | Review of European Community International Environmental Law |
| SEA | Single European Act |
| SELA | Latin American Economic System |
| SME | Small and Medium Enterprises |
| SOM | Senior Officials' Meeting |
| SPS | Sanitary and Phytosanitary |
| TBT | Technical Barrier to Trade |
| TED | Turtle Excluder Device |
| TEU | Treaty on European Union |
| TNC | The Nature Conservancy |
| TPRB | Trade Policy Review Body |
| TREMs | Trade-Related Environmental Measures |
| TRIPs | Trade-Related Intellectual Property Rights |
| UN | United Nations |
| UNCED | United Nations Conference on Environment and Development |
| UNCHE | United Nations Conference on the Human Environment |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCSD | United Nations Commission on Sustainable Development |
| UNCTAD | United Nations Conference on Trade and Development |
| UNEP | United Nations Environment Programme |
| WCED | World Commission on Environment and Development |
| WTO | World Trade Organization |
| WWF | World Wide Fund for Nature International |

# List of Treaties and Legal Instruments

**1946** International Trade Organization Charter, 1 UN ECOSOC Res. 13, UN Doc. E/22 (1946).

**1947** General Agreement on Tariffs and Trade, Geneva, 30 October 1947, 55 *UNTS* 194.

**1951** Treaty Establishing the European Coal and Steel Community, Paris, 18 April 1951, in force 25 July 1952, 261 *UNTS* 140; *UKTS* 16 (1979), Cmnd. 7461; reprinted in Robert M. MacLean, *European Union Law*, Cracknell's Statutes, (Kent: Old Bailey Press Ltd., 1995), 1-20.

**1957** Treaty Establishing the European Economic Community, Rome, 25 March 1957, in force 1 January 1958, 298 *UNTS* 11; *UKTS* 15 (1979), Cmnd. 7480.

**1958** United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, 330 *UNTS* 3; *UKTS* 26 (1976), Cmnd. 3655.

**1965** International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), Washington, 18 March 1965, in force 14 October 1966, 575 *UNTS* 159; *UKTS* 25 (1967), Cmnd. 3255.

**1967** The Association of Southeast Asian Nations Declaration (The Bangkok Declaration), 8 August 1987, reprinted in ASEAN Secretariat, *ASEAN Document Series1967-1988*, 3rd edition, (Jakarta: ASEAN Secretariat, 1988), 27-28.

**1969** Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, 1155 *UNTS* 331; *UKTS* 58 (1980), Cmnd. 7964; reprinted in 8 *ILM* (1969) 679.

**1972** OECD Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD Doc. C(72) 128, 26 May 1972; reprinted in 11 *ILM* (1972) 1172.

**1973** Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, in force 1 July 1975, reprinted in 12 *ILM* (1973) 1055.

**1976** ASEAN Concord, reprinted in ASEAN Secretariat, *ASEAN Document Series 1967-1988*, 3rd edition, (Jakarta: ASEAN Secretariat, 1988), 36-38.

**1976** Treaty of Amity and Co-operation in Southeast Asia, reprinted in ASEAN Secretariat, *ASEAN Document Series 1967-1988*, 3rd edition, (Jakarta: ASEAN Secretariat, 1988), 39-42.

**1982** UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc. A/CONF. 62/122; reprinted in 21 *ILM* (1982) 1261.

**1985** Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, reprinted in 26 *ILM* (1987) 1529.

**1986** Single European Act, in force 1 July 1987, *UKTS* 31 (1988), Cmnd. 372; reprinted in 25 *ILM* (1986) 506.

**1987** Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, reprinted in 26 *ILM* (1987) 1550.

**1987** Canada-United States Free Trade Agreement, 22 December 1987, in force 1 January 1989, reprinted in 27 *ILM* (1987) 281.

**1989** Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, reprinted in 28 *ILM* (1989) 657.

**1991** Seoul APEC Declaration, reprinted in APEC Secretariat, *Selected APEC Document 1989-1994*, (Singapore: APEC Secretariat, 1995), 61-64.

**1992** The Rio Declaration on Environment and Development, UN Doc. A/CONF. 151/5/Rev. 1, 13 June 1992; reprinted in 31 *ILM* (1992) 874.

**1992** United Nations Convention on Biological Diversity, 5 June 1992, in force 29 December 1993, 31 *ILM* (1992) 818.

**1992** United Nations Framework Convention on Climate Change, 9 May 1992, in force 21 March 1994, 31 *ILM* (1992) 849.

**1992** Agenda 21, UN Doc. A/CONF. 151/26, Vol. I,II,III & IV; reprinted in N.A. Robinson, *Agenda 21: Earth's Action Plan*, (London: Oceana Publication, 1993).

**1992** The Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, 31 *ILM* (1992) 881.

**1992** Treaty on the European Union (the Maastricht Treaty), 7 February 1992, in force 1 November 1993, *UKTS* 12 (1994), Cm. 2485; reprinted in 31 *ILM* (1992) 247.

**1992** North American Free Trade Agreement (NAFTA), 8 December 1992, 32 *ILM* (1992) 289.

**1993** North American Agreement on Environmental Cooperation (NAAEC), 8 September 1993, 32 *ILM* (1993) 1480.

**1994** APEC Ministers Responsible for the Environment, Framework of Principles for Integrating Economy and Environment in APEC, Vancouver, Canada, 25 March 1994.

**1994** Bogor Declaration of Common Resolve, 15 November 1994, reprinted in APEC Secretariat, *Selected APEC Documents 1989-1994*, (Singapore: APEC Secretariat, 1995), 5-8.

**1994** Marrakesh Agreement Establishing the World Trade Organization, reprinted in GATT Secretariat, *Final Act: Embodying Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: GATT Secretariat, 1994), 5-18. (Hereinafter *Results of the Uruguay Round.*)

**1994** General Agreement on Tariffs and Trade (GATT 1994), reprinted in *Results of the Uruguay Round*, 19-324.

**1994** Agreement on the Application of Sanitary and Phytosanitary Measures, reprinted in *Results of the Uruguay Round*, 69-84.

**1994** Agreement on Technical Barriers to Trade, reprinted in *Results of the Uruguay Round*, 138-162.

**1994** Agreement on Subsidies and Countervailing Measures, reprinted in *Results of the Uruguay Round*, 264-314.

**1994** General Agreement on Trade in Services, reprinted in *Results of the Uruguay Round*, 325-364.

**1994** Agreement on Trade-Related Intellectual Property Rights, reprinted in *Results of the Uruguay Round*, 365-403.

**1994** Understanding on Rules and Procedures Governing the Settlement of Disputes, reprinted in *Results of the Uruguay Round*, 404-433.

**1994** Draft Decision II, Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal , 2nd meeting, UN Doc. UNEP/CHW.2/CRP.35, 25 March 1994.

**1997** Treaty of Amsterdam, 2 October 1997, reprinted in European Communities, *European Union: Treaty of Amsterdam*, (Luxembourg: Office for Official Publications of the European Communities, 1997).

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The Australian Subsidy on Ammonium Sulphate, Working Party report adopted on 3 April 1950, BISD II/188.

Treatment by Germany of Imports of Sardines, adopted on 31 October 1952, BISD 1S/53.

Italy - Discrimination Against Imported Agricultural Machinery, adopted on 23 October, 1958, BISD 7S/60.

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

United States - Imports of Certain Automotive Spring Assembles, adopted on 26 May 1983, BISD 30S/107.

Canada - Administration of the Foreign Investment Review Act, adopted on 7 February 1984, BISD 30S/140.

United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136.

Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, adopted on 10 November 1987, BISD 34S/83.

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

EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins, adopted on 25 January 1990, BISD 37S/86.

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

United States - Restrictions on Imports of Tuna, unadopted, circulated on 3 September 1991, BISD 39S/155; reprinted in 30 *ILM* (1991) 1594.

United States - Measures Affecting Alcoholic and Malt Beverages, 19 June 1992, GATT BISD 39S/208.

United States - Restrictions on Imports of Tuna, unadopted, circulated on 16 June 1994, WT/DS29/R; reprinted in 33 *ILM* (1994) 839.

United States - Taxes on Automobiles, unadopted, circulated on 11 October 1994, WT/DS31/R.

United States - Standards for Reformulated and Conventional Gasoline, adopted on 20 May 1996, WT/DS2/9,WT/DS/AB/R.

Japan - Taxes on Alcoholic Beverages, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

United States - Measure Affecting Imports of Woven Wool Shirts and Blouses form India, WT/DS33/AB/R, adopted on 23 May 1997.

European Communities - Measures Concerning Meat and Meat Products (Hormones), 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R.

United States - Import Prohibitions of Certain Shrimp and Shrimp Products, adopted on 8 November 1998, WT/DS58/R, WT/DS58/AB/R.

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# Chapter 1

# Introduction

In the 20th century, trade liberalisation and environmental protection were two of the key issues discussed at several international fora. The recognition of the impact of trade liberalisation on the national economy and on the world economic welfare had led many governments towards the creation of a number of bilateral, regional and global trade agreements. The most significant agreement governing the process of trade liberalisation is the General Agreement on Tariffs and Trade (GATT), created in 1947. The main aim of GATT was to promote of world-wide trade liberalisation by reducing, and eventually eliminating, trade barriers in the form of tariffs.

Since the United Nations Conference on the Human Environment, held in Stockholm in 1972, an awareness of environmental protection has been heightened. This event had triggered off the formulation of a string of national and international environmental activities, resulting in the drafting of many domestic and multilateral environmental agreements in order to improve environmental management at all levels.

Although trade liberalisation and environmental protection seem to operate in isolation from one another, the interface between these two regimes has gradually been acknowledged. In the 1990s, the relationship between trade liberalisation and environmental protection was discussed around the world. At the United Nations Conference on Environment and Development held in Rio de Janeiro - the 1992 Earth Summit - it was acknowledged that, in order to achieve the long-term goal of sustainable development, trade liberalisation and environmental protection should be made mutually supportive. But this is a difficult task. Differences between the trade and environment paradigms, particularly the use of trade measures to encourage compliance with environmental policies, have already caused tension between the trade and environmental communities. More often than not, such a tension has escalated into a trade and environment dispute. This kind of dispute must be resolved in the balanced fashion so that both trade liberalisation and environmental protection could continue without impairing one another.

## 1.1. The Scope and Objective of the Thesis

In the light of the growing concerns about the increase in trade and environment disputes around the world and the fear that trade-environment interface will continue to cause conflicts between trade and environmental communities, this thesis sets out on a quest to explore the potential of the Asia-Pacific Economic Cooperation (APEC) to resolve trade and environment disputes in the balanced fashion *via* its dispute resolution mechanism - the Dispute Mediation Service (DMS).

This study will attempt to establish that the APEC's DMS could indeed be used as an alternative to the dispute settlement mechanism of the World Trade Organization (WTO) for resolving trade and environment disputes (in the realm of trade in goods) between APEC members in the balanced manner, such that the process of trade liberalisation and environmental protection are not made subordinate, or act as an impediment, to each other.

## 1.2. The Structure of the Thesis

This thesis is divided into seven chapters. In Chapter 1, a general overview of the thesis is provided, which includes discussions on the scope, objective, structure and methodology of this study. Chapter 2 will give a brief overview of the trade and environment disputes which will provide a necessary foundation for discussions in later chapters. Issues which will be discussed in this chapter include: some positive and negative aspects of the trade and environment nexus; the use of trade measures for environmental purposes and their implications; and how might the trade and environment disputes be resolved.

Chapter 3 will provide an analysis on trade and environment dispute resolution from the perspective of the WTO. This chapter is primarily intended to show how trade and environment disputes have been resolved by the world's most important trade institution. In doing so, it will highlight the drawbacks of the WTO's predecessor, i.e. the GATT of 1947, in resolving trade and environment disputes. Then, some recent decisions given by the WTO's dispute settlement organs will be reviewed in order to

show whether or not the drawbacks of the GATT's trade and environment dispute settlement process have been ameliorated by the dispute settlement system of the WTO.

Chapter 4 will be devoted to discussions on APEC. The objective of this chapter is to provide a general introduction to APEC, its institutional arrangement and activities in the areas of trade liberalisation and environmental protection. APEC's dispute resolution mechanism - the DMS - will be examined in Chapter 5. This chapter will give an explanation why mediation, rather than other methods of dispute resolution, has been adopted by APEC. It will also provide a detailed analysis of the mediation technique of dispute resolution. It will then proceed to examine whether trade and environment disputes among APEC members could be resolved in the balanced fashion by the APEC's DMS.

Chapter 6 will explore if the North American Free Trade Agreement (NAFTA) could provide a model for APEC with regard to trade and environment dispute resolution. NAFTA has been chosen because it has been regarded as one of the most environmentally friendly regional trade agreements in the modern era. It also contains some interesting elements which could help promote the balance in the trade and environment dispute resolution process.

The concluding chapter of this thesis, Chapter 7, will give a synopsis of the findings of this study as well as recommendations of some necessary changes which will further enhance the potential of the DMS for resolving trade and environment disputes between APEC members in the balanced manner. Areas of further research will also be identified at the end of this chapter.

## 1.3. The Methodology

The methodology used in this thesis is largely based on a review of relevant literature in the field of trade and environment, which includes a selection of legal texts, cases, international treaties, international documents, articles, comments of various authors and newspapers. Some interviews with government delegates to international meetings, symposiums and conferences, particularly those related to APEC, were also conducted. However, it must be mentioned that within the purview of this thesis it is not possible,

time wise and financially, to study each member economy of APEC individually. Thus, this thesis will only reflect the viewpoint from the regional perspective. In addition, because the subjects of trade liberalisation, environmental protection and APEC develop continuously, the majority of resources utilised in this thesis are restricted up to the end of 1998. However, some 1999 materials are consulted where directly relevant.

On the whole, this thesis endeavours to contribute towards the ongoing debate on the subject of trade and environment which continues to be one of the most important issues for international discussion for years to come. It will complement and contribute to amplifying the literature in the field of trade and environment, which is heavily dominated by studies from the perspectives of GATT/WTO, NAFTA and the European Union, by providing discussions on the regional approach in resolving trade and environment disputes specifically from the Asia-Pacific's dimension.

# Chapter 2

## Trade and Environment Disputes: An Overview

In the 20th century, trade liberalisation and environmental protection were two of the most important issues discussed world-wide. They were products of the two internationally significant developments which have become prominent over the years: the trade liberalisation process under the General Agreement on Tariffs and Trade (GATT) of 1947 and the environmental movement initiated by the United Nations Conference on the Human Environment (UNCHE) held in 1972 in Stockholm. Although the relationship between trade and environment is by no means novel, it was not until the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro - the 1992 Earth Summit - that trade and environment linkages were seriously discussed. In particular, Principle 12 of the Rio Declaration on Environment and Development (the Rio Declaration)[1] has called for a corroboration between trade and environment regimes in seeking for the long-term goal of sustainable development.[2]

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[1] UN Doc. A/CONF. 151/5/Rev. 1, 13 June 1992; reprinted in 31 *ILM* (1992) 874. Principle 12 of the Rio Declaration states:

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

For a general overview of the Rio Declaration, see Ileana M. Porras, 'The Rio Declaration: A New Basis for International Cooperation', in Philippe Sands, ed., *Greening International Law*, (London: Earthscan, 1993), 20-33 (arguing that the Rio Declaration is likely to influence the future development of environmental and developmental law and practice in the future). The Rio Declaration is one of the five important legal instruments produced at the Rio Earth Summit. The other four instruments are: the United Nations Convention on Biological Diversity; the United Nations Framework Convention on Climate Change; the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests; and Agenda 21.

[2] The definition of "sustainable development" was given by the World Commission on Environment and Development (WCED) as "a development which meets the need of the present without compromising the ability of the future generation to meet their own needs". WCED, *Our Common Future*, (Oxford: Oxford University Press, 1987), at 43.

As a result, the study of trade and environment has been conducted by several institutions around the world, for example the Organization for Economic Cooperation and Development (OECD),[3] the United Nations Environment Programme (UNEP),[4] the United Nations Conference on Trade and Development (UNCTAD),[5] the United Nations Commission on Sustainable Development (UNCSD), and the Committee on Trade and Environment (CTE) of the World Trade Organization (WTO).[6] Not only have these international organisations seriously paid attention to the issue of trade and environment, a number of regional initiatives have also been commissioned to deal with this issue, especially under the auspices of the European Union (EU) and the North American Free Trade Agreement (NAFTA). Recently, with large contribution from academics and non-governmental organisations (NGOs) the literature in the field of trade and environment has dramatically been amplified.

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[3] The OECD was the first international organisation to examine trade and environment issues. With its establishment in 1991 of the Joint Session of Trade and Environment Experts, jointly sponsored by the Trade Committee and the Environment Policy Committee, the OECD aimed to "contribute to the achievement of sustainable development by addressing trade and environment issues with a view to promoting the compatibility and mutual reinforcement of trade and environmental policies in practice". Up to date, the OECD has regularly conducted a number of analytical works toward clarification of the main differences between trade and environmental policies. See OECD, *Report on Trade and Environment to the OECD Council at Ministerial Level*, OECD Working Papers, vol. III, no. 47, (Paris: OECD, 1995).

[4] UNEP has undertaken extensive studies on the trade and environment relationship. In particular, UNEP has focused its work, *inter alia*, on the use of trade restrictive measures to reinforce environmental protection regionally and globally.

[5] UNCTAD has already established an Ad Hoc Working Group on Trade, Environment and Development to conduct an examination of impacts of environmental measures on trade in developing countries. See for more details of UNCTAD's work in UNCTAD Secretariat, *UNCTAD Environment Report*, Note Prepared for the Third Session of the United Nations Commission on Sustainable Development, 11-28 April 1995, available on the internet at: http://www.unicc.org./unctad/en/ pressref/itdtae1.htm. In addition, UNCTAD and UNEP have jointly organised several meetings in relation to the linkages between trade, environment and development. For instance, a series of seminars on trade and environment was organised in various capitals of the Association of South-East Asian Nations (ASEAN) under the sponsorship of UNCTAD in 1995. See ASEAN Secretariat, *Trade and Environment: Issues and Opportunities*, ASEAN Workshop Report, (Jakarta: ASEAN Secretariat, 1995). Trade and environment seminars have been organised in Manila, Bangkok, Kuala Lumpur and Jakarta during 11-23 May 1995.

[6] The work of the CTE will be discussed in Chapter 3.

## 2.1. Trade and Environment Nexus

Due to the issues involved and the level of sensitivity around the subject, trade and environment linkages can prove to be extremely complex. The trade and environment nexus can be viewed from two perspectives: positive and negative.

### 2.1.1. The Positive Nexus

It is generally acknowledged that trade liberalisation can benefit environmental protection in two ways.[7] Firstly, trade liberalisation, according to an economic theory of comparative advantage, will result in an increase in specialisation in producing and manufacturing goods, both for domestic consumption and for export.[8] In developing such specialisation, manufacturers may be able to develop more efficient and environmentally friendly production methods. Normally, it may be thought that environmentally friendly technology, i.e. "clean technology", is more expensive than its counterpart, i.e. "dirty technology". But when the producers are more specialised, they can produce more goods, which in turn will reduce the cost of clean technology per product. Hence, while being able to maintain an economy of scale, the manufacturer may also protect the environment at the same time.

Secondly, trade liberalisation will bring about an expansion of trade, removal of subsidies and pricing policies which are discriminatory and distortionary, and better resource allocation, hence an increase in economic growth.[9] As one country can sell goods more easily in the freer trading environment, it will acquire more financial resources, which in turn can be used to invest in promoting environmental protection. This can be done in a variety of ways, such as promoting environmental education,

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[7] See OECD, *Report on Trade and Environment, op. cit.*, at 5. Also see John. H. Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?', 49(4) *Washington and Lee Law Review* (1992) 1219, at 1228; The House of Commons Environment Committee, *World Trade and the Environment*, Environment Committee Fourth Report, Session 1995-1996, vol. 1, (London: HMSO, 1996), xii-xiii.

[8] See for a general discussion of the theory of comparative advantage in John H. Jackson, 'The Policies and Realities of International Economic Regulation', in *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition, (Cambridge, Massachusetts: The MIT Press, 1997), 1-30, at 14-19.

[9] Duncan Brack, *Trade and Environment: An Update on the Issues*, Briefing Paper No. 35, February 1997, (London: The Royal Institute of International Affairs, 1997).

enhancing cleaner technology, improving capacity building, and enforcing domestic and international environmental law. Moreover, since poverty in itself has been viewed as a kind of environmental problem, the relief of poverty through the provision of financial resources generated by trade expansion can indeed demonstrate that free trade can also indirectly help the protection of the environment.[10]

Although theoretically sound, an ideology that trade liberalisation can help promote environmental protection is somehow doubtful in reality. Resources generated from trade expansion and economic growth may not always be spent on efforts to protect the environment, especially in the developing countries whose priorities may lie in something other than environmental protection *per se*. However, a study by Grossman and Krueger, for example, has shown that it is not always the case that the poorer countries are not interested in protecting their environment. Their study of pollution levels and national wealth illustrates that once the poorer countries have reached the middle-income level (about $5,000 GDP per capita), they tend to invest more on pollution controls, hence reducing the emission level of sulphur dioxide.[11] Although this study was criticised by Pearson as narrowly limited to specific pollutants produced in the manufacturing process,[12] Grossman and Krueger's study is a valuable, although inconclusive, illustration of a trend which shows that once the poor countries have overcome the problem of providing for the basic needs for their people, they might re-prioritise their needs and place environmental protection higher in their agenda.

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[10] See WCED, *Our Common Future, op. cit.*, at 28.

> Environment stress has often been seen as the result of the growing demand on scarce resources and the pollution generated by the rising living standards of the relatively affluent. But *poverty itself, pollutes the environment, creating environmental stress in a different way*. Those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge. (Emphasis added.)

[11] Gene M. Grossman and Alan B. Kruger, 'Environmental Impacts of a North American Free Trade Agreement', in Peter M. Garber, *The Mexico-US Free Trade Agreement*, (Cambridge, Massachusetts: The MIT Press, 1993).

[12] Charles S. Pearson, 'Trade and Environment', in Economic and Social Commission for Asia and the Pacific (ESCAP), *State of the Environment in Asia and the Pacific*, (Bangkok: ESCAP, 1995), at 34.

With regard to the benefits the environment generate for trade, it requires less explanation. Simply, most trade activities depend on the use of natural resources in one form or another. Industries such as logging, fishery and petroleum cannot continue their businesses without woods, fish and crude oil respectively. Thus, a careful management of environmental resources is necessary if economic activities and wealth generation are to be sustained.

### 2.1.2. The Negative Nexus

The prime argument in this respect is that trade expansion leads to over consumption of natural resources, thereby exacerbating environmental degradation. Given the present rate of economic growth and economic development, it has been noted that the ecosystem cannot possibly be sustained.[13] The problem is even more acute in Southeast Asian countries, who view trade expansion as an engine of economic growth.[14] Southeast Asia possesses great wealth in environmental resources, but with its astonishing rate of economic growth over the past few decades, the amount of tropical rain forests, for example, has been devastatingly decreased in order to provide wood for logging industries. Moreover, reducing the amount of forestry resources arguably will also lead towards extinction of wildlife, soil erosion, flooding and many other environmental disasters.[15]

Trade could also damage the environment by encouraging poor environmental practice. As countries are trying to compete against one another in order to gain market share, they might attempt to reduce the cost of production so that their goods could be more competitively priced. It has often been argued that a country with low environmental standards could produce cheaper goods as little or no environmental cost is taken into account, hence no cost internalisation of environmental externalities. If the

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[13] Robert Housman and Durwood Zaelke, 'Trade, Environment, and Sustainable Development: A Primer', 15(4) *Hastings International and Comparative Law Review* (1992) 535, at 536.

[14] Simon S.C. Tay, *International Trade and the Environment in Asia: Business and Environmental Cooperation Across Regions*, a monograph commissioned for the Asia Conference on Trade and Environment, June 1996, Singapore, (Singapore: Asia-Pacific Centre for Environmental Law, National University of Singapore, 1996), at 21.

[15] For example, the Indonesian fire incident which destroyed a devastating amount of trees and land in order to further an entrepreneurial fiscal greed. See Simon S.C. Tay, 'ASEAN: the Haze, Economics and the Environment', 2(2) *Bridges* (1998) 1.

environmental standards are set too stringently and would be expensive to implement, a company might consider relocating to another location where environmental regulation is more lax - a "pollution haven".[16] Another argument which flows from the pollution haven issue is that some countries might compete against one another to lower their environmental standards in order to attract more foreign direct investment, hence a "race-to-the-bottom".[17] The effect of such an action would be an opposite to what the 1992 Earth Summit has called for and ultimately make sustainable development impossible to achieve.

Another concern about the negative impact of trade liberalisation on the environment is that freer trade will lead to more long-distance transportation of goods, as transborder movement of goods becomes much easier between members of free trade arrangements. This will not only elevate the level of noise pollution from constantly moving lorries, ships and aeroplanes, it will also increase the level of toxic emissions, notably carbon monoxide, from their exhausts. Moreover, the probability of accidents with environmental impact, such as collisions of freighters or oil tankers, could be increased.[18]

However, it is not only trade liberalisation which could have a negative impact on the environment. Up until now, environmental regulators have resorted to the utilisation of trade measures to enforce environmental protection. Despite the fact that the use of trade measures may lead towards higher environmental standards, hence stop the race-to-the-bottom problem, these trade measures could equally hinder the process

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[16] However, it should be noted that there has also been an argument against the fact that the company would relocate to a country where environmental regulation is less stringent as the environmental factor is not the only consideration for relocating. Other economic factors such as wage costs, the proximity to natural resources and markets, and the investment policy climate could have more influence on the decision to relocate. SELA Permanent Secretariat, 'Trade, Environment and the Developing Countries', Paper presented at the XVIII Regular Meeting of the Latin American Council held in Caracas, Venezuela on 7-11 September 1992 (SP/CL/XVIII.O/Di No. 2), in UNCTAD and SELA, *Trade and Environment: The International Debate*, (Geneva: UNCTAD, 1993), 41-69, at51.

[17] In recent years, a debate on whether the race-to-the-bottom is a legitimate concern has generated increased interest. However, in view of Richard Ravesz, the race-to-the-bottom ideology has no basis in theory. In fact, he believes that diverse environmental standards will lead to an increase in social welfare. His justification is that the pressure put on governments to reduce environmental compliance costs will boost them to streamline their environmental regulations. Thus, it is unlikely that governments will pursue sub-optimal standards. Richard L. Ravesz, 'Rehabilitating Interstate Competition: Rethinking of the "Race-to-the-Bottom", 67 *New York University Law Review* (1992) 1210. It is also worth noting that another commonly used terminology of the "race-to-the-bottom" is the "race-toward-bottom".

[18] See Nisid Hajari, 'Dark Cloud of Death', *Time*, 6 October 1997, 40.

of trade liberalisation. There are several forms of trade measures which have now been used to promote environmental protection, some of which have received more scrutiny from the trade community than others. These measures will be discussed below.

The main fear for traders is that the trade measures would be used too liberally and without a *bona fide* environmental justification. Consequently, it is believed that this will lead to the emergence of "eco-imperialism" or "green protectionism". In other words, the trade measures would be used in this instance as a tool for economic protection of a domestic industry which, while being protected ostensibly for environmental reasons, does not achieve any environmental benefit.[19] The problem of green protectionism particularly raises concerns for developing countries whose environmental standards tend to be different in form and in their implementation from those in the developed countries.

Another fear for traders is the problem of "eco-dumping". The eco-dumping is caused by the fact that cheaper goods from the locations with low environmental cost are being sold in the markets of the countries whose environmental cost is relatively high, causing the market distortion in the importing countries. In contrast to the green protectionism problem, the eco-dumping controversy has caused more worries to the developed countries rather than the developing countries as their goods tend to be more expensive to make. For example, Mexico could produce much cheaper goods than the United States as the environmental practice of the former is less stringent than the latter. Due to the freer trade between these two countries, the Mexican goods could be sold more easily in the US market.[20] As a result, the United States fears that its market would be "dumped" by cheaper and lower environmental quality goods from Mexico.

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[19] See, for a discussion on green protectionism, Charles Arden-Clarke, *Green Protectionism: Differentiating Environmental Protection from Trade Protectionism*, a WWF International Discussion Paper, (Gland, Switzerland: WWF International, 1994).

[20] The United States and Mexico have entered into some bilateral and multilateral trade agreements which enable the goods of these two countries to be exchanged more freely, for example GATT and the North American Free Trade Agreement.

## 2.2. Trade-Related Environmental Measures

Trade related environmental measures, or as commonly referred to as "TREMs", can be defined as "measures whose justification is primarily the protection of the environment, but which take the form of trade instruments".[21] From this definition, it can also be argued that the suitable terminology for such measures should be "environment-related trade measures" (ERTMs) rather than TREMs as the measure is trade oriented, not environmentally oriented. However, without an official terminology, the use of TREMs is more common than ERTMs and thus will be followed in this study.

### 2.2.1. Unilateral vs. Multilateral Trade Measures

There are two manners upon which TREMs are used. Firstly, TREMs may be used unilaterally and, secondly, TREMs may be used in pursuance to multilateral environmental agreements (MEAs). The former can be regarded as an expression of one country's unilateral environmental policy, whereas the latter is the product of international co-operation.[22]

#### 2.2.1.1. Unilateral Trade Measures

One country may use TREMs against an import of another country as authorised by its domestic law. An example is clearly provided in one infamous case under the GATT regime - the Tuna/Dolphin I case.[23] In this case, the United States imposed a ban on tuna import from Mexico, as authorised by the Marine Mammal Protection Act (MMPA) of 1972, for the reason that the Mexican tuna were harvested by the purse-seine net fishing technique which resulted in the incidental killing of dolphins. It was found that the US measure in this instance was inconsistent with certain rules under GATT. This case has indeed provoked an important discussion about the relationship

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[21] Paul Demaret, 'TREMs, Multilateralism, Unilateralism and the GATT', in James Cameron, Paul Demaret and Damien Geradin, eds., *Trade & The Environment: The Search for Balance*, vol. I, (London: Cameron May Ltd., 1994), 52-68, at 52.

[22] *Ibid.*, at 59.

[23] United States - Restrictions on Imports of Tuna, unadopted, circulated on 3 September 1991, BISD 39S/155; reprinted in 30 *ILM* (1991) 1594.

between trade and environment among traders and environmentalists alike. From the environmental perspective, this case was thought to set a bad precedent as environmental considerations were made subordinate to trade rules contained in GATT. As a result, it can lead to an interpretation that GATT has decreased a state's sovereignty to set its own environmental standards. However, from the trade perspective, if states are allowed to set their environment standards freely, the process of trade liberalisation will be hindered as TREMs will be used as non-tariff barriers to trade (NTBs).

Not only that import and export bans or quotas can indeed act as NTBs, there are also other measures which are capable of hindering trade. These measures include environmental taxes, border tax adjustment schemes, labelling and packaging requirements, and environmental subsidies. Although these measures do not directly stop the free flow of trade like bans or quotas, they could still affect the competition in a particular market.

Firstly, the imposition of taxes for environmental purposes is a way of ensuring compliance with environmental standards such as emission standards. The aim of environmental taxation is to curb environmental degradation through the internalisation of environmental externality costs, a process through which the costs of environmental damages are integrated into the costs of the products themselves or the production processes. The idea of using taxes has been supported by the OECD, as they believe that environmental taxes have better potential to achieve cost-effective environmental protection than other measures.[24] They have argued that the advantages of using the tax system are: more transparency, predictability, and effectiveness in allocation of resources through a pricing mechanism.[25] According to the OECD, the polluters should pay for the cost of deterioration of the environment caused by their actions, be it consumers or producers of the products, hence the "polluter-pays-principle" (PPP).[26]

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[24] *OECD, Report on Trade and Environment, op. cit.*, at 28.

[25] OECD, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations on the Use of PPM-Based Trade Measures*, OECD Working Papers, vol. V, no. 70, (Paris: OECD, 1997), at 40.

[26] For a discussion on the PPP, see Patricia W. Birnie and Alan E. Boyle, *International Law & The Environment*, (Oxford: Clarendon Press, 1992), 109-111. Essentially, the PPP is an economic principle, rather than legal principle. The definition was given by its creator, the OECD, as "the polluter should bear the expenses of carrying out the measures decided by public authorities to ensure that the

Secondly, as different countries administer different levels of taxation on products, it is inevitable that the price of domestic goods and imports will differ. In a highly competitive world market, a country which imposes a higher tax on a product will suffer competitively against cheaper products from its competitors. In order to curb the competitive disadvantage of domestic products, the level of taxation can be adjusted at the border in order to ensure that the same taxes are imposed on products notwithstanding where they originate from. As the world trade rules, like GATT, do not distinguish the purpose on which the border tax adjustment scheme may be used, the level of environmental taxes may therefore be adjusted accordingly.[27]

Thirdly, labelling and packaging requirements are other forms of trade measure which are increasingly being used in order to promote environmental awareness and environmental protection respectively. "Eco-labels" give consumers information about the environmental impacts of the products, be it from their manufacturing processes or consumption. They encourage consumers to make an informed choice whether or not they would use environmentally friendly products.[28] Several countries have already used different eco-labelling schemes, notably the Dolphin Safe (USA), Environmental

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environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption"; Art. 4 OECD Guiding Principles Concerning the International Economic Aspects of Environmental Policies, OECD Document C(72)128, 26 May 1972; reprinted in 11 *ILM* (1972) 1172. See further in Candice Stevens, 'Interpreting the Polluter Pays Principle in the Trade and Environment Context', 27(3) *Cornell International Law Journal* (1994) 577.

[27] See United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136. In this case, the panel ruled that the border tax adjustment schemes

> *do not distinguish between taxes with different policy purposes.* Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of the environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment. (Emphasis added.)

For more comments on GATT and border tax adjustments, see Beatrice Chaytor and James Cameron, *Taxes for Environmental Purposes: The Scope for Border Tax Adjustment under the WTO Rules*, a WWF International Discussion Paper, (Gland, Switzerland: WWF, 1995).

[28] Due to the limited scope in this chapter, it is not possible to explore the issue of eco-labelling in depth. For detailed discussions, see, for example, Veena Jha and Simonetta Zarrilli, 'Eco-labelling Initiatives as Potential Barriers to Trade - A Viewpoint from Developing Countries' in UNCTAD and, SELA, *op. cit.*, 311-330; Halina Ward, 'Trade and Environment Issues in Voluntary Eco-labelling and Life Cycle Analysis', 6(2) *RECIEL* (1997) 139; Seung Wha Chang, 'GATTing a Green Trade Barrier: Eco-labelling and the WTO Agreement on Technical Barriers to Trade', 31(1) *Journal of World Trade* (1994) 137; Elliot B. Staffin, 'Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labelling and Its Role in the "Greening" of World Trade', 21(2) *Columbia Journal of Environmental Law* (1996) 205.

Choice (Canada), Blue Angel (Germany) and White Swan (Scandinavia). In general, the labels are granted upon an assessment of the product's life cycle - i.e. from the production to disposal of the product. The issuers of the label may be governments, private entities or the NGOs. Most of the eco-labelling schemes are run voluntarily (voluntary eco-labels), but there also exist those which operate on a compulsory basis (mandatory eco-labels). Whichever basis the labelling schemes operate, the difference in the criteria for granting labels could have some impacts on the market access. In recognition of this problem, the Geneva-based International Standards Organization (ISO) was established with a view to setting harmonised standards which operate on a global scale.[29] Environmental labels operate under the ISO 14000 series scheme. Manufacturers have to pursue an effective environmental management system, based on the life-cycle approach, in order to earn for themselves the ISO label. Although the ISO standard is applicable only on a voluntary basis, companies which do not obtain the ISO certificate may be at a disadvantage if the consumers prefer the ISO certified goods. At the international level, goods which are sold in the market with preference towards ISO certified goods will suffer competitively if they do not satisfy the ISO standard. Moreover, according to the Chief of the Trade and Environment Section of the International Trade Division of UNCTAD, developing countries only modestly participate in international standard setting, therefore, they are mostly vulnerable to denial of access to the markets dominated by the ISO certified goods.[30]

Packaging requirements are normally used in order to promote recycling of packaging, which ultimately can lead to waste reduction and pollution control. One good example of packaging requirements is the Danish law which introduces a mandatory system requiring all beer and soft drink containers to be returnable.[31] Another example is the German take back scheme which operates under the German Packaging Ordinance.[32] Under this law, manufacturers and distributors are required to

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[29] The ISO is a worldwide federation of national standards bodies form some 130 countries, one from each country. Established in 1947, the mission of this NGO is to promote the development of standardisation and related activities in the world. The ISO is funded by the Central Secretariat.

[30] René Vossenaar, 'Trade and Environment in the Framework of International Cooperation', in UNCTAD and SELA, *op. cit.*, 17-39, at 26.

[31] See Commission *v.* Denmark, C-302/86 [1988] ECR 4607. (The Danish Bottles case.)

[32] See, for a detailed account on Germany's eco-packaging schemes, Kilian Delbrück, 'Eco-Packaging, Green Dot and Blue Angel: The German Case', and Christine Wyatt, 'Environmental Policy Making, Eco-

take back used packaging for the purpose of recycling. Like eco-label programmes, the eco-packaging schemes may operate on either voluntary or compulsory basis.

Lastly, governments may help their domestic producers by way of subsidies. Subsidies which are classified as environmental subsidies are those granted *inter alia* for the purposes of cleaning up pollution, further environmental research and development, and encourage the use of environmentally sound technology in the production processes. Such subsidies can be termed "non-perverse" subsidies. Provided that these subsidies satisfy conditions laid down in GATT, they will be treated as "non-actionable" subsidies and deemed consistent with the GATT's obligations. However, there also exist subsidies which are harmful to the environment. These subsidies can be termed "perverse" subsidies. Examples of such subsidies are those granted to the fishery, forestry, energy and agriculture industries. It was reported that the EU has spent US$230 million a year on subsidising fishing off the coast of Africa.[33] As a result of cheaper fishing costs, some fishermen have overexploited their fishing quotas. Rather than helping the marine conservation, such subsidies have therefore contributed towards the rapid depletion of fish stocks. The subsidisation scheme under the EU Common Agricultural Policy (CAP) is also noteworthy. The CAP reduces the manufacturing costs for the EU farmers in order to enable the EU crops to compete against the cheap crops from developing countries. Not only does this subsidy encourage the overuse of fertilisers - which can lead towards some health problems once too much chemical substances get into the food chain - it has also been argued that the EU subsidy inhibits developing countries' ability to develop sustainable farming techniques. This is because the cheap EU products can depress the world prices and the developing countries' farmers have to lower their prices in order to regain the market share, hence lesser income and lesser financial support in order to adopt more environmentally friendly farming methods.[34]

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Labelling and Eco-Packaging in Germany: The Impact on Exports from Developing Countries', in UNCTAD and SELA, *op. cit.*, 331-343 and 345-388.

[33] Frances Williams, 'Cut in Fishing Subsidy Urged', *The Financial Times*, 4 June 1997, 3.

[34] The House of Commons Environment Committee, *op. cit.*, at xiii.

### 2.2.1.2. Multilateral Trade Measures

Several MEAs currently in operation are involved with the use of TREMs.[35] The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[36] the Montreal Protocol on Substances that Deplete the Ozone layer (the Montreal Protocol)[37] and the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (the Basel Convention)[38] are only three of the 180 MEAs existing today which use TREMs as enforcement mechanisms. These three MEAs will be briefly discussed below in order to show how TREMs are used by them.

(i) *CITES*

CITES aims at controlling international wildlife trade (endangered species and their parts).[39] This MEA was drawn up in 1973 and came into force on 1 July 1974. CITES operates *via* three Appendices: Appendix I regulates species that "are *threatened* with extinction and are or may be affected by trade";[40] Appendix II covers species that "although *not necessarily now threatened* with extinction, *may become so* unless trade in specimens of such species is subject to strict regulation in order to avoid utilisation incompatible with their survival";[41] and Appendix III deals with species identified by a CITES member as "*subject to regulation* within its jurisdiction for the purpose of preventing or restricting exploitation, and *as needing the co-operation* of other parties in the control of trade".

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[35] See generally, Robert Housman *et al.*, *The Use of Trade Measures in Select Multilateral Environmental Agreements*, (Geneva: UNEP, 1995).

[36] Reprinted in 12 *ILM* (1973) 1055.

[37] Reprinted in 26 *ILM* (1987) 1550.

[38] Reprinted in 28 *ILM* (1989) 657.

[39] See generally, Chris Wold, 'The Convention on International Trade in Endangered Species of Wild Fauna and Flora', in Robert Housman *et al.*, *op. cit.*, 163-196.

[40] Art. II(1) of CITES.

[41] Art. II(2) of CITES.

TREMs authorised by CITES primarily comprise import and export permits, quotas and, sometimes, sanctions.[42] However, the choice of measures to be used depends on the listing in the Appendices. CITES also contains a provision restricting trade with non-parties. The aim of such a provision is to reinforce the reciprocity of import and export restrictions already in place between parties. Indirectly, the limitation in trading parties also provides an incentive and puts pressure on the non-parties to join the convention so as not to be left out.

One of CITES' successes can be seen, for example, from combating illegal trade in ivory. During 1981-1989, the population of African elephants declined from 1.2 million to 600,000 due to illegal commercial trade in ivory. However, since an implementation of CITES, the population of African elephants has remained at 600,000.[43] In addition, the growing number of members in the convention through the years is another good indication of the success of CITES. A number of CITES members now stand at 146 - a larger number than the WTO's membership. Indeed, trust in the workability of CITES has arguably made it the most effective international convention on wildlife protection.

(ii) *The Montreal Protocol*

The Montreal Protocol was negotiated to act as an environmental agreement internationally designed to protect the depletion of the ozone layer in response to the recognition of possible threats to global climate and human health.[44] It came into force

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[42] For example, the Standing Committee of CITES recommended trade prohibition to be imposed by the United States on Thailand for reasons, *inter alia*, that Thailand failed to enact legislation allowing confiscation of non-Thai species listed on CITES' Appendices, resulting in Thailand becoming a capital for illegal trade in wildlife. Such a sanction cost Thailand 100 million bahts in terms of economic loss. In addition, Thailand has enacted several pieces of domestic legislation in order to support its CITES obligations. See Mingsan Khawsa-aad and Pisamai Phurisinsitti Iamsakulrattana, *Trade vs. Environmental Problems: From GATT to WTO*, (Bangkok: Natural Resources and Environment Division, Thailand Development Research Institute Foundation, 1997), at 7, (in Thai - *Garn Ka VS Punha Singwadlom: Jark GATT thung Ong-garn Ka Lok*).

[43] See Edward B. Barbier, 'The Role of Trade Interventions in the Sustainable Management of Key Resources: The Cases of African Elephant Ivory and Tropical Timber', in James Cameron, Paul Demaret and Damien Geradin, *op.cit.*, 436-458, at 437.

[44] It should be noted, however, that the Montreal Protocol is not the first MEA dealing with the ozone layer. In fact, it is a continuation of its mother agreement, the Convention on the Protection of the Ozone Layer, Vienna, under the initiative of UNEP; 22 March 1985, reprinted in 26 *ILM* (1987) 1529, in force

on 1 January 1989. Only 29 parties, including the EU, were signatories then and now the Montreal Protocol has 172 members.[45] With an aim to protect the ozone layer, this Protocol contains provisions allowing use of trade measures, directly or indirectly, with a view to achieving the total elimination of ozone-depleting substances, particularly chlorofluorocarbons (CFCs). The principal basis relied upon by this Protocol are scientific developments, technical and economic considerations, and the needs of developing countries.[46]

TREMs which are authorised by the Montreal Protocol comprise bans on imports and exports of ozone depleting substances from non-parties, and import bans on products made with, but not containing ozone depleting substances. Unlike other MEAs, the Montreal Protocol also contains funding and technical assistance provisions for developing country members under Art. 10. The Protocol thus recognises that trade measures alone will not help control the depletion of the ozone layer, it is also necessary to allow the developing countries to develop better technology in order to find substitutes for the CFCs and meet their obligations under the Protocol.

(iii) *The Basel Convention*

The Basel Convention is an MEA which addresses the international transfer of waste on a global scale. It was created under the auspices of UNEP with three principal objectives: (i) to decrease the generation of hazardous wastes; (ii) to encourage disposal of hazardous wastes within the proximity of the location where they are produced; and (iii) to ensure environmentally sound management of all hazardous wastes. The Convention was adopted on 22 March 1986 and entered into force six years later, on 24 May 1992. Although it was adopted by 116 states in 1986, as of April 1995 only 82 states, including the EU, have ratified this convention. Several reasons for not ratifying the convention, as in the case of Thailand, are lack of appropriate regulations for import

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22 September 1988. This convention only represents a framework convention without specifying any measure to combat the ozone-depletion.

[45] For a general discussion on the Montreal Protocol see, for example, Rosalind Twum-Barima and Laura B. Campbell, *Protecting the Ozone Layer through Trade Measures: Reconciling the Trade Provisions of the Montreal Protocol and the Rules of the GATT*, (Geneva: UNEP, 1994); Donald M. Goldberg, 'The Montreal Protocol', in Robert Housman *et al.*, *op. cit.*, 61-92.

[46] Rosalind Twum-Barima and Laura B. Campbell, *op. cit.*, 5-6.

and export controls, lack of procedures for cross-border transportation of hazardous wastes, and lack of environmentally sound management of hazardous wastes.[47]

At the Second Meeting of the Conference of the Parties to the Convention in March 1994, in Geneva, the parties also agreed, *inter alia*, on bans imposed on transboundary movements of wastes for the purpose of disposal from OECD to non-OECD countries, and prohibitions on all transboundary movements from the OECD to non-OECD countries of hazardous wastes destined for recycling or recovery operations as from 31 December 1997.[48]

TREMs authorised under the Basel Convention are restrictions through import and export bans, and prohibitions similarly used by the Montreal Protocol. However, exceptions are provided in Art. 11 which allows for transboundary movements of imports and exports of "covered wastes" between parties and non-parties subject to bilateral or multilateral agreements.[49] But, it should be noted that the Art. 11 allowance is also subject to the coming into force of the Basel Convention, in that for a pre-dated agreement, the transboundary movements of covered wastes are allowed if such an agreement is "compatible" with the Basel Convention's requirement of environmentally sound management of covered wastes. As for the post-Basel agreement, transboundary movements will only be allowed if the standards imposed by the Basel Convention are not being derogated, i.e. for this situation the other agreement must at least comply with the Basel Convention's requirement of sound environmental management of covered wastes.

### 2.2.2. Product vs. PPM Standards

Whether TREMs are used unilaterally or in pursuant to the MEAs, there are two bases upon which they may be used. Firstly, TREMs may be used in order to ensure compliance with "product standards"; and secondly, TREMs may be used to promote

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[47] Mingsan Khawsa-aad and Pisamai Phurisinsitti Iamsakulrattana, *op. cit.*, at 24.

[48] UNEP, Draft Decision II, Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 2nd meeting, UN Doc. UNEP/CHW.2/CRP.35, 25 March 1994.

compliance with standards imposed on "processes and production methods (PPMs). As the product and PPM standards have different legal implications, it is vital that a distinction between them needs to be made from the outset.

Product standards are those which require the *characteristic* of the product *per se* to comply with the specified environmental requirements. For example, an environmental regulation may require that the containers for certain goods must be recyclable, or tropical timber products must be made from woods harvested in sustainable tropical forests. The PPM standards, however, are those which control the *manner* in which particular products are manufactured, for example the way tuna are caught or the way garments are dyed. Thus, the essential distinction between the product and PPM standards lies in the determination whether the environment can be affected by the end products themselves or how they were made. Currently, only the product standards are scrutinised by trade rules like GATT, as the characteristic of the product will be used as an important factor in order to determine whether or not one product may be treated differently from the others.

The PPM standards can be further divided into two categories: "product-related" PPM standards and "non-product related" PPM standards. The difference between them rests on how the end products are affected by the PPM. In order to provide an understanding of the *product-related* PPM standards, let us consider two types of potato: an organically grown potato and a potato grown by using pesticides. Noticeably, the methods of growing these two potatoes differ. The latter method seems to have a greater environmental impact than the former since chemicals used in the composition of the pesticide may, for example, cause acidification of the soil or pollute a nearby river. Additionally, such chemicals may be passed to humans and animals through consumption. Due to the difference in terms of environmental quality between these two potatoes the PPM in this instance is said to be product-related PPM. This is because consumers have to be more careful when consuming the potato treated with pesticides.

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[49] "Covered wastes" in this context refer to both hazardous and other wastes listed in the Basel Convention. See further, Paul Hagen and Robert Housman, 'The Basel Convention', in Robert Housman *et al.*, *op. cit.*, 131-161, at 138 footnote 24, for an analysis of the definitions of "wastes".

An example of the *non-product related* PPM can be found in tuna catching. The main concern in this instance is whether or not tuna are caught by an environmentally sound technique, not the environmental quality of tuna as products *per se*.

At present, only the PPM standards which affect the final products (product-related PPM) are under the scrutiny of GATT. Thus, governments are at liberty to set their own environmental standards based upon how the products are made as long as an environmental impact from the PPM is negligible and is not caused by the final product itself.

### 2.2.3. Why TREMs are used?

There are different purposes for which TREMs are used. They can be used defensively or offensively, or, in non-technical terms, as "shields and swords".[50] According to definitions given by one leading trade and environment expert, TREMs which are "defensive" represent those "employed by a country to address the threat of environmental harm within its own borders", whereas TREMs which are "offensive" represent those "employed by one country to address environmental harms outside its territory".[51] For example, where a country sets its own level of pesticide standards and such standards are to be administered only within its geographical boundary, those standards can be perceived as the defensive TREMs. However, where trade bans are used with a view to changing other country's environmental practice, such TREMs can be interpreted as the offensive TREMs

Alternatively, the use of TREMs can be classified as "carrots and sticks". In this context, the "carrots" are TREMs which help protect the environment *via* providing incentives or inducements to do so while the "sticks" are TREMs designed to punish the failure to protect the environment.[52] An example of TREMs which are classified as "carrots" is a border tax adjustment scheme under which taxes may be rebated if

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[50] See for general comments, Daniel C. Esty, 'Unpacking the "Trade and Environment" Conflict', 25(4) *Law & Policy in International Business* (1994) 1259, at 1263.

[51] Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future*, (Washington, DC: Institute for International Economics, 1994), at 103.

[52] Simon S.C. Tay, *International Trade and the Environment in Asia*, *op. cit.*, at 14.

products have sustained a required level of environmental standards. Trade sanctions or embargoes, on the other hand, may be seen as "sticks" as they are used to punish countries which adopt lower environmental standards.

Whichever ways the use of TREMs are classified, one important question still remains to be asked: Why TREMs are used? Generally, TREMs are used in order to secure compliance with an environmental policy, be it domestic or international environmental policy. As already discussed above, unilateral trade measures may be used to ensure compliance with the former and trade measures authorised by the MEAs may be used to secure compliance with the latter. However, the use of unilateral and multilateral trade measures may be combined together. This is when one country wants to impose a more trade restrictive measure than that allowed under a particular MEA. This kind of situation can be seen more easily from the regional practice. In the EU, for example, members are allowed to raise their environmental standards above the community level as long as certain conditions as laid down in the treaty provisions are satisfied.[53]

It has long been debated whether trade measures are the best instrument to address environmental problems. The common view is that they are not.[54] Trade measures are not believed to be capable of addressing the root causes of the environmental problems. Most TREMs are used predominantly to safeguard the national competitiveness against other country's imports. Several incidences have demonstrated that TREMs are not always used with environmental goals in mind, thus the ecological reasons in such cases were used merely as a guise for trade restriction. The Thai Cigarettes case under the regime of GATT neatly exemplifies this fact.[55] In

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[53] See Art. 130r-t (the "Environment" chapter) of the Single European Act of 1987. These articles have now been renumbered by the 1997 Treaty of Amsterdam as Art. 174-176 respectively. For more discussions on the EU and the environment, see Joanne Scott, *EC Environmental Law*, (New York: Longman, 1998); Damien Geradin, 'Trade and Environmental Protection: Community Harmonization and National Environmental Standards', *Yearbook of European Law* (1993) 151; Damien Geradin, *Trade and the Environment: A Comparative Study of EC and US Law*, (Cambridge: Cambridge University Press, 1997); Ernst-Ulrich Petersmann, *International and European Trade and Environmental Law after the Uruguay Round*, (London: Kluwer Law International, 1995); Andreas R. Ziegler, *Trade and Environment Law in the European Community*, (Oxford: Clarendon Press, 1996).

[54] The House of Commons Environment Committee, *op. cit.*, at lvii.

[55] Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200.

this case, the Thai bans on imports of cigarettes from the United States were found to be inconsistent with the GATT's obligations under Art. III.[56] Thailand had attempted to justify its import restrictions on the protection of health basis. However, while Thailand restricted the US imports it still allowed domestic cigarettes to be sold. Therefore, the Thai restrictions could not be seen as purely environmentally oriented.

In the recognition that trade measures are not the best instrument for addressing environmental problems, other means have been recommended as substitutes. The forerunner of such means is the international co-operation, especially in the case of transboundary environmental problems.[57] Such a co-operation is all the more important for natural resources which are classified as "global commons", for example the ozone layer and global climate, which no one particular country has the property rights over them. The environmental problems may also be addressed by economic means (such as cost internalisation based on the PPP), technology transfer, improvement of environmental education and provision of financial assistance.

Despite environmental problems may arguably be better addressed by means other than trade measures, there is evidence supporting the use of TREMs particularly from the environmental community as other means were thought to be either ineffective or unavailable.[58] International environmental agreements, just like other international agreements, take time to negotiate. The more parties to the agreement, the more diversity in terms of interests, needs and ability to implement such an agreement. It has often been argued that the such diversity may lead towards the use of the "lowest common denominator" as an international environmental standard. In effect, this would inhibit the countries who desire to pursue higher level of environmental protection from doing so, and in the long run this could jeopardise the effort to protect the global environment altogether.

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[56] The GATT articles will be discussed in the next chapter.

[57] See, for example, OECD, Report *on Trade and Environment, op. cit.*, at 22; Robert Housman and Durwood Zaelke, 'Overview', in Robert Housman *et al.*, *op. cit.*, 1-23, at 2.

[58] André Dua and Daniel C. Esty, *Sustaining the Asia Pacific Miracle: Environmental Protection and Economic Integration*, (Washington, DC: Institute for International Economics, 1997), at 88.

From the MEAs' perspective, at least three reasons are said to provide justifications for the use of trade measures.[59] Firstly, certain MEAs, like CITES or the Basel Convention, use trade measures as the means to achieve environmental goals, i.e. prohibiting trade in endangered species and waste respectively. Secondly, trade measures are used in order to safeguard against free-riders, i.e. non-parties, enjoying benefits of the MEAs without bearing the costs. Lastly, trade measures are used to encourage accession to the agreements by causing non-parties more economic and ecological hardships.

Although there are some compelling reasons for using trade measures, in practice it is evident that trade measures only work against certain parties. The United States, for instance, still remains outside the Basel Convention despite it generates more waste than other countries. A case study of UNEP and UNCTAD on India also shows that the threat of trade measures only played insignificant part in phasing out of the CFCs in most sectors of the Indian industry.[60] Moreover, trade measures will only work effectively between countries with a strong economic tie, as the country on which TREMs are used may seek an alternative market. Nevertheless, in absence of environmental supervisory institution, like the Global Environmental Organization (GEO),[61] who will oversee and provide some incentives for compliance with international environmental obligations, trade measures arguably still remain the effective instruments for curbing a short term environmental problems.

Despite the fact that TREMs can, to certain extent, help ameliorate environmental problems, they must be used cautiously. There are some problems associated with the use of TREMs which may cause concerns for traders. Firstly, TREMs may be used with a discriminatory intent in mind and, secondly, TREMs may be used extra-territorially. Trade rules, such as GATT, prohibits use of TREMs in these

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[59] Veena Jha, Anil Markandya and René Vossenaar, 'Policy Instruments in Multilateral Environmental Agreements: Experience of Developing Countries', in *Reconciling Trade and the Environment: Lessons from Case Studies in Developing Countries*, (Cheltenham: Edward Elgar, 1999), 57-78, at 58.

[60] *Ibid.*

[61] See Daniel C. Esty, *Greening the GATT*, *op. cit.*, at 78-85. For a more detailed discussion on the GEO, see Daniel C. Esty, 'The Case for a Global Environment Organization', in Peter Kenen, ed., *Managing the World Economy: Fifty Years After the Bretton Woods*, (Washington, DC: Institute for International Economics, 1994), 287-309.

manners. However, if TREMs are used within the jurisdiction of a state and do not cause an unequal treatment to imports, it is well recognised under the international law doctrine of "sovereignty" that it can do so and such measures also will not be found inconsistent with trade rules.[62] For instance, in the Tuna/Dolphin I case it was found that the United States could ban the Mexican tuna imports only if the bans were neither imposed discriminatorily nor outside its jurisdiction so as to extend its domestic environmental standards at arm's length.[63] Other pieces of legislation which have caused concerns about the extra-territoriality issue are the EU Seal Directive,[64] the Whales Regulation[65] and the Leghold Trap Regulation.[66] As a result, international co-operative efforts are preferred. This is emphasised by the third and fourth sentences of Principle 12 of the Rio Declaration, which state:

> Unilateral action to deal with environmental challenges *outside the jurisdiction* of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an *international consensus*. (Emphasis added.)

## 2.3. Trade and Environment Disputes

A dispute starts "when two parties become unable or unwilling to deal with problems and disagreement in their relationship by dyadic adjustment in private and when, therefore, one or both put the matter into a public domain".[67] Alternatively, disputes can be seen as "discrete, bounded and pathological episodes, generated by rule-

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[62] For more discussions on the concept of sovereignty under international law, see Ian Brownlie, *Principles of Public International Law*, 5th edition, (Oxford: Oxford University Press, 1998), 289-299.

[63] *Supra*, note 23, para. 5.25 and 5.26.

[64] Council Directive 83/129 of 28 March 1983, OJ 1983 (L 91) 30. This Directive prohibits the importation of skins of certain seal pups and products made from them into the Member States.

[65] Council Regulation 348/81 of 20 January 1981, OJ 1981 (L 39) 1. This Regulation governs the importation into the European Community of whales and other cetacean products.

[66] Council Regulation 3254/91 of 4 November 1991, OJ 1991 (L 308) 1. This Regulation prohibits the use of leghold traps in the European Community and the introduction into the Community of pelts of manufactured goods of certain wild animal species originating in certain countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards.

[67] P.H. Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective*, (Toronto: Academic Press, Inc., 1979), at 79.

breach".[68] In layman's terms, they are "messes which need to be cleared up".[69] Moreover, a dispute may be interpreted as "a class or kind of conflict which manifests itself in distinct, justiciable issues".[70]

In the domain of trade and environment, disputes tend to arise as a result of the disability to resolve the differences between the two governments with regard to the use of environmentally inspired trade measures, causing commercial loss to an exporting country. Therefore, "trade and environment disputes" may be viewed broadly as "trade disputes in which one party is more environmentally minded than another".[71] However, due to the unique characteristics of these disputes, as will be discussed below, it is difficult to clearly categorise whether they are in fact "trade" or "environmental" disputes. The modern trend, however, seems to suggest that trade and environment disputes are "trade" disputes which could be resolved by a trade institution like the WTO. But, if the trade measure is used pursuant to the MEA, could a dispute arising out of the use of such a measure be classified as an environmental dispute? One way of eradicating the difficulty in the categorisation of trade and environment disputes may be to treat such disputes as a separate type of dispute and resolve them in the manner that best suited the interests of both trade and environment regimes, i.e. finding a trade-environment balance.

### 2.3.1. Trade and Environment Dispute Resolution

Dispute resolution under both trade and environmental agreements aims at fostering confidential negotiations among the parties.[72] The main purpose of dispute resolution is thus to prolong the relationship between the parties. In the contexts of international

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[68] Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, (London: Butterworths, 1998), at 7.

[69] *Ibid.*

[70] Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice*, 2nd edition, (London: Sweet & Maxwell, 1999), at 2.

[71] See Winfried Lang, 'WTO Dispute Settlement: What the Future Holds', in Simon S.C. Tay and Daniel C. Esty, eds., *Asian Dragons and Green Trade: Environment, Economics and International Law*, (Singapore: Times Academic Press, 1996), 145-151, at 147.

[72] Zane O. Gresham and James M. Schurz, *Dispute Avoidance and Dispute Resolution in International Environmental Agreements and Multilateral Trade Agreements: An Introduction*, (Geneva: UNEP, 1995), at 7.

trade and environmental policy-makings, it is essential that the relationship between the parties to a particular treaty is preserved. This is all the more important in the case of international environmental policy-making as international co-operation is well recognised as the most suitable approach to deal with environmental problems, especially those with transboundary nature.

Like other disputes, a trade and environment dispute involves an examination of laws and facts which will lead towards a determination of who violates the rules in the dispute. However, unlike other disputes, the aim of the trade and environment dispute resolution idealistically should emphasise the finding of the trade-environment equilibrium. More often than not, trade and environment disputes are decided without the trade-environment balance being met. As a result, they have provoked much criticism from the environmental community. So, should trade and environment disputes be treated differently from other disputes? In my view, the answer is yes. This is because trade and environment disputes have unique characteristics which require a careful and delicate balancing act to be performed during the dispute resolution process. This issue will be explored in more detail below.

Theoretically, trade disputes are better resolved by a trade dispute settlement mechanism and, in the same vein, environmental disputes are better resolved by an environmental dispute settlement mechanism. What about trade and environment disputes? Which category of dispute do they fall into? In my opinion, it is rather difficult to precisely categorise trade and environment disputes. There are two issues which need to be considered: trade and the environment. However, whichever category do trade and environment disputes fall into depends largely on the forum before which they are brought. For instance, if a trade measure is used as authorised by the MEA and the dispute is brought before the dispute settlement of the MEA, that dispute may be viewed as an environmental dispute. On other hand, if the same dispute is brought before the dispute resolution mechanism of the trade forum, like the WTO, it may be perceived as a trade dispute. In order to ease the burden of determining what type of dispute trade and environment disputes are, and which forum may such disputes suitably be brought before, there are two options. Firstly, the determination may be made according to which rules are the main issue of contention. If the trade rules are being challenged, then the dispute may be classified as a trade dispute and be resolved before

the dispute resolution mechanism of the trade forum. If the environmental rules are being contested, then the dispute may be classified as an environmental dispute and be resolved before the environmental dispute resolution mechanism accordingly. Secondly, a special mechanism to resolve trade and environment disputes may be created. This mechanism must be able to determine whether the trade measures are used legitimately for environmental purposes *vis-à-vis* protectionism. In doing so, three issues must be considered: (i) the intent and effect of TREMs; (ii) the legitimacy for using such TREMs; and (iii) reasonableness of TREMs.[73] First of all, it is necessary to investigate the intent and effect of the TREMs employed. This is to discover whether or not TREMs in question are hidden trade barriers and to identify environmental policies. If the intent is genuinely environmental and not solely to protect domestic industries, and the effect of using such trade measures does not create trade restrictions, then it would be difficult to challenge such measures. Secondly, the use of TREMs will be legitimate if they are used in response to an environmental injury for which the country administering them has a legitimate interest. Lastly, a determination needs to be made as to whether TREMs in question are reasonable. In other words, whether TREMs are "appropriate *vis-à-vis* the burden imposed on trade flows" - a kind of proportionality test.

Although identifying whether trade or environmental rules are being violated may be a simple process, the first option may run a risk that an emphasis is placed on only one discipline. In other words, once a trade and environment dispute is brought before a dispute resolution mechanism of a trade forum, the focus of the dispute may only be placed on trade issues without careful considerations being given to the environmental issues, and *vice versa*. In the environment paradigm the global environmental organisation (equivalent to the WTO in the realm of trade) does not exist. This institutional non-existence together with the fact that trade and environment disputes are often treated as trade disputes might explain why most trade and environment disputes have been brought before the WTO and its predecessor. Thus, it may be better to consider the second option, i.e. creating a trade and environment dispute resolution mechanism. This could be done either by creating a new mechanism

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[73] See Daniel C. Esty, *Greening the GATT*, *op. cit.*, 99-136.

for trade and environment disputes or transforming an existing dispute resolution mechanism into a more environmentally sensitive avenue.

### 2.3.2. The Uniqueness of Trade and Environment Disputes

Trade and environment disputes are not as straight forward to be resolved like other kinds of dispute. At least three issues could be attributable to the complexity of trade and environment dispute resolution: conceptual differences between the trade and environmental communities; complexity of the issues involved; and the developed vs. developing countries' perceptions.

#### 2.3.2.1. Conceptual Differences

The trade and environment literature shows that there are several conceptual differences between the trade and environmental communities which have been observed over the years. Some common ones, however, can be identified and will be discussed below.

First, it has been thought that, to some extent, one of the causes leading to frictions between trade liberalisation and environmental protection protagonists is the differences in their underlying policies. Generally, the proponents of free trade believe that:

> trade liberalization is important for enhancing world economic welfare and for providing a greater opportunity for billions of individuals to lead satisfying lives. Measures that restrict trade often will decrease the achievement of this goal.

While, through the lens of environmentalists:

> protection of the environment has become exceedingly important, and promises to be more important for the benefit of future generations. Protecting the environment involves rules of international cooperation, sanction, or both, so that some governments' actions to enhance environmental protection will not be undermined by the actions of other governments. Sometimes such rules involve trade restricting measures.

These two propositions, made by Prof John H. Jackson,[74] have truly and accurately reflected the thoughts of those who are pro-trade liberalisation on the one hand and pro-environmental protection on the other. Although, since the 1992 Rio Earth Summit, trade liberalisation and environmental protection policies have been urged to provide support to each other, especially as countries have become more interdependent both economically and ecologically, the divergence in terms of policies of these so-called "camps" undeniably still persists.

Secondly, it can be said that traders and environmentalists differ in their cultures. Prof Daniel C. Esty notes that although both traders and environmentalists are result-oriented, the clash in cultures in this context can be seen from the fact that traders tend to pursue their goal *via* diplomatic means and often isolate themselves from public participation. Thus, a lot of trade negotiations have been undertaken in secret. On the contrary, environmentalists tend to prefer public participation and openness in the decision-making process.[75] The difference in the decision-making processes has manifestly been problematic, especially in GATT cases involving trade and environmental issues. In particular, the secrecy of the GATT's dispute settlement process has been heavily criticised on many occasions.[76]

Thirdly, the trade and environment paradigms differ in their basic modes of operation. It has been argued that environmentalists like to work under the rule-based system, while traders tend to base their reasoning largely on economic considerations.[77] In the United States, for instance, environmental groups believe that environmental objectives should be justifiably supported by the rules of law which are coupled with measures for punishment, like penalties and sanctions. However, although it cannot be denied that traders also need strict and precise legal instruments to give assurance in their trading activities, discriminatory imposition of those punishing measures, especially at international level, would jeopardise the trading community.

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[74] John H. Jackson, 'World Trade Rules and Environmental Policies', *supra*, note 7, at 1227-1228.

[75] See Daniel C. Esty, *Greening the GATT*, *op. cit.*, at 36.

[76] See later in Chapter 3 for a more detailed discussion on the GATT issue.

[77] See Daniel C. Esty, *Greening the GATT*, *op. cit.*, at 37.

Fourthly, environmentalists sometimes worry about environmental problems which have not yet been proven scientifically. This causes difficulties for traders because they do not believe that one can calculate the cost of environmental problems when it is not even certain that such problems do, or will, exist. As traders will not sacrifice their economic gain for some unquantifiable environmental loss, a middle ground, which is now commonly accepted, is to rely on the "precautionary principle" which operates on the basis that the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious or irreversible damage.[78] Indeed, this shows the difference in terms of the principle used by each regime.

### 2.3.2.2. Complexity of the Issues

Trade and environment disputes involve the determination of several complex issues. In particular, they will involve an analysis of scientific information which arguably is better carried out by an expert. All environmental policies are triggered by scientific research.[79] For example, the Montreal Protocol was drafted once it had been discovered by scientists in the 1970s that the ozone layer was depleted and it would become another environmental threat in the near future. Several researchers had carried out investigations in order to confirm such a discovery. In 1974, a report was published, concluding that the main cause of the ozone-depletion was the presence of chlorine, allegedly released from the CFCs, in the atmosphere.[80] Among other uses, the CFCs are commonly used as blowing agents for foams, coolants in air conditioners and refrigerators, and aerosol propellants.[81] Effects of the depletion of the ozone from the

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[78] A definition given by the 1990 Bergen Ministerial Declaration on Sustainable Development, 20 *Environmental Policy and Law* (1990) 100. For more comprehensive discussions on the precautionary principle see, for example, Tim O'Riordan and James Cameron, eds., *Interpreting the Precautionary Principle*, (London: Cameron May Ltd., 1994); James Cameron and Julie Abouchar, 'The Status of the Precautionary Principle in International Law', in David Freestone and Ellen Hey, eds., *The Precautionary Principle and International Law: The Challenge of Implementation*, (The Hague: Kluwer Law International, 1996), 29-52.

[79] For a general discussion, see Lawrence E. Susskind, *Environmental Diplomacy: Negotiating More Effective Global Agreements*, (Oxford: Oxford University Press, 1994), 62-81.

[80] See Mario J. Molina and Sherwood F. Rowland, 'Stratopheric Sink for Chlorofluormethanes: Chlorine Atom Catalyzed Destruction of Ozone', 249 *Nature* (1974) 810.

[81] See Rosalind Twum-Barima and Laura B. Campbell, *op. cit.*, at 6.

stratosphere (about 12 to 50 km above the earth) can vary. They range from an increase in the penetration of the ultra-violet light into the earth's atmosphere, resulting in the risks to human, animal and plant health, to changes in the global temperature and climate.[82]

For environmental issues on which scientific research has been conducted and confirmed the existence of the risk to the environment, the consideration of scientific evidence during the dispute resolution process may be easier than the issues which have no conclusive scientific proofs. In this instance, the core issue of the dispute will be whether the measure in question is reasonable such that the degree of trade impact is proportionate to the environmental risk. In other situation, the dilemma which the trade and environment decision makers have to face is that they have to decide whether the trade measure as used by one party is reasonable in the light of scientific uncertainty. Indeed, it is more difficult for the decision maker in this situation.

The role of science in the field of environmental protection has become even more important in relation to some recent international agreements. The Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures under the framework of the WTO are examples to name but only a few. These agreements allow different environmental standards to be set by a country who can support its justification by scientific evidence.

#### 2.3.2.3. The Developed vs. Developing Countries' Perceptions

Developed and developing countries have different perception towards trade and environmental issues. The consideration of the interests of developed *vis-à-vis* developing countries thus adds another dimension to the trade and environment dispute resolution. With the diversity in economic development, priority and need between developed and developing countries, the trade and environment issues therefore receive different attention in different countries. A country that is so economically advanced may place the need to protect the environment higher in its political agenda than a country that is still poor. The poor country may pay little or no attention at all to

[82] Rosalind Twum-Barima and Laura B. Campbell, *op. cit.*, at 7.

environmental issues, such as the protection of the ozone layer or distinction of endangered species, while it is more concerned about finding enough food and clean water for its inhabitants. As noted by one commentator:

> In the [United States], for example, rare wildlife like the Bald Eagle and excessive radon levels in households are among the highest environmental concerns of average people. In contrast, for poorer countries, key environmental issues may be basic needs such as the lack of clean water and proper sanitation.[83]

What needs to be considered, therefore, is whether the same environmental practice should be followed by all countries. The answer is surely not. As the experience of the GATT meetings has demonstrated, countries in the Asia continent have strongly objected to the use of the same environmental standards which have been set by the developed countries, like the United States and the European Union. However, this does not mean that the Asian countries are not concerned about environmental protection. Indeed, some of them - like Singapore - are environmentally advanced and most of them have become more environmentally sensitive. But, they need to practise a different set of standards from those set by the Western countries. If the international rules allow environmental standards to be set by the developed countries, the poorer countries which cannot meet such stringent standards may suffer competitively. As many of the developing countries are struggling to improve their economic performances *via* an export-oriented trade policy, trade barriers in the form of environmental conditions would hinder such development.

[83] Simon S. C. Tay, *International Trade and the Environment in Asia*, *op. cit.*, at 2.

# Chapter 3

## WTO: Trade, Environment and Dispute Settlement

The last chapter has provided some general overview of the complicated relationship between trade liberalisation and environmental protection, and how trade and environment disputes should be resolved. This chapter will review the trade-environment nexus in the context of the World Trade Organization (WTO). The focus of this chapter will be placed on the way trade and environment disputes have been settled under the WTO regime. The WTO's practice is an important pointer for the direction in which trade and environment dispute resolution will develop given that the WTO is the world's largest trade institution. Therefore, it will provide an excellent reflection on how trade and environment disputes are resolved from an international, *vis-à-vis* regional or domestic, perspective.

With a view to assessing whether the WTO has succeeded in achieving a trade-environment balance when a trade and environment dispute is brought before it, this chapter will be divided into three sections. Section one will give a general overview of the WTO. This section is intended to provide an overview of the WTO's framework. It will review the genesis of the WTO and its organisational structure in order to provide a necessary background for further discussions in this thesis. However, it must be noted from the outset that only synopses of these topics will be given as the WTO itself is a well researched topic among international scholars.

Then, an analysis of the WTO's dispute settlement system will be provided in section two. Section three will review the trade and environment dispute resolution under the framework of the WTO. In doing so, this section will begin with a survey of legal provisions relating to the WTO's trade and environment dispute resolution. Next, it will briefly discuss the Tuna/Dolphin I case under the General Agreement on Tariffs and Trade (GATT) of 1947, then it will discuss some recent cases brought before the WTO: the Gasoline, Shrimp/Turtle and Beef Hormone cases.

## 3.1. The WTO

### 3.1.1. The Background

The WTO is the largest international organisation governing the global trade liberalisation process. Having been established in 1994 as a product of a successful conclusion of the Uruguay Round of Multilateral Trade Negotiations (hereinafter "the Uruguay Round"), the WTO entered into force on 1 January 1995.[1] A piece of legal instrument which gives effect to the WTO is the Marrakesh Agreement Establishing the World Trade Organization, commonly referred to as "the WTO Charter".[2] The WTO Charter is an important agreement with regard to an institutional aspect of the WTO as it gives the WTO the character of a fully fledged international trade organisation.[3] It also gives the WTO a status of a genuine international organisation with legal personality, privileges and immunities recognisable under international law.[4] Parties of the WTO are thus called "members", rather than "contracting parties". At present, more than 130 countries are members of the WTO, and a number of countries have expressed their interest to join the WTO including, most importantly, China.

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[1] The negotiations of the Uruguay Round, in fact, commenced in 1986 and was completed in Marrakesh, Morocco, on 15 April 1994. At the start of the Round there were 103 participating countries, but the number of participants was increased to 128 by the end of the Round. The Uruguay Round is the eighth round of multilateral trade negotiations under the realm of GATT 1947. The seven rounds preceding the Uruguay Round are: the Geneva Round (1947), the Annecy Round (1949), the Torquay Round (1951), the Geneva Round (1956), the Dillon Round (1960-1961), the Kennedy Round (1964-1967), the Tokyo Round (1973-1979). Throughout these rounds, trade liberalisation process in the form of tariff reduction was negotiated as well as several side agreements - "the Codes" - which were binding only on the GATT parties that were signatories to those codes.

[2] Reprinted in GATT Secretariat, *Final Act: Embodying Results of the Uruguay Round of Multilateral Trade Negotiations*, (Geneva: GATT Secretariat, 1994), 5-18. (Hereinafter *Results of the Uruguay Round.*)

[3] According to Prof Jackson, the WTO has acted as a "third leg of the Bretton Woods stool" and filled up the "missing link" of the international economic institutions, which was supposed to comprise the World Bank, the International Monetary Fund (IMF) and the International Trade Organization (ITO). These institutions were created in order to promote the restructuring of the world economic order after the World War II. The ITO, however, did not materialise as the US Congress refused to ratify the ITO Charter, which was successfully concluded in Havana in 1948. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition, (Cambridge, Massachusetts: The MIT Press, 1997), at 4.

[4] John H. Jackson, William J. Davey and Alan O. Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text*, 3rd edition, (St. Paul, Minnesota: West Publishing Co., 1995), 303-304.

The scope of activities of the WTO is more wide ranging than that of its predecessor - GATT - which was created in 1947.[5] While GATT only governs trade in goods, the WTO governs trade in goods as well as other issues including services and intellectual property rights. Trade in goods under the WTO's framework is governed by the "new GATT", i.e. the GATT of 1947 as amended and supplemented by provisions negotiated during the Uruguay Round.[6] This agreement is often referred to as "GATT 1994" in order to mark a distinction between the two GATTs. Trade in services and intellectual property rights are governed by the General Agreement on Trade in Services (GATS)[7] and the Agreement on Trade in Intellectual Property Rights (TRIPs)[8] respectively. Besides these three main agreements, there also are other agreements which have been brought under the rubric of the WTO, including Plurilateral Trade Agreements,[9] a Trade Policy Review Mechanism, and an Understanding on Rules and Procedures Governing the Settlement of Disputes which is commonly referred to as the "Dispute Settlement Understanding" or, in short, "the DSU".[10] In effect, the WTO has brought together agreements and codes negotiated under the realm of GATT 1947 and those negotiated in the Uruguay Round under one single framework.

The functions of the WTO are manifold: administering and implementing the multilateral and plurilateral agreements contained within the WTO's legal framework; acting as a forum for multilateral trade negotiations; providing a dispute settlement system for resolving trade disputes between members; reviewing and assessing trade policies of its members; co-operating with other international institutions; and helping developing countries and economies in transition fully enjoy the benefits of the multilateral trading system. The goals of the WTO are set out in the preamble of the WTO Charter. These include: raising standards of living; ensuring full employment;

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[5] GATT was only a part of the broadly drafted ITO Charter and it had never been intended to become a *de jure* international organisation. But as the ITO did not come into existence GATT had remained operative through the Protocol of Provisional Application.

[6] Reprinted in *Results of the Uruguay Round*, 19-324.

[7] Reprinted in *Results of the Uruguay Round*, 325-364.

[8] Reprinted in *Results of the Uruguay Round*, 365-403.

[9] There are four of these agreements which govern four areas: civil aircraft, government procurement, dairy products and bovine meat.

[10] Reprinted in *Results of the Uruguay Round*, 404-433.

ensuring large and steadily growing real incomes and demand; and expanding the production of and trade in goods and services.

In order to achieve its goals and fulfil its functions, the WTO operates on three core principles. First of all, the WTO operates on the principle of non-discrimination. This principle can furthermore be divided into two sub-principles, *viz.*: the most-favoured nation principle (MFN) and the national treatment principle. In brief, the MFN principle requires that if one country gives a preferential treatment to another country, such a treatment must be accorded to all other member countries of the WTO. The national treatment requires that foreign goods and services must be treated no less favourable than the domestic counterparts. More details of these principles will be discussed below.

The second principle is the market access. This principle is geared towards the promotion of an open trading system by ensuring more predictable market access conditions for traded goods and services. Predictability is enhanced by transparency of domestic laws, regulations and practices of member countries. As the third principle, members of the WTO are required to practise fair competition that ensures the same level playing field.

### 3.1.2. The Organs of the WTO

The WTO's institutional structure consists of several organs, arranged in a hierarchical fashion. At the top of the hierarchy is the *Ministerial Conference*, a governing body of the WTO, composed of international ministers from the member countries. The main function of this organ is to set an agenda for the WTO and making decisions on issues under its governance. It meets at least once every two years. Decisions are generally made by consensus, but voting may be used in some circumstances.

The next level down is the *General Council*, based in Geneva. Its function is to manage the day-to-day business of the WTO. It is composed of senior representatives, usually ambassadors, of all member countries. Meeting as often as once a month, the General Council can also carry out functions of the Ministerial Conference when the latter is not in session. The General Council also has two more roles. It can act, firstly,

as the *Trade Policy Review Body* (TPRB) and, secondly, as the *Dispute Settlement Body* (DSB). In the former role, the TPRB periodically reviews trade policies and implementations of the WTO members. In the latter role, the DSB oversees the implementation of the DSU and the decisions on the disputes, and the overall effectiveness of the WTO's dispute settlement process. In addition, the DSB has a role to establish an Appellate Body which is composed of seven members who serve on a four-year term.[11] The function of the Appellate Body is to hear an appeal on the points of law and legal interpretations. As will be discussed below, the DSB and the Appellate Body have transformed the international trade dispute resolution process and enhanced the credibility of the WTO as the guardian of the world trade.

Under the organisational framework of the WTO there also are three *Councils*, established to oversee the administration of specific agreements: GATT 1994, GATS and TRIPs. These Councils operate under the mandate of the General Council. Under the supervision of the three Councils are numerous *Committees* and *Working Parties* whose work is specifically targeted at a number of individual issues, including regional trade agreements, balance-of-payments restrictions and rules of origin.

With regard to trade and environment issues, a Committee on Trade and Environment (CTE) was set up in 1994.[12] The CTE has been entrusted to continue the work formerly carried out by the Working Group on Environmental Measures and International Trade (1991-1993) under the aegis of GATT 1947 and the Sub-Committee of the Preparatory Committee of the WTO, which met in 1994. Due to the scope of the work undertaken by the CTE, it can be said that the CTE is one of the main international bodies currently dealing most comprehensively and directly with trade and environment issues.[13]

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[11] The current members of the Appellate Body are from the United States, EC, Japan, Philippines, New Zealand, Egypt and Uruguay.

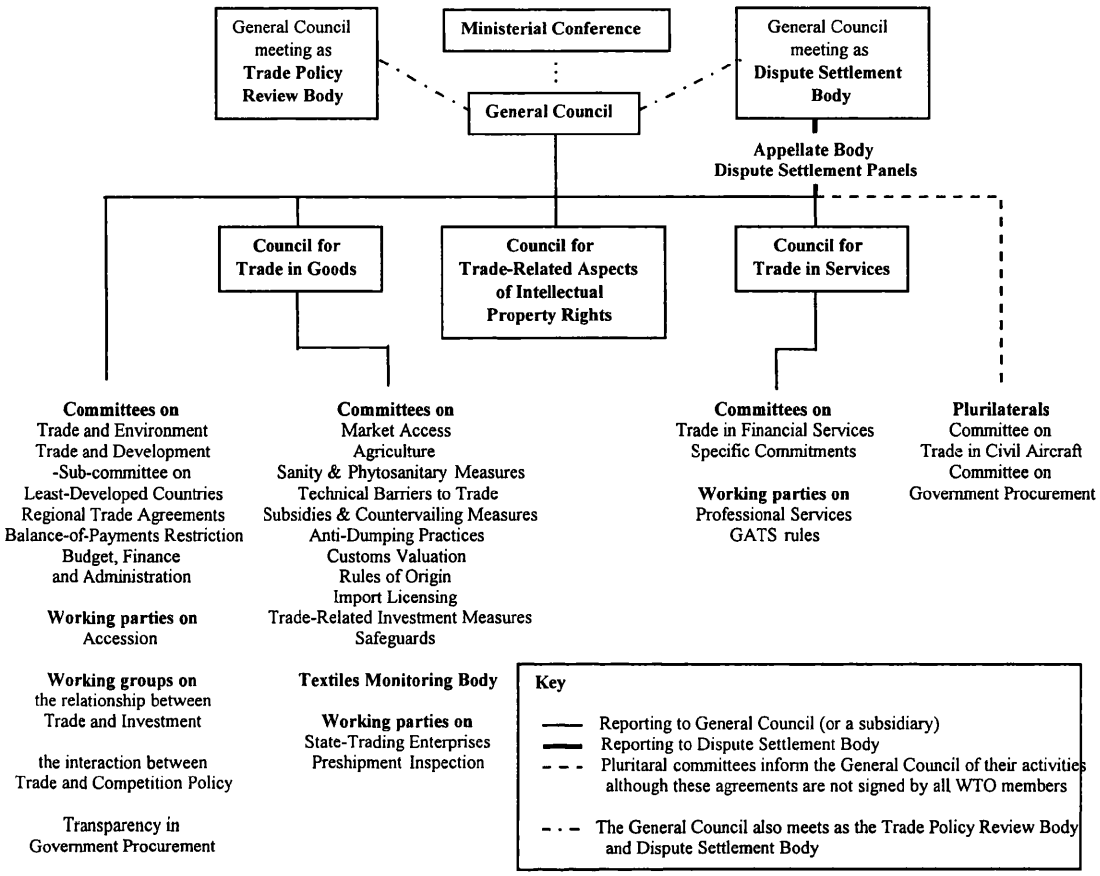
[12] Ministerial Decision on Trade and Environment, adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994, reprinted in *Results of the Uruguay Round*, 469-471.

[13] For more discussions on the work of the CTE, see WTO, *Report of the WTO Committee on Trade and Environment*, document WT/CTE/W/40, 7 November 1996, (Geneva: WTO, 1996); Sabrina Shaw, 'Trade and Environment: The Post-Singapore WTO Agenda', 6(2) *RECIEL* (1997) 105.

Ten issues have been addressed by the CTE. These are: (i) the relationship between trade provisions in Multilateral Environmental Agreements (MEAs) and WTO rules; (ii) the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system; (iii) the relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes, requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling; (iv) transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects; (v) the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in the MEAs; (vi) the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions; (vii) the issue of exports of domestically prohibited goods; (viii) trade-related aspects of intellectual property rights; (ix) the work programme envisaged in the Decision on Trade in Services and the Environment; and (x) input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and NGOs referred to in Art. V of the WTO Charter.

The institutional arrangement of the WTO, however, is not completed without mentioning the *Secretariat*, permanently based in the WTO headquarters in Geneva. The Secretariat houses more that 500 staff who help the day-to-day administration of the WTO. It has no decision-making power. The head of the Secretariat is the Director-General who is elected by the members of the WTO for a renewable term of four years.

**Diagram A: The WTO's Organisational Structure**




Note: Adapted from chart at http://www.wto.org/wto/about/organsn2.htm.

## 3.2. The Dispute Settlement System

A dispute settlement system can be seen as one of the important components of a trading arrangement. This is especially so for the WTO which places the dispute settlement system at the heart of its framework. The governing instrument of the dispute settlement process of the WTO is the DSU, which is contained in Annex 2 to the WTO Charter. This 35-page document provides detailed provisions in relation to all aspects of dispute resolution which might take place under the framework of the WTO. The new dispute settlement process can be used to resolve disputes concerning issues contained in all agreements under the rubric of the WTO, with exceptions to the plurilateral agreements under which parties may resolve the disputes as provided by those agreements.

### 3.2.1. The Dispute Settlement Process of the WTO

The dispute settlement process under the DSU can be broadly divided into four phases: consultations, panel establishment, appeal and implementation. In general, the members are required to consult one another as the first step towards resolving a dispute in order to avoid the use of the formal dispute settlement procedures, i.e. the panel process. Art. 4 of the DSU sets out the rules for consultations. If the parties cannot resolve the dispute within 60 days, the establishment of a panel may be requested by the complainant. In addition, good offices, conciliation and mediation may also be used at any time. The rules for these methods of dispute resolution are contained in Art. 5 of the DSU, which allow these informal methods to be used as an alternative to, or in lieu of, the panel process. Like consultations, the time period allowed for these procedures is 60 days. Art. 5(6) furthermore allows the Director-General to act in an *ex officio* capacity in order to provide good offices, conciliation or mediation with a view to assisting the disputants to settle a dispute.

Secondly, if consultations fail to produce a solution the complainant may request in writing the establishment of a panel. Art. 6(1) of the DSU explicitly grants the right to request the establishment of the panel. Once the request is made the DSB *shall* establish the panel unless there is a consensus in the DSB not to do so. The function of the panel is articulated in Art. 11 of the DSU: "to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements...[by] making an objective assessment of the matter before it". The next step is the panel selection process. Details of this process are contained in Art. 8 of the DSU. The panel shall be composed of three well-qualified individuals, both governmental and non-governmental, who *inter alia* can be a representative of a member country of the WTO or GATT contracting party, a representative to the Council or Committee of any covered agreement under the WTO regime, or international trade law experts.[14] The Secretariat will propose to the

[14] See Art. 8(1) of the DSU for a comprehensive list of persons who will be qualified as panellists. This article read:

> Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

disputing parties the panellists from those whose names are listed and kept at the Secretariat. Should the parties disagree on the panellists, the Director-General may appoint the panellists who are considered most appropriate, after having consulted with the disputants. The panellists are required to serve independently, neither as representatives of their countries nor any organisations. It should be noted, however, that where one of the disputants is a developing country Art. 8(10) of the DSU allows at least one panellist to be appointed from a developing country member. The costs incurred from the panel procedures are to be paid from the WTO budget.

Art. 7 of the DSU sets out rules with regard to the terms of reference. Standard terms of reference are to be followed unless otherwise agreed by the parties within 20 days from the panel establishment process.[15] During the panel process (Art. 12 of the DSU), the panel hears oral presentations and reviews the written submissions made by the parties. The working procedures of the panel are elaborated in Appendix 3 of the DSU, setting out a detailed timetable for each step of the process. A third party, who has substantial interest in the dispute, may also present its case orally and in writing.[16] However, the panel process is conducted in secret, i.e. no public audience,[17] and documents submitted to the panel are kept confidential, subject to the parties' discretion to make them public. Once deliberated, the panel will produce a drafted report detailing its findings. Under normal circumstances, the panel shall deliver its report within six months, three months in an urgent case. A delay, supported by reasons in writing to the

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[15] See Art. 7(1) of the DSU, which reads:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from 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 the ruling provided for in that/those agreement(s).

[16] See Art. 10 of the DSU for rules concerning the third party's intervention.

[17] Art. 14 of the DSU provides:

> (1) Panel deliberations shall be confidential.
> (2) The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.
> (3) Opinions expressed in the panel report by individual panellists shall be anonymous.

DSB, may justify an extension of a further period. In any event, the whole process of dispute settlement should not exceed nine months in total.[18]

The third stage of the dispute resolution process is the appeal to the Appellate Body, which is governed by Art. 17 of the DSU. The appeal can only be requested by the parties in the dispute, not the third party,[19] and only on issues of law and legal interpretations arising out of the panel report.[20] The appeal is made to a panel of three so-called "judges" who will be appointed by the DSB for each case. The qualification requirements of the members of the Appellate Body are contained in Art. 17(3) which provides that only the following persons may serve in the Appellate Body: "persons of recognised authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, and unaffiliated with any government". The working procedures of the appeal process are governed by the Procedures for Appellate Review, under which it is required *inter alia* that the proceedings of the Appellate Body shall be confidential.[21] Like the panel process, at the end of the appeal process, the Appellate Body will prepare a report. The duration of the appeal process in total should normally take no longer than 60 days, with exception to certain cases. But, in any event the duration of the appeal process shall not exceed 90 days.

Once the report is made by the panel, or the Appellate Body as the case may be, the next step of the dispute settlement process is the report adoption. Under the DSU, it is required that such a report shall be adopted by the DSB unless there is a consensus not to do so.[22] This method of adoption is called "reverse consensus". This new approach is worth being distinguished from the former adoption process of GATT 1947 under which the report was deemed adopted only if there was a consensus to adopt it. As a result, the new approach has made it more difficult for a WTO member to block the

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[18] Art. 12(9) of the DSU.

[19] Art. 17(4) of the DSU. Although no right to appeal, the interested third party may submit written submissions to and make oral representation before the Appellate Body.

[20] Art. 17(6) of the DSU.

[21] Working Procedures for Appellate Review, 28 February 1997, WT/AB/WP/3.

[22] The adoptions of the panel and Appellate Body reports are governed by Art. 16 and Art. 17(14) of the DSU respectively.

adoption of the report. The adopted reports are generally deemed binding on the parties of the dispute, albeit no precedent creating value. Nevertheless, the practice of the panels has demonstrated that there is a tendency that a later panel will follow its predecessors' reasoning.[23] Moreover, the significance of an unadopted report cannot be overlooked. Although such a report does not represent "an authoritative statement of GATT law" it can act as a persuasive impetus that influences the later panels.[24]

After the adoption process, the last stage of the dispute settlement process is the implementation of the findings. Art. 21(1) of the DSU states: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". In the report of the panel or the Appellate Body recommendations will normally be given, calling upon the offending party to rectify its acts, for example by ceasing or amending the offending measures. The offending party has 30 days after the report being adopted to give an intention on implementation, after which it will have a "reasonable period of time" to carry out the implementation programme. In absence of any other agreement, such a period normally will not exceed 15 months.[25] However, where the implementation is not forthcoming

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[23] See Japan - Taxes on Alcoholic Beverages, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. The Appellate Body in this case noted that the adopted panel reports are:

> an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO [m]embers, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.

[24] Halina Ward, 'Trade and Environment in the Round - And After', 6(2) *Journal of Environmental Law* (1994) 263, at 275.

[25] Art. 21(3) of the DSU gives an elaboration of the reasonable period of time as follows:

> (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
> (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,
> (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

the DSB has no power to compel the offending member to change its offending measures. But, the winning party may seek compensation from, or suspend concessions formerly reciprocated to, the offending party.[26] Either compensation or the suspension of concessions can be pursued automatically under the DSU if there is no consensus to prevent it.[27] The level of compensation or the suspension of concessions are to be determined according to guiding procedures in Art. 22(3). If there is a challenge on the level of compensation or the suspension, it will be referred to an arbitration.[28] It is worth noting, however, that the DSU explicitly indicates its intention that in any event both compensation or the suspension of concessions are not to be preferred to the withdrawal of the offending measures.[29]

With the rule-oriented approach, precise time-frame and possibility to appeal, it is not difficult to understand why the dispute settlement mechanism of the WTO has been praised by a community of government officials and scholars.[30] The increasing number of disputes which have been brought before the DSB provides an excellent evidence of the trust in the WTO's dispute settlement mechanism for resolving international trade disputes. Statistically, within only a few years of the DSB being in existence more than a hundred disputes have already been filed. This can be sharply contrasted with the GATT 1947's experience under which only 36 complaints were filed between 1991-1994.[31] However, with more social issues - like the environment, labour and human rights - being brought closer to the operation of the WTO trade rules it is still debatable whether the dispute settlement mechanism will be able to withstand the challenges from these contemporary issues.

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[26] Art. 22(1) of the DSU.

[27] Art. 22(6) of the DSU.

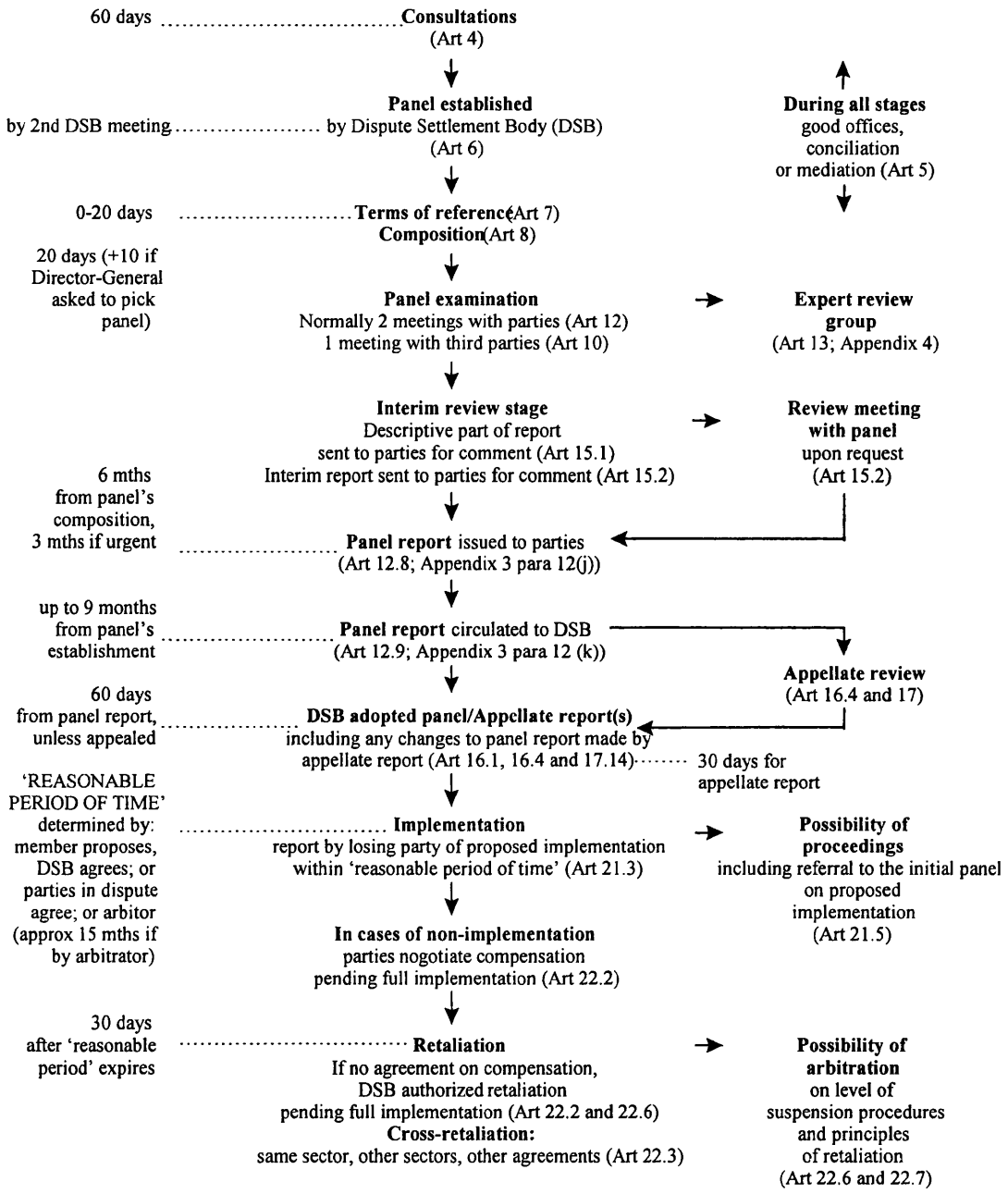
[28] See Art. 22(6) and (7) of the DSU for the roles of arbitration.

[29] Art. 22(1) of the DSU.

[30] For example, John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, (London: The Royal Institute of International Affairs, 1998), 64-72; Debra P. Steger and Susan M. Hainsworth, 'New Directions in International Trade Law: WTO Dispute Settlement', in James Cameron and Karen Campbell, eds., *Dispute Resolution in the WTO*, (London: Cameron May Ltd., 1998), 28-58.

[31] Debra P. Steger and Susan M. Hainsworth, *supra*, note 30, at 33.

**Diagram B: The WTO's Panel Process**




Source: WTO, *WTO: Trading into the Future*, (Geneva: WTO, 1995).

### 3.2.2. The Grounds for Initiating the Dispute Settlement Process

In the realm of trade in goods, while some elements of the dispute settlement system of GATT have been improved by the DSU, what have not been changed are the grounds upon which the dispute settlement process could be initiated, i.e. "nullification or

impairment" of benefits accruing to the complainant under GATT; or "impedance" of the attainment of a GATT's objective. These grounds are contained in Art. XXIII of GATT. Virtually all disputes which have been brought before GATT or the WTO have relied on the nullification or impairment of GATT's benefits as a ground to initiate the dispute settlement proceedings. However, the nullification or impairment complaint alone is not sufficient to demand the establishment of a panel, the complainant also has to demonstrate that its nullification or impairment has arisen out of: (i) a breach of obligation by the respondent; (ii) the application of any measure by the respondent, whether or not it conflicts with GATT; or (iii) the existence of any other situation.

Nullification or impairment of GATT's benefits can arise out of either the violation or non-violation of the GATT's obligations by the respondent. The history of GATT shows that it is more common that a case is brought to its attention on the ground of GATT's violation *vis-à-vis* non-violation. In the "violation" case, it is required that the respondent must have failed to carry out its GATT's obligations and that benefits accruing to the complainant directly or indirectly under GATT is being nullified or impaired. Thus, it is not enough to show only that the respondent has violated its GATT's obligations, it must also be shown that the benefits of the complainant have been nullified or impaired. This is because the GATT panel used to rely on the establishment of violation in order to determine whether such violation had in fact caused the nullification or impairment of the GATT's benefits.[32] The requirement that both "violation" and "nullification or impairment" must be proven by the complainant was indeed a difficult burden to discharge when compared to a later requirement - the proof of "*prima facie* nullification or impairment" - which has been introduced by the Superfund case.[33] In effect, the new test only requires that the violation of GATT be established, and once this is done the *prima facie* nullification or impairment will be presumed. As a result, the panel does not need to consider the trade impact of the measure.

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[32] See Italy - Discrimination Against Imported Agricultural Machinery, adopted on 23 October 1958, BISD 7S/60.

[33] United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136.

As for the "non-violation" case, the dispute settlement process could be initiated when the trade of one member was affected by the measure of another member even though the measure of the latter was not inconsistent with the GATT's obligations. The nullification or impairment of the complainant's benefits under GATT in this case would be found if the measure taken by the respondent "could not reasonably have been anticipated" by the complainant at the time it (the complainant) negotiated for a concession.[34]

In any case, the member who contemplates initiating the WTO's dispute settlement proceedings is required to "exercise its judgment as to whether action under [the dispute settlement process] would be fruitful".[35] This is because although the DSU provides for the panel procedures and the appeal, it is preferred that a mutually acceptable solution is found among the disputing parties.

### 3.2.3. The Burden of Proof

The burden of proof is customarily borne by the complainant. However, where the respondent would like to invoke any exception provided under GATT, the burden of proof would be borne by the respondent - a shift in the burden of proof. This allocation of the burden proof had been a practice of GATT 1947 and still continues to be followed. For example, in the United States - Measure Affecting Imports of Woven Wool Shirts and Blouses form India, the Appellate Body noted: "a party claiming a violation of a provision of the WTO Agreement by another [m]ember must assert and prove it claim." Once this was done, "the onus then shifted to [the respondent] to bring forward evidence and argument to disprove the claim".[36]

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[34] See The Australian Subsidy on Ammonium Sulphate, Working Party report adopted on 3 April 1950, BISD II/188, at 193; Treatment by Germany of Imports of Sardines, adopted on 31 October 1952, BISD 1S/53; and EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins, adopted on 25 January 1990, BISD 37S/86.

[35] Art. 3(7) of the DSU.

[36] Adopted on 23 May 1997, WT/DS33/AB/R.

## 3.3. Trade and Environment Dispute Resolution

Trade and environment dispute resolution has been associated with the practice of GATT and WTO for the past two decades. A typical scenario under which a trade and environment dispute would arise under the realm of GATT/WTO is as follows: a complaining party claims that its benefits under GATT have been nullified or impaired as a result of the other GATT/WTO party using trade measures in order to pursue its environmental goals. Benefits under GATT against which have often been contested are Art. I (the MFN treatment), Art. III (the national treatment) and Art. XI (prohibition of quantitative restrictions).

Art. I obligates a member of the GATT/WTO not to accord favourable treatment to another member without equally extending it to all other members. Accordingly, "any advantage, favour, privilege or immunity granted by *any* contracting party to *any* product originating in or destined for *any* other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all* other contracting parties". (Emphasis added.) In effect, Art. I encourages members of the GATT/WTO to follow the non-discrimination practice *vis-à-vis* one another. The same practice is also required to be observed within the jurisdiction of the GATT/WTO member. Art. III prescribes that a GATT/WTO member shall not treat imports of another member less equally to its domestically produced goods. More specifically, Art. III(1) provides 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. Art. III(4) further provides that imports are to be treated no less favourably than the "like" domestic goods in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. In effect, Art. III prohibits use of an unequal measure on both tax or non-tax basis against foreign imports.

With respect to goods before they cross the border, Art. XI prohibits use of quantitative restrictions in the forms of quotas, licences, or other measures on imports

and exports. An aim of this article is to reduce the use of non-tariff barriers (NTBs) which have increasingly become common, since volume-based restrictions could cause market distortion more easily than the price-base mechanism such as taxes and tariffs.

Environmental exceptions under GATT are commonly perceived to be contained in Art. XX. Paragraphs which are most relevant to environmental protection are paragraphs (b) and (g). Art. XX(b) allows an exemption from the GATT's obligation for measures which are "necessary to protect human, animal or plant life or health"; and Art. XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". However, not only do these preliminary environmental thresholds need to be satisfied, the measure must also pass the test contained in the introductory clause (the chapeau) of Art. XX before the measure may be deemed justified on the environmental ground and exempted from GATT. The chapeau provides:

> 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 [GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures...

What one can see immediately is that the word "environment" has not been used in any part of the provisions under Art. XX of GATT. Arguments have thus been raised as to whether Art. XX is wide enough to cover environmental protection *per se* as well as health and safety, and depletion of natural resources as contained in Art. XX(b) and (g) respectively. On the one hand, Shrybman, for example, argues that Art. XX(b) and (g) only covers a narrow range of policy. Thus, Art. XX(b) was argued to cover only the measures for health and safety reasons while the scope of Art. XX(g) was only as wide as covering only exhaustible natural resources that were necessary for economic well being.[37] On the other hand, Charnovitz, for instance, interprets the scope of the GATT so-called "environmental exceptions" as wide enough to cover almost all aspects of environmental protection for the reason that the drafters of GATT did not think that it

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[37] S. Shrybman, 'International Trade and the Environment: An Environment Assessment of the General Agreement on Tariffs and Trade', 20(1) *Ecologist* (1990) 30.

was necessary to explicitly spell out the word "environment" while the drafters had already recognised the existence of international environmental agreements.[38] Amidst the debate regarding the scope of Art. XX environmental exceptions, the present trend is that the wider interpretation of Art. XX is preferred. However, it would be preferable if the word "environment" is clearly mentioned in Art. XX in order to prevent any later confusion. Understandably, the omission of the word "environment" when GATT was first drafted in 1940's was not accidental. This is because the need for environmental protection was not apparent at that time.[39] But now, since the perception on environmental protection has undoubtedly been changed it might be timely to reconsider inserting the word "environment" in the GATT articles.

To some extent, the WTO regime has rectified the linguistic defect of GATT through its new provisions. Examples of the pertinent provisions are: the preamble of the WTO Charter, the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).[40] The preamble of the WTO Charter recognises:

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

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[38] Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', 25(5) *Journal of World Trade* (1991) 37.

[39] John H. Jackson, William J. Davey and Alan O. Sykes, Jr., *op. cit.*, at 559.

[40] It should be noted, however, that environmental provisions under the framework of the WTO also appear in TRIPs, GATS, the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures. But, these agreements will not be studied in detail here as this thesis tries to limit the scope of study to trade in goods. In summary, TRIPs and GATS contain exceptions for measures taken for environmental purposes, similar to those used in GATT. The Agreement on Agriculture provides exceptions for direct payments to reduce domestic support for agricultural production if certain conditions are fulfilled. The Agreement on Subsidies and Countervailing Measures allows use of a subsidy to assist domestic industry adaptation to new environmental legislation, not more than 20 percent of the adaptation cost.

On the face, the wordings in the preamble clearly suggest that the WTO is to become more environmentally conscious than its predecessor. However, like other preambles of international agreements, the preamble of the WTO is not binding. Therefore, it can at best only provide a broad guidance of the ways trade liberalisation and environmental protection should interact under the realm of the WTO. Nevertheless, it has provided some encouraging signal for the environmental community that the WTO would take environmental issues more seriously.

The TBT and SPS Agreements, on the other hand, have significantly shed light on a move into a new direction in which environmental matters could be accommodated by the WTO. Essentially, these two agreements strongly put an emphasis on the international harmonisation of environmental standards.

Firstly, the TBT Agreement is part of the framework of the WTO, governing the use of measures which may be perceived as NTBs, such as standards relating to technical performance, environment, health and labour. It is aimed at supplementing GATT 1994[41] by adding amongst other things "discipline on environmental policy making".[42] The scope of application of the TBT Agreement is quite wide. It extends to all standards formulated by the member governments, including most levels of government, of the WTO. Non-governmental standards, are less stringently regulated and covered under the Code of Good Practice. The main provision in the TBT Agreement which specifically refers to the protection of the environment is Art. 2.2, which states:

> Parties shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*, national security requirements; the

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[41] It is worth noting, however, that the TBT Agreement had existed before the coming into force of the WTO, i.e. it was one of the Tokyo Round side agreements. But, during the pre-WTO era, most of the side agreements had to be ratified separately. Thus, the TBT agreement then was not included as a part of GATT 1947. As already described, the WTO has amalgamated all main agreements and side agreements concluded before 1995 under one WTO Charter.

[42] Zen Makuch, 'Legal Aspects of Environmental Standards Regulation in GATT', unpublished paper, n.d., at 50. (On file with author.)

> prevention of deceptive practices; *protection of human health or safety, animal or plant life or health, or the environment.* In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products. (Emphasis added.)

Immediately, one can see that "the environment" is explicitly mentioned in this article. Technically, technical measures which are geared towards an attainment of environmental protection, such as eco-labels, recycled content requirements, emission standards, could be used. However, the application of Art. 2.2 is somewhat difficult in practice as the TBT Agreement places a strong emphasis upon the principle of non-discrimination and availability of internationally accepted standards.[43] For example, Art. 2.1 of the TBT Agreement requires that technical regulations shall be applied equally on foreign imports and domestic goods.[44] Art. 2.4 requires that where relevant international standards exist, or their completion is imminent, these standards must be used as a basis for the impending domestic technical regulations. In addition, where a WTO member wishes to pursue a technical standard which is higher than that set internationally, it could do so provided that the international standards, or the relevant parts contained therein, are considered to be "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems". But most importantly, the measure adopted by a member of the WTO must be "proportionate". Despite the fact that there is no explicit requirement as such, some legal scholars read Art. 2.2 of the TBT Agreement as containing the proportionality threshold. Accordingly, "the risks of non-fulfilment of an [environmental] objective would have to be proportional to the level of trade-restrictive behaviour which might be accepted in a given regulation."[45] And, the measure must not create an unnecessary obstacle to trade. However, at date of writing, neither the panel nor the Appellate Body of the WTO has yet determined how the TBT Agreement would apply to the TBT measures based on environmental justification, it therefore still remains to be seen how the trade and

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[43] For criticisms on the application of the TBT Agreement, see James Cameron and Halina Ward, *The Uruguay Round's Technical Barriers to Trade Agreement*, a WWF International Research Report, January 1993, (Gland, Switzerland: WWF International, 1993).

[44] Art. 2.1 reads: "Parties shall ensure that in respect of technical regulations, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to the like products of national origin and to like products originating in any other country".

[45] Zen Makuch, 'Legal Aspects of Environmental Standards Regulation in GATT', *supra*, note 42, at 50.

environment nexus could be addressed by this agreement, and how this agreement could enhance the environmental sensitivity of the WTO on the whole.

Secondly, the SPS Agreement is another important legal instrument relating to the environment which is incorporated into the framework of the WTO. It only came into force at the same time as the WTO, as the SPS Agreement did not exist in the pre-WTO era. In essence, the SPS Agreement is aimed at setting basic rules governing food safety and standards for animal and plant health.[46] What is deemed a "sanitary and phytosanitary measure" is provided in Annex A: Definitions paragraph 1.[47] The SPS measure may be used in so far as certain conditions stipulated in this Agreement are met. These conditions include: non-discrimination, the use of international standards, scientific justification and risk assessment. For example, Art. 2.2 of the SPS Agreement requires that an SPS measure is applied only "to the extent necessary to protect, human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence". Art. 2.3 provides further that the SPS measure shall not "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and other Members". Neither shall it be used as a disguised trade restriction. An exception to these

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[46] For general information on the SPS Agreement, see WTO, *The WTO Agreement on Sanitary & Phytosanitary Measures*, (Geneva: WTO, 1998).

[47] A "sanitary and phytosanitary measure" is defined as any measure applied:

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment of spread of pests; or
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Measures in this place include:

> all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; [PPMs]; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

requirements is provided in Art. 5.7 which allows a WTO member to provisionally adopt an SPS measure where scientific evidence is insufficient on the basis of available relevant information,[48] but it must obtain additional information necessary for more objective risk assessment and review such a measure within a reasonable time.

The SPS Agreement also allows a WTO member to pursue an "appropriate level" of SPS protection which could go beyond international standards, if "there is a scientific justification" or if steps for the determination of an appropriate level of protection as specified in Art. 5 of the SPS Agreement are followed.[49] The SPS measure which conforms to international standards, such as those set by the Food and Agriculture Organization (FAO) or Codex Alimentarius Commission, or conforms to the provisions in the SPS Agreement, would be presumed to be in conformity with both the SPS Agreement and GATT 1994 itself.[50] Unlike the TBT Agreement, a panel and an Appellate Body have already been established to address the application of the SPS Agreement in the so-called Beef Hormone case which will be discussed below.

Under the GATT 1947 regime, seven trade and environment cases were brought to the attention of the panels[51] and a few cases have already reached the Appellate Body

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[48] The information could be obtained from relevant international organisations as well as the SPS measures as used by other WTO members.

[49] Art. 3.3 of the SPS Agreement.

[50] Art. 2.4 of the SPS Agreement. This article provides:

> Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Art. XX(b).

[51] These cases are as follows: United States - Prohibition of Imports of Tuna and Tuna Products from Canada, adopted on 22 February 1982, BISD 29S/91 (the Canadian Tuna case); United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136 (the Superfund case); Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, adopted on 22 March 1988, BISD 35S/98 (the Herring and Salmon case); Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200 (the Thai Cigarettes case); United States - Restrictions on Imports of Tuna, unadopted, circulated on 3 September 1991, BISD 39S/155; reprinted in 30 *ILM* (1991) 1594 (the Tuna/Dolphin I case); United States - Restrictions on Imports of Tuna, unadopted, circulated on 16 June 1994, WT/DS29/R; reprinted in 33 *ILM* (1994) 839 (the Tuna/Dolphin II case); and United States - Taxes on Automobiles, unadopted, circulated on 11 October 1994, WT/DS31/R (the CAFE case).

of the WTO.[52] Although these cases have been settled successfully, i.e. the winner was found in each dispute, from the perspective of the trade and environment debate these disputes have raised a critical question as to whether a trade-environment balance has been struck. As described in the last chapter, a successful trade and environment dispute settlement is not when a wrongdoer is found but when an equilibrium that supports both the process of trade liberalisation and environmental protection is achieved. The cases from GATT and the WTO will be reviewed below in order to assess if GATT/WTO was able to strike such a balance.

### 3.3.1. Trade and Environment Disputes under GATT: The Tuna/Dolphin Saga

Under the realm of GATT 1947, the Tuna/Dolphin I case was certainly the highlight of the trade and environment dispute resolution. This case offered the GATT panel an opportunity to seriously reconsider the trade-environment nexus in the context of GATT. In this case, the United States imposed bans on imports of Mexican tuna pursuant to the 1972 Marine Mammal Protection Act (MMPA). The MMPA allowed bans to be used on tuna which were caught by purse seine nets - a fishing technique that could incidentally kill dolphins while tuna were being harvested. The United States also imposed embargoes on the intermediary nations since 24 May 1991 on tuna or tuna products which were supplied by the Mexican vessels fishing by the above technique. The focus of this dispute was whether the US bans on the imports of tuna and tuna products from Mexico and intermediary nations were deemed inconsistent with GATT; and if so, could the United States justify its measures by resorting to Art. XX of GATT?

The GATT panel found that both primary and intermediary embargoes were inconsistent with Art. III and XI of GATT. The United States' attempt to rely on Art. XX(b) and (g) as an exception was also found unattainable. Although the panel report was not adopted by the GATT Council (the predecessor of the DSB), the Tuna/Dolphin I case attracted much criticism from the environmental community and had no doubt

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[52] These case are: United States - Standards for Reformulated and Conventional Gasoline, adopted on 20 May 1996, WT/DS2/9,WT/DS/AB/R (the Gasoline case); European Communities - Measures Concerning Meat and Meat Products (Hormones), 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R (the Beef Hormone case); and United States - Import Prohibitions of Certain Shrimp and Shrimp Products, adopted on 8 November 1998, WT/DS58/R, WT/DS58/AB/R (the Shrimp/Turtle case).

transformed GATT to the main enemy of the "green" supporters.[53] The main concern, according to Cameron, was that international trade rules would limit the ability of the GATT members to protect the environment through their national environmental laws.[54]

In its reasoning process, the panel first examined whether the US measures were internal regulations or quantitative restrictions. Mexican had argued that the US measures were quantitative restrictions and thus violated Art. XI of GATT. However, the United States argued that its measures were internal regulations enforced at the time or point of importation under Art. III(4) and the Note Ad Article III, i.e. the prohibition of imports of tuna and tuna products constituted an enforcement of the regulation of the MMPA with regard to domestic tuna harvesting. The panel examined the distinction between Art. XI and Art. III of GATT and found that the US measures were indeed quantitative restrictions inconsistent with Art. XI of GATT. The reasons given by the panel was that Art. III only applied on tuna as "products", not how they were caught. Thus, the US measures were not found to be under the coverage of Art. III of GATT.[55] With regard to Art. XI of GATT, the panel had no difficulty to conclude that the US import restrictions were inconsistent with Art. XI for the reason that Art. XI clearly prohibits the use of such measures.[56]

While the United States did not contest the panel's finding on the Art. XI violation, it had argued that its measures were justifiable under Art. XX(b) and (g) of GATT. The panel interpreted these articles narrowly, as it was of an opinion that "Art. XX is a limited and conditional exception from obligations under other provisions of [GATT], and not a positive rule establishing obligations in itself".[57] Art. XX must therefore be invoked specifically by the party seeking to rely on the provisions contained

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[53] An example of the fierce attack from the environment protagonists can be seen from GATT being called "Gattzilla" - named after a Japanese monster (Godzilla) who likes to destroy the world - in a poster displayed in Washington. For more examples of criticisms from the environmental community, see Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future*, (Washington, DC: Institute for International Economics, 1994), at 35.

[54] James Cameron, 'The GATT and the Environment', in Philippe Sands, ed., *Greening International Law*, (London: Earthscan, 1993), 100-121, at 103.

[55] See paras. 5.8-5.16 of the panel report.

[56] Paras. 5.17-5.19 of the panel report.

[57] Para. 5.22 of the panel report.

therein who would also bear the onus to prove its justification. Thus, rather than Mexico has to prove that the United States' measures were not justifiable under Art. XX(b) or (g), it was the latter who had to discharge its claim.

With regard to Art. XX(b), the panel found that the United States could not justify its measures under this exception for the following reasons. Firstly, the US measures were exercised "extraterritorially". As no guidance on this particular issue was provided in GATT itself, the panel therefore resorted to the drafting history of Art. XX(b) in order to find an answer. The drafting history showed that the drafters of Art. XX(b) were concerned only with the use of sanitary measures to safeguard human, animal or plant life or health within the jurisdiction of the importing country.[58] The panel also extended its reasoning as follows:

> If the broad interpretation of [Art.] XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other parties could not deviate without jeopardizing their rights under [GATT]. [GATT] would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[59]

Secondly, the panel considered that even if the US measures could be used outside its jurisdiction, they would still fall outside the scope of Art. XX(b) as they were not "necessary" for the protection of life or health of human, animal or plant - in this case, dolphins. For what makes a measure "necessary", the panel sought its guidance from the earlier GATT case, the Thai Cigarettes case. In that case, the interpretation of "necessary" was made in the light of Art. XX(d) which provides an exception for measures "necessary to secure compliance with laws or regulations which are not inconsistent" with GATT provisions. The Thai Cigarettes' panel thus interpreted a measure as necessary where neither alternative and GATT consistent, or less GATT inconsistent, measures were available.[60] Therefore, in the Tuna/Dolphin I case, the US

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[58] Para. 5.26 of the panel report.

[59] Para. 5.27 of the panel report.

[60] Para. 74 of the panel report. In the Thai Cigarettes case, the Thai import restrictions on the US cigarettes were deemed inconsistent with GATT and were not justified under Art. XX(b) because

bans were found inconsistent with GATT and could not be justified under Art. XX(b) as the United States could have attempted international co-operation efforts regarding the protection dolphins before employing the bans - hence, the bans were unnecessary.

As for Art. XX(g), the panel turned to another previous panel - the Herring and Salmon dispute[61] - for some guidance on the interpretation of "relating to the conservation of exhaustible natural resources" and "in conjunction with restrictions on domestic production or consumption". In that case, the panel found that a measure could only be deemed "relating to the conservation" as such if it was "primarily aimed at" such conservation.[62] However, the measure "did not have to be necessary or essential to the conservation" in the sense used in Art. XX(b). In the same vein, a measure would be found "in conjunction with" production restrictions if it was "primarily aimed at rendering effective these restrictions".[63] As a result, the panel in the Tuna/Dolphin I case found that the US bans on Mexican tuna and tuna products were not justifiable under Art. XX(g). The reason given by the panel was that the US embargo was linked to the US maximum incidental dolphin taking rate - the rate which the Mexican fishermen were not able to find out the level at which it was set at a particular period of time. Accordingly, "such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins".[64]

The panel also found that measures under Art. XX(g) could not be used outside the jurisdiction of the importing state. The reasoning of the panel was that a "a country can effectively control the production or consumption of an exhaustible natural resource

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Thailand should have used other available measures which were consistent, or less inconsistent, with GATT such as advertising bans or the use of labels instead of import bans.

[61] In this case, the United States brought a challenge against Canadian regulations which prohibit the exportation or sale of unprocessed herring and salmon on the basis that such prohibition was in violation of Art. XI of GATT and could not be justified under Art. XX. Canada, however, claimed that its measures were justifiable under Art. XX(g) as they were integral part of a Canadian fishery resource management system. The panel found that such export restrictions were not covered by Art. XX(g) of GATT since Canada could promote its fishery management programme successfully without the use export restrictions. Thus, the Canadian export restrictions were not "primarily aimed at" conservation of herring and salmon. Neither were they "primarily aimed at" rendering effective the restrictions on the harvesting of those fish as no similar restrictions were imposed domestically.

[62] Para. 4.6 of the panel report.

[63] *Ibid.*

[64] Para. 5.33 of the panel report.

only to the extent that the production or consumption is under its jurisdiction".[65] Accordingly, the measure could only be primarily aimed at rendering effective restrictions on production or consumption within the jurisdiction of a contracting party.

From the panel's reasoning in the Tuna/Dolphin I case, it is not surprising that environmentalists were so provoked. Several issues arising from this case had given the environmental community a cause of concern about the GATT's approach for resolving a trade and environment dispute.[66] First of all, the environment protagonists were not satisfied with the way the panel had handled an issue concerning the use of extraterritorial trade measures for environmental purposes. Ward, for example, argues that there ought to be a situation where unilateral trade restrictive measures are allowed as a matter of environmental policy and GATT. Such a situation could arise, for example, when trade measures are used to protect the global commons or global warming.[67] She argues further that the jurisdiction of a GATT party to protect the environment based solely on the territorial basis was inappropriate as it is difficult nowadays to specifically differentiate global environmental impacts from those that occur domestically.[68] Moreover, environmental protection requires "a more sophisticated approach to sovereignty", i.e. a shared sovereignty and responsibility.[69] Moreover, Cameron and Makuch view the GATT panel's reasoning on the extraterritorial issue as a misunderstanding of the negotiating history and underlying rationale of Art. XX(b) and does not bode well for the environmental practice of addressing the environmental risk at the source where such a risk lies outside the jurisdiction of one country but nonetheless within the area of common jurisdiction, like the high seas.[70]

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[65] Para. 5.31 of the panel report.

[66] For comments on the Tuna/Dolphin I case, see, for example, Dorothy Black, 'International Trade *v.* Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna', 24 *Law & Policy International Business* (1992) 123; Frederic L. Kirgis, 'Environment and Trade Measures After the Tuna/Dolphin Decision', 49(4) *Washington and Lee Law Review* (1992) 1221; Philippe Sands, 'Danish Bottles and Mexican Tuna', 1(1) *RECIEL* (1992) 28.

[67] Halina Ward, *supra*, note 24, at 276.

[68] *Ibid.*

[69] *Ibid.*

[70] James Cameron and Zen Makuch, 'Implementation of the United Nations Framework Convention on Climate Change: International Trade Law Implications', in James Cameron, Paul Demaret, and Damien

Secondly, environmentalists view the criteria for allowing use of trade-related environmental measures under the GATT regime as too restrictive. As the Thai Cigarettes and Tuna/Dolphin I cases show, the Art. XX(b) requirement of "necessary" was to be construed restrictively. As such, the use of a trade restrictive measure in a particular case would be allowed only when the "least trade restrictive" measure was not available as an alternative.[71] From the environmental perspective, this is discouraging. Legal scholars, like Trebilcock and Howse, note: the panel "ignored the possibility that the alternative measures might involve high regulatory and compliance costs, or might be impracticable to implement effectively in a developing country".[72] Moreover, the panel seems to ignore the fact that different environmental problems must be addressed by different measures. Therefore, there may be a situation where only a trade restrictive measure would effectively achieve the envisaged environmental objective even though the least trade restrictive alternative is available. It would be better for the panel, therefore, to adopt a method of balancing the environmental benefits against the quantum of trade loss, i.e. a "proportionality test".[73] Under this test, the panel should consider both the precautionary principle and the concept of environmental cost internalisation.[74]

Thirdly, it could be argued that international co-operation as suggested by the panel in the Tuna/Dolphin I panel is "not a panacea for all environmental issues".[75]

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Geradin, eds., *Trade & The Environment: The Search for Balance*, (London: Cameron May Ltd., 1994), vol. I, 116-146, at 129.

[71] *Ibid*, at 130.

[72] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (London: Routledge, 1995), at 337.

[73] The proportionality test has regularly been used by the European Court of Justice (ECJ) in performing the trade-environment balancing act. For example, see Commission *v.* Denmark, C-302/86 [1988] ECR 4607 (the Danish Bottles case). In this case, the ECJ ruled that the Danish law requiring the use of approved containers on part of importers was not disproportionate even so it resulted in the restriction on the Community free flow of trade as a lesser trade restrictive measures would not achieve the same level of environmental protection. Where the same level of environmental protection could be achieved by a lesser trade restrictive measure, the more trade restrictive measure might be found disproportionate. See, for example, Commission *v.* Germany, Case C-131/93 [1994] ECR I-3303 (the German Crayfish case). For more discussion on the proportionality test in the context of trade and environment, see Joanne Scott, *EC Environmental Law*, (New York: Longman, 1998), 69-70; Montini, Massimiliano, 'The Nature and Function of the Necessity and Proportionality Principles in the Trade and Environment Context', 6(2) *RECIEL* (1997) 121.

[74] Halina Ward, *supra*, note 24, at 277.

[75] James Cameron and Zen Makuch, *supra*, note 70, at 130.

International negotiations also are extremely time consuming and may not produce a timely solution. Even if a solution is agreed, different countries still need some more time to implement at a domestic level. Additionally, international efforts in the form of multilateral environmental agreements (MEAs) which allow use of trade restrictive measures technically still run into conflict with GATT Art. XI. So far, no MEAs have yet been challenged under GATT, thus one cannot be certain that the panel would allow a trade measure pursuant to the MEA to be justified under the so-called environmental exceptions under GATT. Indeed, this uncertainty has increased the doubt in the effectiveness of international co-operation even more.

Fourthly, criticism could be made with regard to the panel's consideration of the processes and production methods (PPMs) issue. In the consideration of the "like products" issue under Art. III of GATT, the panel found that products would be deemed "like" if they had the same product characteristics. It is worth nothing, however, that even though the panel in the Tuna/Dolphin I found that the US bans were quantitative restrictions, not internal measures as covered by Art. III of GATT, the panel's reasoning regarding Art. III still create some negative environmental implications. Most importantly, the panel did not consider the way the products were made was relevant to the determination of the like products. This could be viewed from the environmental perspective as discouraging. Products which are produced by different techniques could have different environmental attributes. Accordingly, tuna which are caught by an unenvironmentally friendly harvesting technique are different from those caught in an environmentally friendly manner. The panel should therefore also differentiate the products on the environmental characteristics when determining whether or not the two products are "like". An important effect of finding that the products are not "like" is that the two products may be treated differently. As a result, had the panel considered the PPMs as a basis for differentiating the products, the Mexican tuna and the US tuna would be deemed different and thus the United States could technically treat the Mexican tuna differently without violating the GATT Art. III(4) which requires foreign imports and domestic goods to be treated equally.

Not only did the legal reasoning of the panel on the Tuna/Dolphin I case seriously worry environmentalists, environmental critics were also concerned about some institutional issues related to the dispute settlement process. Notably, criticism

was made on the way the GATT's dispute settlement process operated. It has often been argued that the GATT's dispute settlement process operates behind a closed-door, resulting in the lack of transparency, democracy, technical competence and fairness.[76] Neither an open court style like the European Court of Justice (ECJ) was adopted nor participation from the NGOs was allowed. The secrecy of the panel's process significantly contradicted the *modus operandi* of the environmentalists who by and large prefer a more open approach which allows public involvement.[77]

Another criticism made against the GATT's trade and environment dispute settlement is the composition of the GATT's dispute settlement panel. Panellists had always come from a trade-oriented background. Thus, it could be argued that these panellists did not possess competent knowledge of the environmental issues at hand, which enables them to consider the interaction between trade and the environment in a balanced manner. Often, more weight had been given to arguments and considerations on trade issues.

On the whole, the trade and environment dispute resolution under the regime of GATT was seen as dissatisfactory in the eyes of the environmentalists, while the GATT personnel strongly disagreed. Several recommendations which arguably would have transformed GATT into a more environmentally competent institution and instilled more environmental sensitivity in GATT have been proposed by various scholars.[78] Some of the recommendations include: (i) inserting a "trumping clause" in GATT, allowing certain international environmental agreements to withstand the challenge from GATT, as a waiver of the GATT's obligations; (ii) making an amendment to GATT by adding a new paragraph to Art. XX - paragraph (k) - in a parallel language to Art. XX(h) which provides an exception for measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so

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[76] Daniel C. Esty, *Greening the GATT*, *op. cit.*, at 52.

[77] See the previous chapter, section 2.3.2.1, for a discussion on the environmentalists' method of doing business.

[78] For example, see John H. Jackson, 'Greening the GATT: Trade Rules and Environmental Policy', in James Cameron, Paul Demaret and Damien Geradin, eds., *op. cit.*, 39-51, at 46-47; Daniel C. Esty, *Greening the GATT*, *op. cit.*, 205-224; James Cameron, 'GATT and the Environment', *supra*, note 54, at 120-121.

submitted and not so disapproved"; (iii) amending the wording in Art. XX(b) or (g) to explicitly include "environmental circumstances" which would be exempted; and (iv) adding generic language which explicitly provides an exception for specified trade-related environmental measures in addition to the chapeau of Art. XX; (v) making the GATT's panel process more transparent through public hearing; (vi) allowing submissions from environmental NGOs which would provide the panel with expert's opinions on environmental issues and enhance the panel's performance of the trade and environment balancing act.

### 3.3.2. Trade and Environment Disputes under the WTO

Having seen the failure of GATT to handle trade and environment issues, the environment supporters expected that the WTO with its newly established dispute settlement mechanism would improve the way in which trade and environment disputes are resolved. Since the WTO arguably is the most powerful international trade organisation in the world, it would undoubtedly have a significant impact on international trade as well as other trade-related issues, including the environment. The CTE was established in 1994 to oversee the trade and environment policy development under the auspices of the WTO, however, this committee has not been perceived as effective as it was hoped to be. No concrete policy recommendations or workable programmes have been set by the CTE in order to enhance the trade and environment nexus within the WTO's framework.[79] The CTE can only be seen now as nothing more than a venue for discussion. Like its predecessor, the WTO's DSB has to formulate its own way to address the trade and environment issues on the case-by-case basis, in the light of the existing policy vacuum.[80] The highlights of the trade and environment dispute settlement under the WTO regime undoubtedly are the Gasoline and Shrimp/Turtle disputes. In the opinion of some commentators, these two cases and the

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[79] James Cameron, 'Dispute Settlement and Conflicting Trade and Environment Regimes', in Agata Fijalkowski and James Cameron, eds., *Trade and the Environment: Bridging the Gap*, (London: Cameron May Ltd., 1998), 16-26, at 16.

[80] James Cameron and Karen Campbell, 'Challenging the Boundaries of the DSU through Trade and Environment Disputes', in James Cameron and Karen Campbell, eds., *Dispute Resolution in the WTO*, *op. cit.*, 204-231, at 204; Beatrice Chaytor, *Reform of the WTO's Dispute Settlement Mechanism for Sustainable Development*, a WWF International Discussion Paper, July 1999, (Gland, Switzerland: WWF International, 1999), at 3.

Beef Hormone decision have, to a certain extent, optimistically changed the way an international trade institution resolves trade and environment disputes.[81]

### 3.3.2.1. The Gasoline Case

In the Gasoline case, Venezuela and Brazil challenged the United States' differential treatments on imported gasoline contrary to Art. III of GATT 1994 and Art. 2 of the TBT Agreement. As in the past, the United States relied upon Art. XX(b), (d) and (g) for its justifications of the measures in this dispute.

In 1990, an amendment to the Clean Air Act was introduced in the United States in order to reduce air pollution, resulting in the promulgation by the Environmental Protection Agency (EPA) of the Regulation of Fuels and Fuels Additives: Standards for Reformulated and Conventional Gasoline (the Gasoline Rule). The Rule focused on the composition and emission effects of gasoline. Accordingly, two types of gasoline could be sold in the United States, namely the "reformulated" gasoline and the "conventional" gasoline. The former type of gasoline could be sold in the most polluted areas of the United States only if a certain degree of cleanliness was met. The latter type could be sold elsewhere as long as such gasoline was no dirtier than the cleanliness level based on the year 1990. Persons affected by the new Gasoline Rule were all US gasoline refiners, blenders and importers. Moreover, the EPA had established two different sets of standards for baseline emissions. Firstly, it required domestic refiners who were in operation for at least six months in 1990 to formulate an "individual baseline", demonstrating their emissions in 1990.[82] For those who were not in operation as such, together with importers and blenders of gasoline, it was required that a "statutory baseline" was to be complied with. On the part of importers who were also refiners, they were further subject to the so-called "75 per cent rule", calling for a calculation of an individual baseline if 75 per cent or more of the refined gasoline were imported into the United States. On the basis that the statutory baseline was arguably more stringent than the individual baseline and importers of gasoline were subject to such requirement,

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[81] James Cameron and Karen Campbell, *supra*, note 80.

[82] There were three methods for establishing an individual baseline, ranging from the methods which required the most to the least precise data.

Venezuela contested that the US measures in this case had accorded less favourable treatment to importers.

Having failed to settle effectively during consultations, Venezuela requested the establishment of a panel from the DSB.[83] Brazil also joined in by way of Art. 9 of the DSU (the multiple complainants' provisions) on 31 May 1995. The panel found that the Gasoline Rule was inconsistent with Art. III and was not justifiable under Art. XX(b), (d) or (g). The United States later appealed to the Appellate Body who consequently found that the US Gasoline Rule fell within the parameter of Art. XX(g). But, it was found that the Gasoline Rule did not satisfy the requirements set forth in the chapeau.

First of all, the panel focused its analysis on the principal articles of GATT alleged to be in breach. The first provision to be examined was Art. III(4), i.e. the national treatment provision. With no difficulty, the panel had found that the Gasoline Rule was a law affecting internal sale, offering for sale, purchase, transportation, distribution or use of gasoline. Thus, the Gasoline Rule fell within the group of subjects that can be reviewed if it renders less favourable treatment to foreign like products. Then, the panel examined whether the domestic and imported gasoline were "like products" in the sense required under Art. III(4) of GATT. Additionally, once it was found that the products in question were "like", the next question to be asked was whether foreign products were treated in a less favourable fashion than the domestic counterparts. The panel in this case resorted to earlier practice of GATT. In particular, it made cross references to the 1970 Working Party report on Border Tax Adjustments[84] and the panel's decision in the Japan Alcohol case.[85] The criteria used were "product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality".[86] These criteria were applied by the panel in the Japan Alcohol case, i.e. "their similar properties, end-uses and usually uniform classification in tariff nomenclatures".[87] However, both of these reports had

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[83] The panel was established on 10 April 1995.

[84] Para 6.8 of the judgment. The Working Party Report on Border Tax Adjustments, L/3464, adopted on 2 December 1970, BISD 18S/97. (Hereinafter the *Working Party report*).

[85] Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34S/84 (Japan Alcohol case).

[86] Para. 18 of the *Working Party report.*

agreed that the determination of the "like products" were to be made on a case-by-case basis. While these criteria were applied in respect of Art. III(2) (Internal Tax Measures), the panel in the Gasoline case saw no reason not to apply them in the light of Art. III(4). Accordingly, the Gasoline panel noted that "chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable",[88] hence they were "like products".

As to whether the foreign gasoline was treated less favourably than domestic gasoline, the panel found that "under the baseline establishment methods, imported gasoline was effectively prevented from benefiting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer, imported gasoline was treated less favourably than domestic gasoline".[89] Having found that imported gasoline was accorded less favourable sales conditions than the domestic counterpart, the panel found that the US Gasoline Rule violated Art. III(4) of GATT.

Next, the panel examined the possibility of exemptions. The panel noted that in order for the United States successfully to invoke the so-called environmental exceptions, *viz.* Art. XX(b) and (g), it bore the burden to prove that its measures fell under at least one of those provisions. On top of this requirement, the panel noted that once the specific exception is satisfactorily proven, the conditions in the chapeau also had to be satisfied, hence the "two-tiered test".

On the whole, the United States, however, did not satisfy the tests laid down in the environmental exceptions as delineated earlier.[90] The panel, therefore, found that the US measures were neither necessary, as to satisfy the "necessity" test under Art. XX(b), nor "primarily aimed at" conservation of exhaustible natural resources required under Art. XX(g). In respect of Art. XX(b), although the Gasoline Rule was a policy within the range of Art. XX(b) exception, the Gasoline Rule had failed to satisfy the tests because, *inter alia*, the United States could not show that there were no other

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[87] Japan Alcohol case, para. 5.6 of the judgment.

[88] Para. 6.9 of the judgment.

[89] Para. 6.10 of the judgment.

[90] See section 3.3.1, *supra.*

measure consistent or less inconsistent with GATT in order to justify its differential treatment between the domestic and foreign gasolines. As for Art. XX(g) exception, since the panel could not see a direct connection between less favourable treatment of imported gasoline and the US environmental objectives, it therefore found that the US baseline establishment methods were not primarily aimed at the conservation of natural resources in the sense used in the Herring and Salmon case. Thus, it had failed to overcome the "relating to" test in Art. XX(g). As such, the panel did not even turn to consider either whether the US measure was "primarily aimed at rendering effective restrictions on domestic production or consumption" or the chapeau.

Upon an appeal against the panel's finding, the Appellate Body reconsidered the US Gasoline Rule and found, with the different reasoning, that it could be deemed consistent with Art. XX(g). No doubt, the Appellate Body's ruling on this issue was remarkable as, during the existence of GATT and the WTO, no measures had ever met conditions stipulated in Art. XX(g) before. The Appellate Body had noted a number of errors made in regard to the ruling on Art. XX(g) of the panel. Firstly, the Appellate Body corrected the panel's attempt to determine whether the less favourable treatment of the trade measure was primarily aimed at conservation of natural resources, showing that it ought to focus on whether the trade measure itself "related to" (hence primarily aimed at) conservation of exhaustible natural resources. Secondly, the Appellate Body did not agree with the panel that the "necessity" test applied under Art. XX(b) should also be relied upon in Art. XX(g). Thirdly, the panel had overlooked the rule of treaty interpretation specified in Art. 31(1) of the Vienna Convention.

Another significant element of this case is that it offered another opportunity for the chapeau to be re-examined. According to Charnovitz, this Appellate Body decision "marks the first time a trade panel has used the chapeau to rule that a national measure violates GATT rules".[91] It is worth noting that while the consideration of the chapeau was overlooked at the panel stage, the Appellate Body seemed to stress its importance. The Appellate Body has in effect affirmed the "two-tiered" test. Thus, the measure must pass the tests for specific exceptions in the first place then it has to pass the tests stipulated in the chapeau.

[91] Steve Charnovitz, 'New WTO Adjudication and Its Implications for the Environment', 19(19) *International Environment Reporter* (1996) 581, at 582.

Having decided that the chapeau governs the "manner in which the measure is applied" rather than the nature or contents of the measure *per se*, the Appellate Body had underscored that the chapeau's purpose was to "prevent abuse of the exceptions", not to "frustrate or defeat the legal obligations" under the GATT. In compliance with such a purpose, the measure "must be *applied reasonably*, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned". However, this interpretation of the Appellate Body was criticised as being unclear as to whether the Appellate Body intended this to be a new test, and what was meant by "legal duties".[92] But what was clear is that the Appellate Body had designated that burden to prove compliance with the chapeau on the party invoking the exception. And, according to the Appellate Body, this is a heavier burden to discharge than that required under, for example, Art. XX(g). The justification was given by the Appellate Body, relying heavily upon the interpretation of the Vienna Convention which articulates that interpretation must give meaning and effect to all the terms of a treaty. Therefore, "the provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred", as it would deprive the contents of the chapeau as well as the meaning of Art. XX sub-paragraphs.

The Appellate Body then examined specific requirements under the language of the chapeau, *viz.* arbitrary discrimination, unjustifiable discrimination, and disguised restriction on international trade. These three requirements, according to the Appellate Body, may be read "side-by-side". They also "impart meaning to one another". "Disguised restriction" on international trade was read by the Appellate Body as including disguised discrimination in international trade. Moreover, "concealed or unannounced" restriction or discrimination has been opined by the Appellate Body as not exhausting the meaning of the terms "disguised restriction" specified in the chapeau. But, what is more interesting is that the Appellate Body seemed to mix the meanings of disguised restriction, arbitrary discrimination and unjustifiable discrimination together without giving each any one its precise interpretation. The Appellate Body thus stated:

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[92] *Ibid.*, at 583.

> "We consider that disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.

The Appellate Body's statement above *prima facie* seems to suggest a wide coverage of measures which would not pass the tests under the chapeau. But, for the US statutory baseline requirement to overcome the test enshrined in the chapeau, firstly, it had to be imposed without differentiating between domestic and imported gasoline. Secondly, the US individual baseline scheme could be made applicable to both domestic and imported refiners. Indeed, had these things been done, the US gasoline rules would, no doubt, have satisfied the chapeau and would have been the first case which did not fall foul of the so-called environmental exceptions to GATT. Unfortunately, the United States gave reasons for not being able to follow the above pathways, relying heavily on physical and financial difficulties for not applying the statutory baselines to all gasoline. In addition, it justified its measure upon difficulties for not imposing a more stringent requirement on the foreign refiners due to foreign verification techniques and enforcement. These reasons unfortunately did not succeed in persuading the Appellate Body to uphold the US gasoline rules as consistent with GATT's environmental exceptions.

All in all, this decision can be seen to be broadening and narrowing the application of Art. XX at the same time. This is because as the panel's decision broadened the scope of the specific environmental exception, i.e. Art. XX(g), the Appellate Body has applied the chapeau more stringently.[93] In this way, it can be seen that a better trade and environment decision has been achieved since while the use of trade measures for environmental purposes are not narrowly delimited, the decision also shows that they have to be no hindrance to trade liberalisation. Thus, it brings satisfaction to both trade and environmental proponents. However, the ruling by the Appellate Body was open to criticism for its lack of clear guidance on the specific criteria imposed by the chapeau.

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[93] James Cameron and Karen Campbell, *supra*, note 80, at 211.

### 3.3.2.2. The Shrimp/Turtle Case

In the Shrimp/Turtle case,[94] with some factual resemblance to the Tuna/Dolphin I dispute discussed earlier, Thailand, India, Pakistan and Malaysia complained against Section 609 of the US Endangered Species Act (ESA), which allowed the imposition of an import ban on shrimp and shrimp products harvested in a manner by which sea turtles could be incidentally drowned. The applicability of this provision extended to both within and outside US territorial waters.

Chronologically, the case originated from the enactment of the Public Law 101-162 Section 609 on 21 November 1989. Since 1 May 1991, this law was applied to 14 countries in the wider Caribbean. Following the ruling in Earth Island Institute *v.* Christopher,[95] the effect of Section 609 was extended globally on 1 May 1996. Substantively, several elements were contained in Section 609. Firstly, Section 609(a) calls for co-operation with other governments to promote international protection of sea turtles. Under this provision, the State Department is required to negotiate with other governments agreements which require the utilisation of Turtle Excluder Devices (TEDs). A description of a TED was given in the panel report as "a grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net".[96] Under an amendment of the ESA in July 1987, a TED is to be used by all US shrimp harvesters. But, exceptions were allowed for vessels which retrieved trawls manually or trawled with techniques by which sea turtles were unlikely to be captured, or only trawled for a short time during each catch.

Secondly, Section 609(b) allows use of import restrictions on shrimp or shrimp products harvested in a manner that threatens the extinction of sea turtles. However, imports from harvesting nations were unaffected if a certification was granted by the President. This power, however, has now been delegated to the State Department. To

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[94] For comments on this case, see Charles Arden-Clarke, ed., *Dispute Settlement in the WTO: A Crisis for Sustainable Development*, Discussion Paper, May 1998, (Gland, Switzerland: WWF International, 1998); James Cameron and Karen Campbell, *supra*, note 80, at 212; Robert Howse, 'The Turtle Panel: Another Environmental Disaster in Geneva', 32(5) *Journal of World Trade* (1998) 73; David E. Kaczka, 'A Primer on the Shrimp-Sea Turtle Controversy', 6(2) *RECIEL* (1997) 171.

[95] 913 F. Supp. 559 (1995).

obtain the certification as such, the shrimp trawling nations must have adopted, firstly, a comparable regulatory programme, in line with the ESP, geared towards protection of sea turtles which can be endangered by trawling activities and, secondly, a comparable fleet average incidental take rate to US vessels. As an alternative, a certification could be obtained if the fishing environment of the trawling nations did not threaten sea turtles living therein. Imports of shrimp from uncertified nations, however, were not banned so long as the harvests of shrimp were carried out either by artisanal means or from aquaculture facilities.

The DSB established a panel in February 1997 after consultations with the United States, requested by India, Malaysia, Pakistan and Thailand, had failed to yield fruitful results. Interestingly, in the voluminous panel report, it can be seen that the United States did not contest its violation of Art. XI of GATT. But, it had largely channelled its defences on Art. XX(b) and (g). Accordingly, the United States argued, on the basis of Art. XX(b), that its import restrictions were justified because sea turtles were threatened with extinction and no other methods were more appropriate than the use of TED in order to safeguard against such extinction, hence making import restrictions "necessary". As for Art. XX(g), the United States claimed that sea turtles were "exhaustible natural resources" within the meaning previously accepted by panels, and its measures were "related to" their conservation. The report of the panel was delivered on 15 May 1998, in which the panel ruled that the import bans on shrimp and shrimp products of the United States were inconsistent with Art. XI(1) of GATT and could not be justified by means of Art. XX provisions. The United States appealed against this ruling. The final report of the Appellate Body was dispatched on 12 October 1998. In the Appellate Body report, it can be seen that the Appellate Body has significantly overturned the panel's reasoning despite reaching the same conclusion on the violation of GATT on the part of the United States. The departure of the Appellate Body in this instance is extremely important to the jurisprudential development of the trade and environment debate since the Appellate Body ruled, contrary to the panel, that the United States' *measure* to protect endangered sea turtles was consistent with Art. XX(g) of GATT while its *application* failed to satisfy the chapeau requirements. An analysis of the case will be provided below.

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[96] Paragraph II.15.

At the panel stage of the dispute settlement process, unlike the earlier practice, the focus of the dispute was placed upon an analysis of the language of the chapeau rather than the so-called environmental sub-sections of Art. XX.[97] Upon such analysis, the US measures were found to be "unjustified discrimination between countries where the same conditions prevail". The panel stressed:

> In our view, if an interpretation of the chapeau of Article XX were to be followed which would 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. (Emphasis added in the original.)

As the panel considered the US measures to be inconsistent with the chapeau, it felt no need to explore further Art. XX sub-sections, namely Art. XX(b) and (g).

Having lost at the panel stage, the United States then requested that the Appellate Body re-examine whether its measure constituted unjustifiable discrimination between countries where the same conditions prevail, hence, falling outside the coverage of Art. XX exception. The Appellate Body took a different approach. It criticised the panel for its failure to follow "customary rules of interpretation of public international law", as required by Art. 3(2) of the DSU.[98] The rule of interpretation under customary international law requires that ordinary meaning is given to the words in the treaty, read in their context or in the light of the purpose and object of such treaty. Thus, by citing the Gasoline case, the correct approach for interpreting Art. XX was to concentrate on the "manner" in which the measure has been applied rather than the "design of the measure". This was because the ordinary meaning and purpose of Art. XX called for an examination of the former, not the latter.[99] Moreover, the Appellate Body found that the panel had incorrectly looked into the object and purpose of the whole of GATT and the WTO Agreement rather than just the chapeau. The object and purpose of the former is very broad, in comparison to that of the latter. Accordingly, the

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[97] Para. 7.29 of the panel report.

[98] Para. 121 of the Appellate Body report.

[99] Para. 122 of the Appellate Body report.

panel found the measures which "undermine the WTO multilateral trading system" fell outside the "scope of measures permitted under the chapeau of Article XX".[100] As for the object and purpose of Art. XX chapeau, the Gasoline Appellate Body has underscored that the object and purpose is to prevent "abuse of the exceptions of Article XX". Hence, it provides a much narrower scope.

Accordingly, the Appellate Body has re-instated the two-tiered test as applied in the Gasoline case. Firstly, it is imperative to examine whether the measure falls within the sub-sections of Art. XX. If so, only then should the panel examine if the measure in question is applied in accordance with the chapeau requirements.[101] Based upon this test, the Appellate Body started examining whether the US bans in this case fell under Art. XX(g). The Appellate Body, in rejecting arguments by India, Pakistan, Thailand and Malaysia, ruled that "exhaustible natural resources" under Art. XX(g) covered both finite and non-finite resources, living and non-living.[102] The reason for this ruling was that the words of Art. XX(g) "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment".[103] The definition of "natural resources" is "evolutionary" and "not static".[104] Moreover, as all types of turtles in this dispute were listed under Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), it was therefore difficult to argue that they were not "exhaustible".

As for the "relating to" test enshrined in Art. XX(g), the Appellate Body followed the interpretation from the Gasoline case as meaning "primarily aimed at the conservation". Accordingly, the Appellate Body felt it necessary to examine if the Section 609 measure was administered in achieving its purported policy goal. Having

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[100] Para. 123 of the Appellate Body report.

[101] This is in a totally opposite direction to interpretation of the panel, who justified its own approach that "*as the conditions contained in the introductory provision supply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX*". (Emphasis added in the Appellate Body report, para. 124.)

[102] Para. 139 of the Appellate Body report.

[103] Para. 136 of the Appellate Body report.

[104] Para. 138 of the Appellate Body report.

examined this, the Appellate Body found that Section 609 satisfied the "relating to" test within the meaning of Art. XX(g). In the words of the Appellate Body:

> it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is obviously a close and real one...

Next, the Appellate Body looked at the "in conjunction with restrictions on domestic production or consumption" test under Art. XX(g). Again, relying upon the Appellate Body's interpretation in the Gasoline case which requires "even-handedness" in the imposition of restrictions, the Appellate Body in this case examined whether the shrimp caught by the US vessels were restricted in pursuant to Section 609 in the same way as other imported shrimp. It found that the US measure was applied even-handedly, i.e. applied to both US and foreign vessels, hence fell within the Art. XX(g) "in conjunction..." test.

Having examined the sub-paragraphs first, the Appellate Body then pursued an examination of the chapeau of Art. XX, i.e. the second tier of the test. This is because, as the Appellate Body stressed, although the measure provisionally was justified under Art. XX(g) it was not automatic that it would also be justified under the chapeau.[105] By recalling three inherent conditions which must be satisfied, *viz.* "arbitrary discrimination between countries where the same conditions prevail", "unjustifiable discrimination between countries where the same conditions prevail", and "a disguised restriction on international trade", the Appellate Body found the US measure to be inconsistent with these requirements, despite being found to be within the Art. XX(g) type of measure. This is because, firstly, while Section 609(a) directs the Secretary of State to negotiate bilateral or multilateral agreements for the protection of sea turtles, it did not do so. Secondly, having regarded sea turtles as highly migratory, concerted and co-operative efforts were indeed necessary. As the United States had only negotiated with some countries but none of the Appellees in this case, its act therefore was considered to be

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[105] Para. 157 of the Appellate Body report.

"discriminatory" and "unjustifiable". Moreover, the unjustifiable discrimination was also accentuated by the fact that the United States had accorded differential treatment for the implementation of its measure. A requirement of a four month period given to some and a period of three years given to others to implement the compulsory use of TED highlighted this fact. Indeed, the lesser the time, the more onerous it was to comply with the United States' requirement.

As for "arbitrary discrimination", Section 609 requires countries wanting a certification to adopt a comprehensive regulatory programme which bore the same conditions as the United States. By not taking into consideration the conditions already existing in the exporting countries, the Appellate Body therefore found the United States' rigidity and inflexibility to be arbitrary discrimination. The certification process of the United States was further observed by the Appellate Body to deny basic fairness and due process,[106] as there was no reviewing or appeal procedure for a denial of a certificate. Such a lack of procedural fairness and transparency led to the conclusion that the US measures was applied in an "arbitrary discriminatory" fashion. Having found the two foregone conditions to the contrary, the Appellate Body did not examine further the third condition, i.e. "disguised restriction on international trade".

On the whole, the ruling of the panel in this case has provoked much criticism, particularly from environmental supporters. According to some environmental critics, the panel "has failed to achieve such a balanced settlement. If adopted, the panel report would escalate existing conflicts between the WTO and domestic and international environmental law and policy".[107] What these critics are worried about is that the panel in the Shrimp/Turtle case has introduced "a new trade-based threshold test for the chapeau of Art. XX...[which] marks a new low-point in WTO dispute settlement".[108] The way the panel went about the tests in the chapeau has also illustrated a discernible departure from its previous practice. In that, the panel examined if the measures fulfilled the conditions in the chapeau before it examined the specific environmental exceptions themselves. By doing so, the panel has inadvertently put the overall aim and

[106] Para. 189 of the Appellate Body report.

[107] Matthew Stillwell and Charles Arden-Clarke, 'The WTO Shrimp-Turtle Ruling: International Trade versus the Global Environment', in Charles Arden-Clarke, ed., *Dispute Settlement in the WTO*, *op. cit.*, 2-5, at 2.

objective of the WTO Agreement above environmental protection, irrespective of its legitimacy.

Fortunately, the Appellate Body report, to a certain extent, has alleviated the damage - branded by the World Wide Fund for Nature International (WWF) as "a crisis for sustainable development" - created by the panel report. In particular, it has re-established the credentials of the WTO's dispute settlement regime in the realm of trade and environment. In the view of some critics, although the Appellate Body did not favour the environmental side of the issue, its finding in the Shrimp/Turtle case has arguably struck a good balance between the promotion of trade liberalisation and environmental protection. At the very least, this case has provided some encouraging indication that in some cases trade measures could justifiably be used for the protection of the environment - in this instance, the protection of endangered species. This ruling has also reaffirmed the fact, which the Director-General Ruggiero has reiterated from time to time, that the WTO does not inhibit its members from protecting their own environment as long as the trade liberalisation initiative is observed even-handedly.[109]

Apart from the foregoing, the Shrimp/Turtle case has also provided a good opportunity for clarifing some other side issues pertaining to the working of the WTO's DSB in trade and environment cases, *viz.* expert evidence, including scientific and technical submission, participation from NGOs and the relationship between GATT and international law.[110] First of all, as it was necessary to establish whether the harm to sea turtles justified the erection of a trade barrier, the role of scientific and technical experts was quite important. However, the panel in the Shrimp/Turtle dispute did not seem to go along this line of thought. As the panel ignored the examination of the environmental sub-sections of Art. XX, it therefore did not consider scientific and technical evidence. This is because to decide on the violation of the chapeau, which is more trade oriented than the sub-sections, it was not necessary to consider the scientific

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[108] *Ibid.*, at 3.

[109] See Renato Ruggiero, Director-General of the WTO, 'A Global System for the Next Fifty Years', a speech to the Royal Institute of International Affairs at the "Trade, Investment and the Environment Conference", Chatham House, 29-30 October 1998. He stressed that the Shrimp/Turtle Appeal was "the clearest sign yet that the world trading system is fully supportive of policies to protect endangered species or the environment" and that "the WTO is a strong institutional friend and supporter of the environment".

[110] See Matthew Stillwell and Charles Arden-Clarke, *supra*, note 107, at 4-5.

evidence. The panel was capable of deciding for themselves on the trade issue which is within their field of expertise. Likewise, the participation by NGOs in the dispute settlement process of the WTO was not wholeheartedly supported. In fact, the panel explicitly refused participation of NGOs by finding that non-requested information from non-governmental sources was incompatible with the provisions of the DSU. In this case, two submissions by the NGOs were made, firstly, by the Center for Marine Conservation and the Center for International Environmental Law on 28 July 1997 and, secondly, by the WWF on 16 September 1997.[111] The United States argued that, under Art. 13 of the DSU,[112] the panel was entitled to consult these two *amicus curiae* briefs. But, according to the panel, these documents were not intended to be relied upon because it did not specifically ask for them.[113] The issue of admission of NGOs' *amicus curiae* briefs was later appealed by the United States. At the Appellate Body stage, a different finding was given. The Appellate Body ruled that the entitlement of the panel to seek information from any relevant source or experts was "a grant of discretionary authority". Thus, a panel "is not duty-bound to seek information in each and every case or to consult particular experts" under Art. 13 of the DSU.[114] The Appellate Body has further stated "just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all". Implicitly, although this provides encouragement for environmental supporters to make their views heard during the WTO's dispute settlement process, it should not be forgotten that the extent of involvement of an NGO still largely rests upon the discretion of the panel. But, if more NGOs could make their views heard in the dispute settlement process, it should enhance the transparency of the WTO system.

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[111] The document was drafted on behalf of the WWF by James Cameron and Fiona Darroch, Foundation for International Environmental Law and Development (FIELD), London.

[112] Art. 13 of the DSU reads:

> (1) Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate...
>
> (2) Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter....

[113] Para. 3.129 of the panel report.

[114] Para. 107 of the Appellate Body report.

From the foregoing, it is not surprising that some commentators have labelled the WTO's dispute settlement process "incapable of settling trade disputes in a manner that supports sustainable development".[115] Even if the flaws at the panel stage have been remedied by the Appellate Body's efforts, the Appellate Body cannot be said to be conclusive in terms of providing guidance for the way trade and environment disputes are to be handled in the future, for it did not deal explicitly with the issue of PPMs which, in essence, was at the heart of the Shrimp/Turtle dispute.[116] Accordingly, it has been commented that it is not clear if this case has signalled a closer linkage between trade and environment.[117] Thus, it still remains to be seen how close the WTO's dispute settlement system has brought trade and environment closer to one another. That, of course, will depend on further clarification of some core issues of the trade and environment debate. But, as of now, the Shrimp/Turtle case has at least provided some encouragement to the way trade and environment disputes are resolved, especially from the environmentalist's point of view.[118] This is neatly summarised in para. 193 of the Appellate Body report which reads:

> In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should.

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[115] Matthew Stillwell and Charles Arden-Clarke, *supra*, note 107, at 5.

[116] See para. 128 of the Appellate Body report. In that paragraph the Appellate Body stated:

> conditioning access to a member's domestic market on whether exporting members comply with or adopt, a policy or policies unilaterally prescribed by the importing member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of [Art.] XX.

Although it can be seen that the Appellate Body did not deal with the PPMs issue explicitly here, it could be argued that a condition of market access based on the PPMs could be interpreted as falling within the Appellate Body's statement. The Appellate Body also did not rule out the possibility that an environmental policy based on the PPMs could be justified under Art. XX type of exception.

> [i]t is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Art. XX.

[117] See Prof. Dr. Thomas Cottier, 'Conflict Resolution in the Future', a paper presented at the "Trade, Investment and the Environment Conference", Chatham House, London, 29-30 October 1998, at 9.

[118] See 'Turtle Soup', *The Economist*, 17 October 1998, 124.

> And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do. (Emphasis added in the original.)

### 3.3.2.3. The Beef Hormone Case[119]

This was the very first opportunity for the DSB to address the application of the SPS Agreement. Initially, the dispute settlement process began with a consultation with the EU on 26 January 1996, from which no attainable compromises were achieved. Thus, on 25 April 1996, the United States requested the establishment of a panel under the WTO's dispute settlement regime. The panel was established on 20 May 1996, to determine whether or not the measure by the EU was incompatible with the SPS and other WTO agreements.[120] On 27 September 1996, Canada also requested the establishment of a panel for more or less the same issue. The panel was established on 16 October 1996.[121] The EU measure in this case was a ban imposed on trade in meat, including meat products, which had been treated with six growth-promoting hormones, both within the EU and with other countries. The hormones in this case include "natural" as well as "synthetic" hormones. The former encompasses oestradiol - 17ß, progesterone and testosterone. The latter encompasses trenbolone acetate, zeranol and melengestrol acetate (MGA).

The reasons for the ban were the fear that the hormone used in the production of meat might increase the chance of health risks such as cancer and reduction in male fertility. In effect, the EU exercised the precautionary approach which had been infused into its practice. Prior to the advent of this dispute, the diethylstilbestrol (DES)

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[119] See for commentary, Dale E. McNiel, 'The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban', 39 *Virginia Journal of International Law* (1998) 89; Vern R. Walker, 'Keeping the WTO from Becoming the "World Trans-science Organization": Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute', 31 *Cornell International Law Journal* (1998) 251.

[120] The dispute under the SPS Agreement can be resolved by the DSB as the SPS is one of the Covered agreements under the WTO Charter.

[121] See report of the panel, EC Measures Concerning Meat and Meat Products (Hormones) - Complaint by Canada, , 18 August 1997, WT/DS48/R/CAN.

hormone in meat production had been used in cattle production in order to enhance growth by speeding up muscle development and weight gain. Thus, the cattle would be ready to be marketed quicker than if they grew naturally.[122] In 1980, a scandal in Italy broke out in relation to the use of the DES hormone which had resulted in young children developing enlarged breasts. Since then the ban on meat treated with hormones was authorised in a series of European Council Directives, *viz.* Directive 81/602,[123] Directive 88/146[124] and Directive 88/299.[125] However, these three Directives were repealed and replaced from 1 July 1997 by Council Directive 96/22 of 29 April 1996.[126] The new Directive prohibits use of hormones for growth-promotion purposes. It also prohibits the placing on the market and importing of meat and meat products made from animals administered with hormones. But, it provides exceptions if hormones have been used for therapeutic and zootechnical purposes.

Against this backdrop, the United States contended that the EU ban was unfounded as there was no scientific evidence in its support. As a result, the ban on beef trade effectively acted as a barrier to trade.

On 30 June 1997, the panel delivered its final report to the parties in dispute, finding that the EU measure in this instance was inconsistent with the WTO's obligations. By and large, the reasons given by the panel were that: (i) the EU ban constituted a SPS measure; (ii) the ban was not based on a risk assessment, and thus violated Art. 5.1 of the SPS Agreement; (iii) the ban was not based on international

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[122] According to a 1987 study by the US Department of Agriculture (USDA), the hormone-treated animals grow approximately 15 per cent, or 17 days, faster than their untreated counterparts. This account was cited in Dale E. McNiel, *supra*, note 119, at 100.

[123] Council Directive 81/602/EEC of 31 July 1981, OJ 1981 L222, 32. This Directive prohibits, subject to exceptions, an administration of substances having either hormonal or thyrostatic action to farm animals. Additionally, the Directive prohibits marketing of meat and meat products produced from animals administered with such substances, whether they were domestic or imported. The exceptions are allowed when the hormones are used for therapeutic or zootechnical purposes and are administered by a veterinarian or under his/her responsibility.

[124] Council Directive 88/146/EEC of 7 March 1988, OJ 1988 L70, 16. Promulgated seven years later than the first Directive in the series, this Directive prohibits the administration of synthetic hormones for any purposes, and of natural hormones for growth promotion and fattening purposes. Trade, both intra-EC and importation into the EC, of meat and meat products made from animals administered with hormones is banned, except for therapeutic or zootechnical purposes.

[125] Council Directive 88/299/EEC of 17 May 1988, OJ 1988 L128, 36.

[126] OJ 1996 L125, 3.

standards and was more stringent without justification, and thereby violated Art. 3.1 of the SPS Agreement; and (iv) the EU ban was inconsistent with Art. 5.5 of the SPS Agreement for being arbitrary or having unjustifiable distinctions, in the appropriate level of sanitary protection, resulting in discrimination or a disguised restriction on international trade.

Upon such findings, the EU promptly appealed to the Appellate Body on the interpretation of the SPS Agreement, which delivered its report on 16 January 1998 upholding most of the panel's decisions and declaring the EU ban violated the WTO and the SPS rules while reversing the panel's finding that the EU ban was inconsistent with international standards and constituted arbitrary or unjustifiable distinctions in the appropriate level of sanitary protection resulting in discrimination or a disguised restriction on international trade. The reports will be discussed more substantially below.

To begin its analysis on the EU measure, the panel first examined the applicability of the SPS Agreement to the EU ban. As the measure in this dispute was found to be applied for the purpose of protecting human life or health from residues of hormones used in growth-promotion of cattle, it was not difficult therefore to find that the SPS Agreement was applicable in this dispute. This was because the SPS Agreement covers measures adopted in order to protect human or animal life from categories of risks specified in the Agreement.[127] A wide choice of measures for the sanitary protection was provided in the Agreement, one of which is a trade ban pursuant to the law and regulation of the member of the WTO. Thus, the ban pursuant to the EU Directive fell within the scope of what could be classified as the SPS measures, and hence fell under the ambit of the SPS Agreement.

However, as the SPS measure of the EU in this case had been adopted prior to the coming into force of the WTO Agreement, encompassing the SPS Agreement, the next issue examined by the panel was the retrospective application of the SPS Agreement. On this issue, the panel ruled that the SPS Agreement had a retrospective effect where the sanitary protection measure was already in use before the entry into

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[127] See footnote 47, *supra.*

force of the WTO and remained in force thereafter.[128] Therefore, the EU measure was found to be within the scope of the SPS Agreement.

Turning to the more substantive provisions of the SPS Agreement, the panel examined whether the EU ban was based on a risk assessment pursuant to the requirement in Art. 5.1 of the SPS Agreement. "Risk assessment" is defined in para. 4 of Annex A of the SPS Agreement as "the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs". Moreover, according to the panel, "risk assessment" was equated to "a *scientific* examination of data and factual studies, not a *policy* exercise involving social value judgments made by political bodies".[129] In any case, the panel interpreted the "risk assessment" as requiring a two-step test: (i) *identify the adverse effects* on human health (if any) arising from the presence of the hormones at issue when used as growth promoters *in meat*...; and (ii) if any such adverse effects exist, *evaluate* the *potential* or probability of occurrence of such effects". (Emphasis added in the Appellate Body report).

However, it is worth noting that the Appellate Body has pointed out that while the two-step test advocated by the panel was debatable, it did not consider the test to be "substantially wrong". It was more concerned about the alternative use of the words "probability" and "potential".[130] From the viewpoint of the Appellate Body, the ordinary meaning of these words conveyed a different connotation, as "probability" implied a higher degree of potentiality or possibility.[131] Unfortunately, the Appellate Body did not further clarify which terminology it preferred. Instead, it went on to state that what was required by "based on" a risk assessment under the SPS Agreement meant that "a panel has to determine whether an SPS measure is sufficiently supported or reasonably warranted by the risk assessment".

[128] Para. 8.27 of the panel report.

[129] Para. 181 of the Appellate Body report.

[130] Para. 184 of the Appellate Body report.

[131] Para. 184 of the Appellate Body report.

The key issues in the Appellate Body's interpretation lie in the meanings of "based on" and "risk assessment". In respect of the former, the panel interpreted it as requiring "a minimum procedural requirement", i.e. "the Member imposing a sanitary measure needs to submit evidence that at least it actually *took into account* a risk assessment when it enacted or maintained its sanitary measure". (Emphasis added in original.)[132] However, the Appellate Body interpreted the requirement of "based on" otherwise. It interpreted the phrase as referring to "a certain *objective relationship* between two elements, that is to say, to an *objective situation* that persists and is observable between an SPS measure and a risk assessment". (Emphasis added in original.)[133] Thus, the Appellate Body found the panel's interpretation to be unnecessary and an error in law, since the panel required a Member imposing an SPS measure to practically *carry out* a risk assessment while Art. 5.1, in fact, only requires that member to show the connection between the measure and a risk assessment without having to perform the risk assessment *per se*.

With regard to the latter, i.e. the "risk assessment", the risk to be assessed covers not only risk ascertainable in a science laboratory but also includes risk in human societies, i.e. "the actual potential for adverse effects on human health in the real world where people live and work and die."[134] Additionally, there needs to be a rational relationship between an SPS measure and a risk assessment,[135] whose determination could be carried out on a "case-to-case" basis. Having examined the issue, the panel found that several of the submitted scientific reports relied upon by the EU had met the requirement of a risk assessment, and all seemed to suggest that the use of hormones in this case was safe. As it could not be found that any risk assessment reasonably supported or warranted the ban, both the panel and the Appellate Body found that the ban was not based on a risk assessment. In effect, this was a violation of Art. 5.1 of the SPS Agreement.

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[132] Para. 188 of the Appellate Body report.

[133] Para. 189 of the Appellate Body report.

[134] Para. 187 of the Appellate Body report.

[135] Para. 193 of the Appellate Body report.

The next question was whether the EU ban was supported by scientific evidence and based on scientific principles as required by the SPS Agreement. On this point, the panel had found that the EU did not provide convincing evidence that its measure was scientifically justified as "[a]ll the evidence referred to by the [EU] which specifically relates to the use of the hormones at issue for growth promotion purposes concludes that the use of these hormones as growth promoters in accordance with good practice is safe".[136] This view of the panel was upheld by the Appellate Body.

The SPS Agreement in Art. 3 also requires that the SPS measure is to be based on existing international standards, guidelines or recommendations where they exist. The panel had found that the EU ban relating to the natural hormones was not so based because the EU sanitary measure differed significantly from the level of protection under international standards, in this case, the Codex Alimentarius Commission. Accordingly, the panel found the EU measure to be in violation of Art. 3.1 of the SPS Agreement.[137] However, the Appellate Body did not agree with the panel on this issue. It explained its contrary finding by suggesting that the panel had erroneously interpreted the requirement of "based on" international standards as meaning "conforming with" international standards, which signified "obligatory" force and effect. By interpreting as the panel had done, it would "transform those [international] standards, guidelines and recommendations into binding norms" which was not intended by the SPS Agreement.[138] Moreover, according to one writer, "based on" was chosen by the negotiators of the SPS Agreement to provide some leeway for disparate national standards.[139] The Appellate Body went on to state that a measure based on an international standard "may adopt some, not necessarily all, of the elements of the international standard".[140] Unfortunately, the Appellate Body did not pursue further examination whether the EU ban was in fact "based on" international standards in the sense given by itself.

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[136] Para. 8.137 of the panel report.

[137] Para. 8.77 of the panel report.

[138] Para. 165 of the Appellate Body report.

[139] Dale E. McNiel, *supra*, note 119, at 122.

[140] Para. 171 of the Appellate Body report.

The level of sanitary protection can be set, however, at a higher level than international standards subject to two qualifications, namely (i) the measure results in a higher than international standard of sanitary protection; and (ii) the higher level of protection can be justified scientifically or must follow from the choice of Member States for the appropriate level of protection determined in accordance with requirements in Art. 5 of the SPS Agreement, which *inter alia* includes a risk assessment.[141] In this case, the panel ruled that the ban, although argued to be appropriate for the EU, could not be qualified under this exception because the EU measure was found not to be based on risk assessment. The Appellate Body, in upholding this finding, dismissed the EU's appeal on this issue.

The next substantive issue is whether the EU has acted inconsistently with Art. 5.5 of the SPS Agreement by adopting arbitrary or unjustifiable distinctions in the level of protection resulting in discrimination or disguised restriction on international trade. The Appellate Body began its analysis by reading together Art. 5.5 with Art. 2.3 (the basic rights and obligations of the WTO Members). Within both of these articles the distinctions in the level of sanitary protection are not to be "arbitrary or unjustifiably discriminatory" and "applied in a manner which would constitute a disguised restriction on international trade". The Appellate Body has noted that the objective of Art. 5.5 is to achieve "consistency in the application of the concept of the appropriate level of sanitary or phytosanitary protection".[142] Thus, in order to examine whether Art. 5.5 has been violated, it is necessary to examine three inherent conditions, *viz.* that (i) the "Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations"; (ii) "those levels of protection exhibit arbitrary or unjustifiable differences in their treatment of different situations"; and (iii) "the arbitrary or unjustifiable differences result in discrimination or a disguised restriction on international trade".[143] These three conditions were considered cumulatively by the Appellate Body, thus all of these elements must be established prior to the finding of the Art. 5.5 violation.

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[141] For what "risk assessment" entails, see Art. 5(2) and (3) of the SPS Agreement, which *inter alia* includes taking into account relevant processes and production methods, ecological and environment conditions and economic factors.

[142] Para. 213 of the Appellate Body report.

[143] Para. 214 of the Appellate Body report.

For the first condition, in order to be able to determine whether the measure adopted would be appropriate in "different situations", there need to be some common elements for rendering possible a comparison. Having examined the EU measure in this dispute, five different levels of protection were found as follows:

(i) the level of protection in respect of natural hormones when used for growth promotion;

(ii) the level of protection in respect of natural hormones occurring endogenously in meat and other foods;

(iii) the level of protection in respect of natural hormones when used for therapeutic or zootechnical purposes;

(iv) the level of protection in respect of synthetic hormones (zeranol and trenbolone) when used for growth promotion; and

(v) the level of protection in respect of carbadox and olaquindox.[144]

Having found that several levels of protection existed for the purpose of comparison, it was not difficult to satisfy the first requirement of the test. The Appellate Body, therefore, could then proceed to an examination of the second prong of the test.

By comparing the levels of protection relating to hormones under the categories mentioned earlier, the panel found the difference in the levels of protection between the levels of protection of natural and synthetic hormones for growth-promoting purposes and between natural hormones for growth-promoting purposes and natural hormones occurred endogenously in meat and other foods to be "arbitrary and unjustifiable". This was because

> the [EU] had not provided any reason other than the difference between added hormones and hormones naturally occurring in meat and other foods that have formed part of the human diet for centuries, and had not

[144] Para. 218 of the Appellate Body report.

> submitted any evidence that the risk related to natural hormones used as growth promoters was higher than the risk related to endogenous hormones.[145]

However, the Appellate Body considered the contrary to be the case. By not having any regulation in place for the hormones occurring endogenously, the Appellate Body did not find such practice of the EU to be arbitrary or unjustifiable.

Because the Appellate Body found differently from the panel's finding, it went on to compare other levels of protection, while the panel did not, as it felt it unnecessary to do so. The Appellate Body, accordingly, compared the natural hormones used for promoting growth and for therapeutic and zootechnical purposes. Having examined the frequency and scale of the treatment and the mode of administration of such hormones, the Appellate Body came up with a conclusion that the difference in the levels of protection relating to these two types of hormones was not arbitrary or unjustifiable.[146] This was because the hormones for therapeutic and zootechnical purposes were used sparingly and could only be administered by a qualified veterinarian or under his/her responsibility. Hence, there was a clear difference between these two types of hormones.

In comparing the levels of protection of natural and synthetic hormones for promoting growth and carbadox and olaquindox,[147] the Appellate Body found the difference in their levels of protection to be unjustifiable[148] on the basis of seven reasons presented by the EC in its case.[149] For example, carbadox and olaquindox were argued to be anti-microbial agents, rather than hormones; carbadox and olaquindox were available commercially in prepared feedstuffs in certain dosages and less open to abuse than the growth-promoting hormones; and carbadox was only used in a very small amount and hardly leaves residues in pork meat.

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[145] Para. 220 of the Appellate Body report.

[146] Para. 225 of the Appellate Body report.

[147] Carbadox and olaquindox are "anti-microbial agents or compounds which are mixed with the feed given to piglets (maximum age of four months)". Para. 226 of the Appellate Body report.

[148] Para. 235 of the Appellate Body report.

[149] See para. 228-234 of the Appellate Body.

For the last requirement, i.e. "resulting in discrimination or a disguised restriction on international trade", the panel followed the Gasoline case by interpreting the terms "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction on international trade" side-by-side as they imparted meaning to one another.[150] As this test has to be performed on a case-by-case basis, in this instance, the panel found three reasons for the difference in the levels of protection concerning carbadox and olaquindox vis-à-vis growth-promoting hormones had resulted in discrimination or a disguised restriction on international trade. These are: (i) the "great difference" in the levels of protection between hormones; (ii) the absence of any plausible justification to support the difference between the levels of protection by the EU; and (iii) the import ban which, by its nature, restricted international trade. The panel further justified its finding, *inter alia*, by reading into the EU ban "*de facto* discrimination against imported beef produced with growth promotion hormones."[151] However, the Appellate Body found the finding of the panel to be "unjustified and erroneous as a matter of law", and reversed that finding accordingly as it could not share the same view with the panel that the import ban in beef treated with growth-promoting hormones was a disguised trade restriction.

It is worth noting too that another issue appealed by the EU was an allocation of the burden of proof in the SPS Agreement proceedings. The panel found that the "evidentiary burden" rested upon the member imposing the SPS measure. In other words, the burden to show consistency with the SPS Agreement rests with the defending party all the way through. However, the Appellate Body did not agree with this. Having established that the panel erred in its interpretation on this issue, it found that it was for the complaining party to establish a *prima facie* case of inconsistency with a provision of the SPS Agreement before the burden of showing consistency with that provision shifted to the defending party.

The findings of the WTO's dispute resolution body have led some writers to question the role played by the WTO. One writer has argued that the WTO should not become the "World Trans-Science Organization", as it has no authority to regulate the

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[150] See the Gasoline case, *supra*.

[151] Para. 243 of the Appellate Body report.

level of, and relating policies to, health and safety of its members.[152] Understandably, allowing the WTO to assume such a role would hinder the level of sovereignty accorded to each nation under international law in setting its own environmental policies. Although this seems to be the view taken by the panel in the Beef Hormone case, it can be seen from the Appellate Body's ruling that with respect to the SPS measure, the WTO at least is prepared to accept, subject to some prevailing conditions, the disparity between each government to set its own environmental standards. According to some commentators, the Appellate Body's clarification on this issue "opens the door to a better integration of trade and environmental policy".[153] Nonetheless, other writers argued that the panel and the Appellate Body have failed to deal effectively with the complex and difficult issues raised by the Beef Hormone dispute.[154]

On the whole, the Beef Hormone case can be considered as "a major decision in WTO jurisprudence with potentially widespread repercussions for environmental and public health policy in a number of areas".[155] In the light of growing concerns relating to modern health and safety issues, this case has indeed provided an important yardstick when the SPS measures are brought before the WTO's dispute settlement system.

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[152] Vern R. Walker, *supra*, note 119, at 255.

[153] James Cameron and Karen Campbell, *supra*, note 80, at 209.

[154] Dale E. McNiel, *supra*, note 119, at 93.

[155] Jake Caldwell, 'The WTO Beef Growth Hormone Ruling: An Analysis', in Charles Arden-Clarke, ed., *Dispute Settlement in the WTO*, *op. cit.*, 10-13, at 10.

# Chapter 4

# APEC: Trade and the Environment

In this chapter, an introduction to APEC will be given. It aims at providing readers who are not familiar with APEC with some background information. This chapter consists of three sections. Section one will briefly give an historical account of APEC and delineate the essence of APEC. Then, section two will discuss some of APEC's trade and environmental activities as carried out by APEC and its organs. In the last section, issues relating to trade and environment disputes will be examined in the context of APEC.

## 4.1. The Background of APEC

"APEC" is an acronym for the Asia-Pacific Economic Cooperation, comprising 21 member "economies" across the Pacific Ocean.[1] These are: Australia, Brunei, Canada, Chile, China, Taiwan, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, South Korea, Thailand, the United States and Vietnam.

Historically, APEC began as an informal discussion group whose aim was to foster regional economic co-operation among its members in the light of the growing economic interdependence around the world, especially in the Pacific Rim, and the fear that the Uruguay Round of Multilateral Trade Negotiations would not materialise. In November 1989, under the then Australian Prime Minister, Bob Hawke, APEC was formally inaugurated at a ministerial meeting, attended by 12 founding members. The three Chinese members joined APEC in 1991. Mexico and Papua New Guinea were admitted in 1993 and Chile joined the group in 1994. More recently, APEC's membership expanded to include Russia, Vietnam and Peru in 1998.[2]

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[1] It should be noted that the word "economies" is commonly used to represent members of APEC. This is because not all members of APEC are recognisable States under international law.

Since its inception, APEC has developed gradually. However, specific objectives of APEC were not developed until the materialisation of the Seoul Declaration in 1991.[3] Four main objectives were set out by this Declaration, which are: (i) to sustain the growth and development of the region for the common good and to contribute to the growth and development of the world economy; (ii) to enhance the positive gains from the increasing interdependence, by encouraging the free flow of goods, services, capital and technology; (iii) to develop and strengthen the open multilateral trading system in the interest of the Asia-Pacific members and all others; and (iv) to reduce barriers to trade in goods and services among members and in manners consistent with the General Agreement on Tariffs and Trade (GATT).

The Declaration further stipulates two co-operation methods for all APEC's activities, *viz.* the recognition of diversity in the members' economic development, social and political systems; and the need for open dialogue and consensus and respect for the views of all members.

In its early stages, APEC could only be seen as no more than a forum which provided an opportunity for APEC personnel to meet. But, gradually APEC has turned into something more than that, albeit lacking in concrete institutional structures and legal frameworks. The landmark event for APEC's development was the 1994 Bogor Meeting of APEC leaders which produced the Bogor Declaration of Common Resolve (hereinafter the "Bogor Declaration").[4] Despite only being a non-binding instrument, this Declaration is not only significant in setting a broad aim for APEC to pursue open trade by eliminating impediments to economic co-operation and integration, in my view it also marks the beginning of APEC's move into the 21st century. In doing so, the Bogor Declaration sets target dates for achieving free trade and investment in APEC by the year 2010 for developed members and 2020 for developing members. The Bogor

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[2] In addition, many other countries and economies have shown interest in joining APEC, such as India, Macau, Mongolia, Bangladesh, Sri Lanka, Ecuador, Panama and Columbia. See 'China Seeks Senior Status in APEC', *Asian Business Review*, June 1996, 8. However, APEC has been careful about admitting new members as it believes that too many members from diverse backgrounds may jeopardise the workability of APEC as a whole, particularly in the areas of trade liberalisation and facilitation.

[3] 1991 Seoul APEC Declaration, in APEC Secretariat, *Selected APEC Document 1989-1994*, (Singapore: APEC Secretariat, 1995), 61-64.

[4] The Bogor Declaration, 15 November 1994, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 5-8. See Appendix A.

Declaration has also paved the way for later initiatives to follow, notably the Osaka Action Agenda in 1995[5] and the Manila Action Plan for APEC (MAPA) in 1996.[6]

Over the years, APEC may be perceived as the world's most economically dynamic region. Its economic performance, both individually or as a group, has been astonishing. According to one of APEC's sources, in 1994 the 18 members of APEC had an aggregate Gross National Product (GDP) of US$ 13 trillion. This represented an approximation of half of the world's total annual output. In addition, about 46 percent of global trade in commodities originated from APEC members.[7] In 1995, the APEC's combined GDP rose to US$ 15.6 trillion, and it is believed to be continuously growing.[8] According to APEC officials, based upon 1997 figures, the inclusion of Russia, Vietnam and Peru at the meeting of APEC in 1998 was expected to produce a combined GDP of US$ 14 trillion, accounting for approximately 58 percent of world income and 47 percent of total world trade.[9]

The success of APEC is partly due to its composition of members. APEC encompasses three members of the G-7 nations: the United States, Canada and Japan; four "East Asian Tigers": Singapore, South Korea, Hong Kong and Taiwan; and a group of "Newly Industrialised Countries" (NICs), comprising Thailand, Malaysia and Indonesia. Unquestionably, several domestic economic and political reforms in these Asian members have, within the past decades, led to their magnificent economic growth. Most of them have even outperformed their European counterparts. China, in particular, has played an important role in APEC's economic windfall. China has already been placed as the third largest economy in the world, after the United States

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[5] The Osaka Action Agenda: Implementing of the Bogor Declaration, in APEC Secretariat, *Selected APEC Documents 1995*, (Singapore: APEC Secretariat, 1995), 5-123.

[6] Manila Action Plan for APEC, available from the APEC Secretariat in Singapore at http://www.apecsec.org.sg.

[7] APEC Secretariat, *Asia-Pacific Economic Cooperation (APEC)*, (Singapore: APEC Secretariat, 1996), at 1.

[8] André Dua and Daniel C. Esty, eds., *Sustaining the Asia Pacific Miracle: Environmental Protection and Economic Integration*, (Washington, DC: Institute for International Economics, 1997), at 13.

[9] Michael Richardson, 'Divided and Distracted, APEC Prepares to Meet', *International Herald Tribune*, 14-15 November 1998, at 1.

and Japan,[10] and with its continuing trade and investment reforms, in awaiting membership of the World Trade Organization (WTO), it has the potential to grow even more.[11]

Another reason for APEC's success is the way APEC has progressed pragmatically.[12] It has been argued that APEC has to be pragmatic because of its diversity. Such diversity can be seen in terms of culture, language, religion, politics and, most importantly, the level of economic development. Throughout the development of APEC, therefore, sensitive issues have normally been omitted from discussion, at least until such time as APEC feels ready to deal with the issue. For example, common economic interests have been identified by all members before any concrete work programmes are designed, as opposed to setting up an economic work agenda which some of the members have no capability to fulfil.

## 4.2. The Organisational Structure of APEC

Like other international organisations, APEC cannot operate without a necessary institutional infrastructure. In comparison to other existing regional institutions - like the European Union (EU), North American Free Trade Agreement (NAFTA) or Association of South-East Asian Nations (ASEAN) - APEC's organisational structure was loosely constituted.

Since its inception, the highest organ of APEC had been the *Ministerial Meetings*, usually from the ministry of trade or economy from each member of APEC. The meetings have been arranged annually, and alternately chaired by Asian and non-Asian member.

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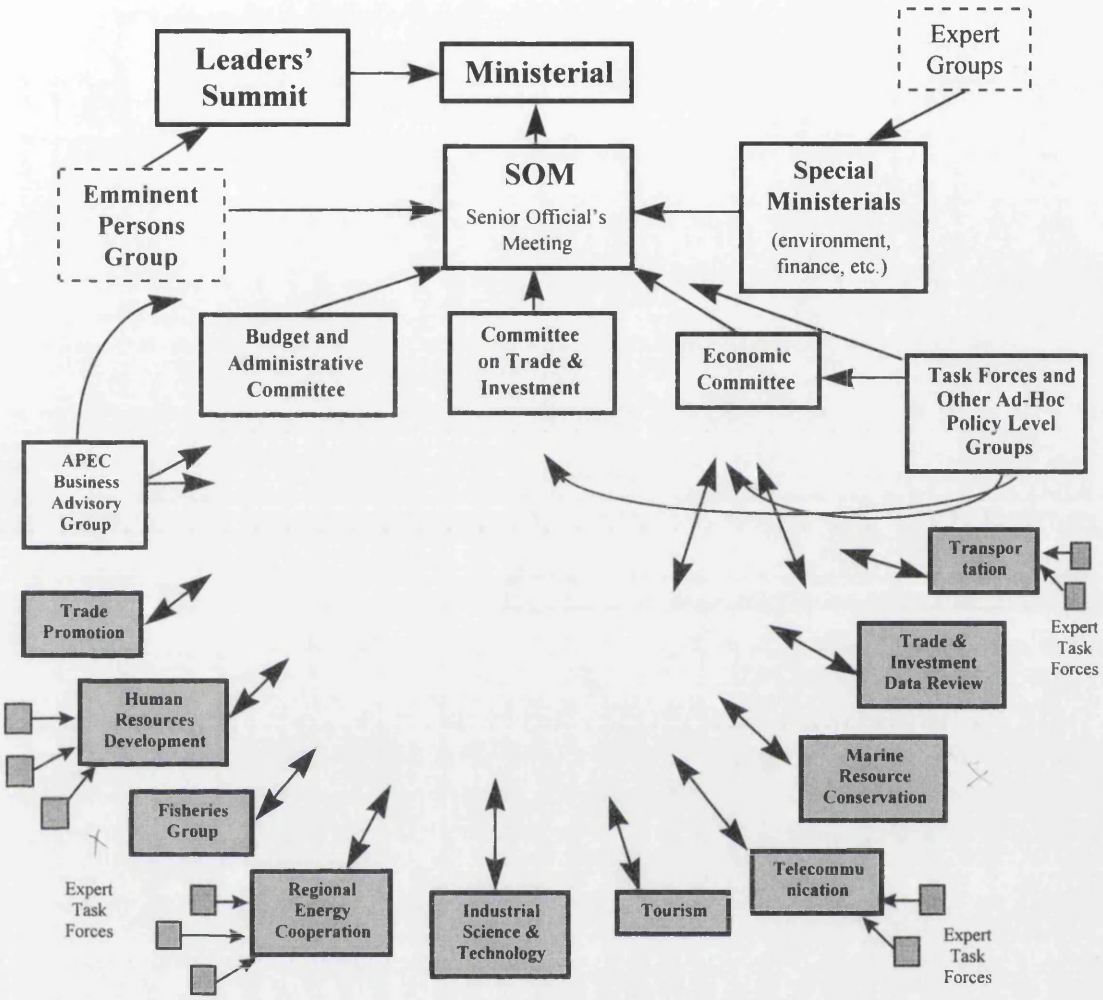
[10] See International Monetary Fund, *Staff Studies for the World Economic Outlook*, (Washington, DC: IMF, 1993); World Bank, *World Development Report*, (New York: Oxford University Press, 1993).

[11] See for a discussion on China and its trade liberalisation reforms, Yongzheng Yang, 'China's WTO Membership: What's at Stake?', 19 (6) *The World Economy* (1996) 661.

[12] See Hugh Corbet, 'Why and How the APEC Process is Working', 14(4) *Journal of Northeast Asian Studies* (1995) 4.

**Diagram C: APEC's Organisational Structure**




In 1993, the President of the United States, Bill Clinton, hosted an unprecedented informal meeting of leaders of APEC at Blake Island on 20 November. Since then, the so-called *Leaders' Summit* has been held immediately after each Ministerial Meeting. Over the history of APEC, the summits have been held in Seattle, United States (1993); Bogor, Indonesia (1994); Osaka, Japan (1995); Manila, the Philippines (1996); and Vancouver, Canada (1997). The 1998 summit was held in Kuala Lumpur, Malaysia. At the end of each summit, the leaders agree on an annual Declaration which sets out broad objectives and vision for APEC to follow. Significantly, what the leaders' summits have contributed to APEC is that they have

elevated APEC from meetings of economic bureaucrats to those of high-level political leaders.[13] Indirectly, this has heightened the recognition of APEC in the global arena.[14]

Policy goals will then be designated to senior officials to carry out. Normally, these senior officials are foreign or trade ministry bureaucrats, at the assistant secretary or vice-ministerial level. They meet regularly, approximately three to five times a year, at the *Senior Officials' Meeting* (SOM). Their tasks are to co-ordinate and oversee activities of APEC's committees and working groups, and carry out APEC's work in between the annual Ministerial Meetings and *ad hoc* special Ministerial Meetings. These special Ministerial Meetings were attended by ministers of APEC members specifically responsible, *inter alia*, for trade, environment, energy, finance, telecommunications, science and technology, and human resource development.

In 1992, a permanent *Secretariat* of APEC was established in Singapore by the Bangkok Declaration.[15] However, the Secretariat is very small and only modestly funded. It comprises an executive director, deputy executive director, eight to nine professional staff and just over a dozen supporting staff who are recruited locally. Despite its size, the Secretariat has played an important role in carrying out day-to-day work and co-ordinating all activities of APEC. It has been argued that because positions at the Secretariat are rotated quickly, this has caused difficulties and discontinuity in the operation of the Secretariat.[16] Nonetheless, the establishment of the permanent Secretariat has marked the turn of APEC from loose arrangements into a fully fledged international organisation.[17]

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[13] David K. Linnan, 'APEC Quo Vadis?', 89(4) *American Journal of International Law* (1995) 824, at 826.

[14] 'Assessing APEC', 21(6) *China Business Review* (1994) 6.

[15] Bangkok Declaration on Asia-Pacific Economic Cooperation (APEC) Institutional Arrangements, Bangkok, 10 September 1992, in APEC Secretariat, *Selected APEC Document 1989-1994*, *op. cit.*, 77-79.

[16] Dajin Peng, *The Rise of a Pacific Community? Evolution and Trends of Asia Pacific Economic Cooperation*, Ph.D. Thesis, the Woodrow Wilson School of Public and International Affairs, November 1995, at 263.

[17] Shaun Seow and Phua Kok Kim, 'APEC to Focus on Freer Trade for Region', *Straits Times*, 12 September 1992, 1.

Specific areas of APEC's activities have been carried out by three permanent Committees, *Ad hoc* Policy Level Group on Small and Medium Enterprises (SMEs),[18] and ten working groups. The three Committees are the Committee on Trade and Investment (CTI),[19] the Budget and Administrative Committee (BAC),[20] and the Economic Committee.[21] These committees are to report to the ministers through the SOM. They also represent key organs in carrying out key areas of APEC's activities. For example, the CTI is one of the key organs of APEC in assisting the implementation of trade liberalisation and facilitation components of the Osaka Action Agenda. As will be discussed in the next chapter, in relation to the dispute settlement aspect, the CTI has also been entrusted to develop a dispute settlement mechanism specifically designed for APEC. The Economic Committee's main task is to enhance APEC's capability for analysing economic trends and studying specific economic issues, especially cross-cutting issues. For example, in 1996 the Economic Committee specifically agreed a work plan which *inter alia* covers research on economic instruments for environmental protection under the economic and technical co-operation (ECOTECH) scheme.[22]

Ten working groups focus their work on specified areas as follows: fisheries, human resources development, industrial science and technology, marine resource conservation, regional energy co-operation, telecommunications, tourism, trade and investment data, trade promotion, and transportation. As will be seen later, relating to environmental protection, some of these working groups have already incorporated environmental considerations into their work programmes. However, it is still questionable whether such effort will be enough to protect the APEC's environment without establishing, for example, a separate environmental working group to oversee an overall implementation of environmental protection in APEC.

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[18] Established at the 1994 Ministerial Meeting in Jakarta, Indonesia.

[19] Established at the 1993 Ministerial Meeting in Seattle, United States.

[20] Established at the 1993 Ministerial Meeting in Seattle, United States.

[21] Established at the 1994 Ministerial Meeting in Jakarta, Indonesia.

[22] See for a summary of this work, David Black, *The Experience with Economic Instruments in APEC Economies*, paper presented at a Workshop on Economic Instruments Toward Sustainable Cities in APEC. (On file with author.)

Outside these APEC organs, there also exist a number of advisory groups: the APEC Business Advisory Council (ABAC), the Pacific Business Forum (PBF), and the Eminent Persons Group (EPG).[23] ABAC was established in November 1995 at the Ministerial Meeting in Osaka. Its purposes are to provide advice on the implementation of the Osaka Action Agenda and other specific business sector priorities. The PBF was set up in 1993 by APEC leaders in order to "identify issues APEC should address to facilitate regional trade and investment and encourage the further development of business networks throughout the region".[24] Out of these three, however, the most important advisory group is the EPG, which was set up by the ministers in 1992. This non-governmental think-tank group had played a significant role in developing and implementing a vision for APEC. Its reports have contributed towards the way APEC is heading, especially in the earlier stage of APEC's development.[25] However, the EPG was only an *ad hoc* advisory group and has ceased existence since 1995. It was not responsible for carrying out its recommendations. Thus, each APEC member remains responsible for carrying out its tasks. Currently, not only has the EPG been discontinued, the PBF has also been dissolved. Only the ABAC still remains operative and holds its periodic meetings.

From the brief description of APEC's organisational structure above, it can clearly be observed that at present there is no specific organ dealing with dispute resolution issues. Disputes between members of APEC have hitherto been resolved either bilaterally or in other fora. However, this may change in the near future as APEC is now in the process of developing its own dispute resolution mechanism.

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[23] See for further details in APEC Secretariat, *Asia-Pacific Economic Cooperation (APEC)*, *op. cit.*, at 4-5.

[24] APEC Leaders Economic Vision Statement, Blake Island, Seattle, 20 November 1993, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 1-3, at 2.

[25] The three reports produced by the EPG were: *A Vision for APEC: Towards an Asia-Pacific Economic Community* (1993), *Achieving the APEC Vision: Free and Open Trade in the Asia-Pacific Region* (1994), and *Implementing the APEC Vision* (1995).

## 4.3. Trade Liberalisation in APEC

Generally speaking, when one talks about trade liberalisation a concept of economic integration inevitably springs to mind. Throughout the history of APEC, the promotion of economic integration has been associated with the aim of APEC. At the very first meeting of APEC ministers in Canberra in 1989, the focus of the meeting was the call for support for a multilateral trading system, apart from the obvious purpose of establishing APEC itself. In particular, this meeting urged APEC members to promote the successful completion of the Uruguay Round of Multilateral Trade Negotiations.[26] The ministers strongly believed in all "open multilateral trading system" and they did not envisage that APEC "should be directed to the formation of a trading bloc". However, at this meeting it was not yet felt appropriate to discuss the issue of trade liberalisation.[27]

In July 1990, the ministers met again in Singapore. The focus of the meeting was still the push towards the conclusion of the Uruguay Round, for APEC ministers recognised that all countries depended on the open multilateral trading system.[28] With regard to the work on trade liberalisation, APEC ministers agreed that it would be "desirable to reduce barriers to trade in goods and services among [members], so long as such liberalisation was consistent with GATT principles and was not to the detriment of other parties".

At the third meeting in Seoul, in 1991, the ministers focused on finalising the structure of APEC. No substantial progress was reported in terms of trade liberalisation. However, one significant step was taken to further the trade liberalisation initiative, i.e. ministers adopted the Seoul Declaration. Apart from setting up goals for APEC, the Declaration also formulated a concept of "open regionalism", which has since remained the central philosophy of APEC.

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[26] See APEC Ministerial Meeting, Joint Statement, Canberra, Australia, 6-7 November 1989, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 35-36.

[27] Hugh Corbet, *supra*, note 12.

[28] See APEC Ministerial Meeting, Joint Statement, Singapore, 29-31 July 1990; also see APEC Declaration on the Uruguay Round, Singapore, 30 July 1990, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 47-52; and 53.

Unfortunately, the concept of open regionalism is by no means clear. However, a definition of open regionalism has been attempted by one economist. According to him, open regionalism is a "regional economic integration without discrimination against outsiders".[29] Thus, open regionalism seems to combine the concepts of "open trade" and "regionalism" together. Technically, the former, like GATT, allows all countries to share the same preferential treatments in trade that one country accords to another, whereas the latter tends to promote a limited circle of beneficiaries who may share trade advantages among themselves without extending them to others, hence encouraging protectionism. But, open regionalism seems to offer the best of both worlds. Thus, while APEC members advance trade preferential treatments to other members, they have to do the same for non-APEC members.

In words of C. Fred Bergsten, a chairman of the EPG, open regionalism represents:

> an effort to resolve one of the central problems of contemporary trade policy: how to achieve compatibility between the explosion of regional trading arrangements around the world and the global trading system as embodied in the [WTO]. The *concept seeks to ensure that regional agreements will in practice be building blocks for further global liberalization rather than stumbling blocks that deter such progress.*[30] (Emphasis added.)

In contrast to any other years in the history of APEC, the 1993 Ministerial Meeting in Seattle was followed by the unprecedented First APEC Leaders' Summit. This informal summit not only brought APEC leaders closer together,[31] according to one commentator, it also provided an opportunity for presidents and prime ministers of APEC members to agree on stalled trade and co-operation issues at other levels of the APEC's framework.[32] In the Leaders Economic Vision Statement, the leaders called for

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[29] Ross Garnaut, *Open Regionalism and Trade Liberalization: An Asia-Pacific Contribution to the World Trade System*, (Singapore: Institute of Southeast Asian Studies, 1996), at 1.

[30] C. Fred Bergsten, 'Open Regionalism', in C. Fred Bergsten, ed., *Whither APEC?: The Progress to Date and Agenda for the Future*, (Washington, DC: Institute for International Economics, 1997), 83-105, at 83.

[31] Particularly, this was the first time President Bill Clinton met with the Chinese President, Jiang Zemin, after the Tiananmen incident. However, the Prime Minister Mahatir Mohammed of Malaysia refused to attend.

[32] 'Forum for the Future', *Far Eastern Economic Review*, 27 November 1997, 39 at 44.

APEC members to "take concrete steps to produce the strongest possible outcome in Geneva",[33] i.e. to bring about a completion of the Uruguay Round. In addition, the leaders urged for strengthening liberalisation in regional trade and investment and facilitating regional co-operation.

Preceding the summit was the Fifth Ministerial Meeting. Specific reference must be made to the adoption of a Declaration on Asia-Pacific Economic Cooperation Trade and Investment Framework.[34] This is the first piece of concrete agreement of its kind. Its essence was to provide a framework designed to promote co-operative effort in liberalising trade and investment between APEC members. Institutionally, ministers agreed that the CTI was to be established to co-ordinate and oversee trade and investment liberalisation in APEC.

Up to 1994, trade liberalisation efforts in APEC had merely been rhetoric and did not substantially add to what APEC members had already been obliged to do under GATT. The main focus of the meetings seemed to be the promotion of the successful conclusion of the Uruguay Round. But, a dramatic step was taken by APEC at the Leaders' Summit in Bogor. As already mentioned, this summit produced the landmark Bogor Declaration, containing many important commitments to further trade liberalisation in the Asia-Pacific region. In the Declaration, the leaders pledge to reach free trade and investment in the Asia-Pacific by 2010 for developed members and 2020 for developing members.

Although the Bogor Declaration has set forth the free trade goals, it does not mean that APEC is to create another free trade area. Indeed, this has never been included in APEC's perspective. However, for some time there have been some debates as to whether a Pacific Free Trade Area is feasible.[35] Furthermore, there has been a fear that the phrase "free trade in the Asia-Pacific" would "set off alarm bells in

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[33] APEC Leaders Economic Vision Statement, *supra*, note 24.

[34] Declaration on an Asia-Pacific Economic Cooperation Trade and Investment Framework, Seattle, 19 November 1993, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 92-94.

[35] See Ross Garnaut, 'Option for Asia-Pacific Trade Liberalization: A Pacific Free Trade Area?'; and 'A Pacific Free Trade Area?', in Ross Garnaut, *Open Regionalism and Trade Liberalization*, *op. cit.*, 55-79; and 142-189.

capitals around the Pacific Rim".[36] Given that APEC has persistently maintained its commitment to open regionalism, it is unlikely that APEC will be transformed into a free trade area, like the EU or NAFTA. The possibility of creating an APEC free trade area is even dimmer given the fact that the United States does not want to commit itself to another binding free trade agreement, particularly with China and Japan, with whom it has constantly had uneasy relationships.[37]

Just as much as the Bogor Declaration was the landmark instrument for APEC, the Sixth Ministerial Meeting in Jakarta also marked a step forward for APEC. Unlike other previous encounters, it was the first meeting to which all 18 members sent ministers. With a view to furthering co-operation in APEC, the ministers agreed on Non-Binding Investment Principles.[38]

A year later, APEC moved on to an "action phase". The Ministerial Meeting in Osaka, Japan, in 1995, introduced the Osaka Action Agenda. The Agenda represents a blueprint for trade and investment liberalisation, facilitation and ECOTECH, which have since become three pillars of APEC's work. In the setting of the Osaka Action Agenda, trade liberalisation programmes were to be carried out upon nine principles, comprising: (i) comprehensiveness; (ii) consistency with the WTO; (iii) comparability; (iv) non-discrimination; (v) transparency; (vi) standstill; (vii) simultaneous start, continuous process and differentiated time tables; (viii) flexibility; and (ix) co-operation. Rather ambitiously, the starting date of trade liberalisation was set to be January 1997. For trade facilitation, the Osaka Action Agenda focuses, *inter alia*, on regulatory co-operation and harmonisation of existing various standards in APEC members. These trade and investment liberalisation and facilitation efforts are to be carried out on both individual and collective bases. As for ECOTECH, it is to be carried out upon the principles of: (i) mutual respect and equality; (ii) mutual benefit and assistance; (iii) constructive and genuine partnership; and (iv) consensus building.[39]

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[36] 'Assessing APEC', *supra*, note 14.

[37] Ross Garnaut, 'The Western Pacific Paradigm and the Singapore Ministerial Meeting of the WTO', in *Open Regionalism and Trade Liberalization, op. cit.*, 100-121, at 119.

[38] Non-Binding Investment Principles, Jakarta, 1994, in APEC Secretariat, *Selected APEC Documents 1989-1994, op. cit.*, 117-119.

[39] See further, APEC Secretariat, *The State of Economic and Technical Cooperation in APEC*, Report by the Economic Committee, November 1996, (Singapore: APEC Secretariat, 1996).

The main work programmes of ECOTECH target information exchange and capacity building.[40]

The Osaka Action Agenda was approved by the leaders at their summit held also in Osaka on 19 November 1995. The Economic Leaders' Declaration for Action reaffirms that:

> The Osaka Action Agenda is the template for future APEC work toward our common goals. It represents the three pillars of trade and investment liberalizations, their facilitation, and [ECOTECH]. Achieving sustained economic development throughout the APEC region depends on pursuing actions in each of these areas vigorously.[41]

An ambition envisaged in the Osaka Action Agenda was further elaborated in MAPA 1996, which was adopted at the Ministerial Meeting in Manila, the Philippines. MAPA contains action programmes for each member of APEC and APEC as a whole, *viz.* "individual action plan" and "collective action plan". [42] The former allows each member to set its own trade liberalisation programme, while the latter aims at the promotion of simplified customs procedures and lowering administrative obstacles to trade. MAPA also contains "joint activities" for ECOTECH whereunder more than 300 projects have been listed. To help implement ECOTECH, the ministers at the Manila meeting, also endorsed the Declaration on an APEC Framework for Strengthening Economic Cooperation and Development.[43] This framework serves as guidance for APEC members in implementing the ECOTECH scheme. According to a study carried out by the APEC Economic Committee, it has been projected that the successful

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[40] Thirteen work programmes have been set under ECOTECH as follows: trade and investment data, trade promotion, industrial science and technology, human resource development, energy, marine resource conservation, fisheries, telecommunications and information, transportation, tourism, small and medium enterprises, economic infrastructure, and agricultural technology,

[41] APEC Economic Leaders' Declaration for Action, Osaka, Japan, 19 November 1995, in APEC Secretariat, *Selected APEC Documents 1995*, *op. cit.*, 1-4, at 1.

[42] Fourteen areas were specified to be undertaken under individual and collective action plans: tariffs, non-tariff measures, services, investment, standards and conformance, customs procedures, intellectual property rights, competition policy, government procurement, deregulation, rules of origin, dispute mediation, mobility of business people, and implementation of the Uruguay Round outcomes. For the collective action plan, one more area has also been added, which is information gathering and analysis (groundwork).

[43] Excerpts reprinted in Donald C. Hellmann and Kenneth B. Pyle, *From APEC to Xanadu: Creating Available Community in the Post-war Pacific*, (Armonk, NY: M.E. Sharpe, 1997), 230-234.

implementation of MAPA would generate substantial benefits for APEC.[44] MAPA would raise exports by approximately 3.0 percent from APEC members and 1.8 percent from the world. About 0.4 percent or US$ 69 billion permanent increase in 1995 prices per annum of the real GDP of APEC members would also be raised.

MAPA was endorsed by APEC leaders at the Fourth Leaders' Summit, which was held immediately after the Ministerial Meeting, in Subic Bay, the Philippines, on 25 November 1996. Indeed, this has marked an "implementation phase" of APEC trade and investment liberalisation.

In 1997, the meetings of APEC leaders and ministers were held in Canada. The Vancouver meeting has proved to be something of a dilemma for APEC members. On the one hand, APEC has already entered into the implementation phase, requiring members to start liberalising as outlined in the Osaka Action Agenda and MAPA with a view to meeting the 2010/2020 free trade deadlines. On the other hand, nearly half of APEC members, especially those in the Eastern side of the Pacific, have suffered economic downturn as a result of the Asian financial crisis. Adding to the discussion for further trade liberalisation, facilitation and ECOTECH in APEC, the leaders were preoccupied by finding a common solution to ease the tension of such a crisis. Nonetheless, the Vancouver meetings have provided an opportunity for assessing the compliance of APEC members with MAPA.

Pertinent to the issue of liberalisation, the leaders endorsed in their APEC Economic Leaders Declaration that fifteen sectors, as referred to in the Ministerial Meeting Joint Statement, were to be liberalised upon an Early Voluntary Sectoral Liberalization (EVSL) basis.[45] Nine of them were to take effect throughout 1998 on the fast track, namely: environmental goods and services, fish and fish products, forest products, medical equipment and instruments, telecommunication mutual recognition arrangement, energy sector, toys, gems and jewellery, and chemicals. The rest would be implemented at the start of 1999. At the same meeting, the leaders also adopted a

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[44] See APEC Secretariat, *The Impact of Trade Liberalization in APEC*, Report by the Economic Committee, (Singapore: APEC Secretariat, 1997).

Blueprint for APEC Customs Modernization, seeking harmonisation and simplification of customs clearances by the year 2002. Although some of these works have already started, it remains to be seen, however, how far the APEC initiatives are carried out in due course given that Japan has been reluctant to liberalise its fisheries and forestry industries.[46]

In 1998, Malaysia was to host the APEC's annual meetings it its capital, Kuala Lumpur. Given the reluctance of Malaysia to participate in APEC right from the start,[47] it has performed its task rather well. Like other previous years, the focus of the meetings were trade and investment liberalisation. But the emphasis was more on the facilitation and implementation process. With the absence of the US President,[48] leaders and ministers from all APEC members were present at the 1998 meetings. Although the meetings were overshadowed by Malaysia's internal affairs regarding its high-level politicians, nevertheless the meetings produced, *inter alia*, the APEC Economic Leaders' Declaration: Strengthening the Foundations for Growth.[49] With regard to trade and investment liberalisation and facilitation, the ministers reaffirmed their commitment to continue the individual and collective actions in order to speed up the recovery from the financial crisis and to continue APEC's liberalisation goals.

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[45] See APEC Leaders Declaration: Connecting the APEC Community, Vancouver, Canada, 25 November 1997; and APEC Ministerial Meeting Joint Statement, 21-22 November 1997, available at http://www.apecsec.org.sg/minismtg/ mtgmin97.htm.

[46] 'Japan Calls on APEC to Focus on Asian Crisis', *Reuters*, 5 November 1998.

[47] From an APEC historical point of view, the Malaysian Prime Minister, Dr Mahathir Mohamad was not keen on the creation of APEC. He had preferred his proposition that the East Asian Economic Caucus (EAEC), which would not have included the United States in the group, be established. See for discussions of EAEC, for example, Paul J. Davidson, *The Legal Framework for International Economic Relations: ASEAN and Canada*, (Singapore: Institute of Southeast Asian Studies, 1997), 131-133.

[48] However, the Vice-President, Al Gore, attended in place of President Clinton.

[49] APEC Economic Leaders' Declaration: Strengthening the Foundations for Growth, Kuala Lumpur, Malaysia, 18 November 1998; available from the APEC Secretariat, at www.apecsec.org.sg/virtualib/ econlead/malaysia.html. In this Declaration, the leaders pledge to "work together to support an early and sustained recovery [of the financial crisis] in the region". Among other things, an emphasis was placed on "capacity building across the broad range of APEC activities, particularly the human resources development".

## 4.4. Environmental Co-operation in APEC

In contrast to an initiative to liberalise trade, environmental issues have only been modestly dealt with by APEC. However, as the concerns about protecting the environment increase, more environmental considerations have gradually been incorporated within APEC's wide range of activities.

There are some valid reasons why APEC should seriously consider environmental protection as part of their agenda. Firstly, APEC encompasses members who depend a great deal on natural resources, processed or unprocessed, for bringing capital to their economies. For example, Thailand is one of the main exporters of seafood products, Indonesia and Malaysia are the world's main exporters of timber. Many Asian members, in particular the Asian NICs, have adopted export-oriented trade policies in order to elevate their economic prosperity. It flows naturally that more natural resources have been exploited both for their own consumption and for export purposes. Without careful environmental management, these natural resources will be depleted and eventually exhausted.

Secondly, APEC is well endowed with natural resources. For example, APEC houses the largest tropical rainforests found outside the Amazon. Indonesia and Malaysia possess over two-thirds of the world's coral reefs, and a significant environmental heritage in biodiversity.[50] Compared to other regions, APEC has been blessed with natural gifts. It, therefore, should not neglect the preservation of its ecological inheritance for future generations.

Arguably, these reasons alone may adequately warrant APEC to take environmental protection seriously. But, further justification for the need for APEC's environmental agenda can be discerned from the fact that current environmental problems have a different magnitude. They can be of a national, regional or even global scale. Within the APEC context, members of APEC have already faced a wide range of

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[50] See Economic and Social Commission for Asia and the Pacific (ESCAP), *State of the Environment in Asia and the Pacific*, (Bangkok: ESCAP, 1995); United Nations Environment Programme (UNEP), *Asia-Pacific Environment Outlook*, (Bangkok: UNEP, 1997).

environmental problems.[51] At the national level, APEC members, especially the developing members, have *inter alia* encountered air and water pollution, deforestation, discharging of toxic chemicals, soil erosion, land degradation, and emission of toxic gases. Together with these problems, some APEC cities, like Bangkok and Jakarta, face challenges from urbanisation and poverty. Although not being environmental problems *per se*, these problems could exacerbate and accelerate existing environmental degradation.

On a regional scale, an acid rain problem is to be noted. Emissions of greenhouse gases, for example, have already caused concerns within the Asia-Pacific region. Currently, the largest emitter is the United States. But, it has been predicted that with the same pace as today's emission, China's emission level will be doubled in the year 2010.[52] In addition, over-fishing has recently become another aggravating environmental problem in the APEC region. Within APEC's geography, a large part constitutes oceans and seas. Seafood is widely consumed in the daily diet. Without careful management of commercial aquaculture, APEC's marine resources will be exhausted in the near future.

As for the global dimension, similar to other countries, APEC members currently face problems such as climate change, depletion of the ozone layer, and the loss of biodiversity. Although these issues have been discussed regularly in international fora and there have already been numerous international environmental agreements, APEC arguably still needs environmental co-operation in these areas. It can be discerned that at the moment international environmental problems are dealt with by fragmented international institutions. For instance, under the auspices of the United Nations (UN) alone, at least three agencies, in different headquarters, currently undertake works on environmental protection, namely: the UN Development

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[51] See for further discussions on APEC's environmental problems, André Dua and Daniel C. Esty, *op. cit.*, 33-55. Also see UNEP, *Asia-Pacific Environmental Outlook*, *op. cit.* For descriptions of environmental problems faced by Asian members of APEC, see ASEAN Secretariat, *First ASEAN State of the Environment Report*, (Jakarta: ASEAN Secretariat, 1997).

[52] See The World Resources Institute, *World Resources 1996-1997: The Urban Environment*, (Oxford: Oxford University Press, 1996), at 318, where the statistics of fifty countries with the highest industrial emissions of carbon dioxide in 1992 show that the total carbon dioxide emission levels are at 4,881,349 million metric tons for the United States, and at 2,667,982 million metric tons for China.

Programme, the UN Environment Programme, and the UN Commission on Sustainable Development. The flaws of international environmental institutions in co-ordinating environmental activities have arguably made it necessary for APEC members to co-ordinate their own environmental programmes. Being such a large conglomeration of economies from both sides of the world, APEC arguably could even serve as a substitute for a long-awaited global environmental organisation by setting common environmental strategies in response to the global environmental problems.[53]

Although environmental initiatives have gained more weight in APEC only recently, environmental considerations have, in fact, been incorporated into APEC as early as its inception in 1989. The Ministers at their founding meeting in Canberra noted the need

> to identify more clearly the scope to *extend cooperation in other areas, including, energy, resources, fisheries, the environment*, trade promotion and tourism and it was agreed that officials should carry forward preliminary work in other areas for consideration at future meeting.[54] (Emphasis added.)

The further environmental co-operation has been called for in the Seoul APEC Declaration 1991. But, the significant step forward for the environmental co-operation in APEC came in 1993, when the leaders agreed, as one of their initiatives, to develop APEC's policy dialogue and action plans for conserving energy, improving the environment and sustaining economic growth.[55] As noted by some commentators, "with the launching of the Sustainable Development Dialogue by APEC heads of state [at the summit in Blake Island], the environmental issues moved unmistakably onto APEC's radar screen".[56] Moreover, at this very summit, the Prime Minister Jean Chretien of Canada proposed that an Environmental Ministerial Meeting was to be held in Vancouver in 1994. In March 1994, the very first APEC Environmental Ministerial Meeting was accordingly held with success. This meeting has produced two milestone

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[53] André Dua and Daniel C. Esty, *op. cit.*, at 112-113.

[54] APEC Ministerial Meeting Joint Statement, Canberra, 6-7 November 1989, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, at 39.

[55] APEC Leaders Meeting, Initiatives, 20 November 1993, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, at 4.

documents, namely an APEC Environmental Vision Statement[57] and a Framework of Principles for Integrating Economy and the Environment in APEC.[58]

The APEC Environmental Vision Statement proclaims that there is an "inseparable linkage between environmental protection and economic growth to build an enduring foundation for sustainable development" in APEC. It also calls for environmental considerations to be integrated into activities of APEC at all levels. Unfortunately, this Vision Statement did nothing more than just set out broad guidelines for environmental co-operation in APEC.

The Framework of Principles for Integrating Economy and Environment in APEC, however, has gone a step further than the Vision Statement. It sets out nine principles in order to help the implementation of the Vision Statement, including: sustainable development, internalisation, science and research, technology transfer, precautionary principle, trade and environment, environmental education and information, financing for sustainable development, and the role of APEC.

Being only non-binding instruments, as are other APEC's instruments, there is no guarantee that all the promises of a grandiose nature contained in these two instruments will be fully implemented in reality.[59] Despite the scepticism, APEC's working groups have already started incorporating environmental concerns in their tasks. APEC at present has ten working groups. Not all working groups, however, are environmentally related. Those with some environmentally related activities are the

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[56] Lyuba Zarsky and Jason Hunter, 'Environmental Cooperation at APEC: The First Five Years', 6(3) *The Journal of Environment & Development* (1997) 222, at 237.

[57] APEC Environmental Vision Statement, Vancouver, Canada, 25 March 1994, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 133-134. See Appendix B.

[58] A Framework of Principles for Integrating the Economy and the Environment, Vancouver, Canada, 25 March 1994, (Singapore: APEC Secretariat, 1994), available from the APEC Secretariat in Singapore at http://www.apecsec.org.sg. See Appendix C.

[59] See Jennifer L. Haworth and Mark D. Nguyen, 'Law and Agreement in APEC', in Paul Davidson, ed., *Trading Arrangements in the Pacific Rim: ASEAN and APEC*, (New York: Oceana Publications Inc., 1997), 1-15, at 8, where the authors argued that although the non-binding nature of an agreement enhances flexibility and implementation, and especially well-suited APEC due to its multifarious diversity, some APEC members who are accustomed to a rule-oriented system are less likely to comply with non-binding commitments.

working groups on regional energy co-operation, marine resources conservation, human resources development, tourism, industrial science and technology, and fisheries.

First of all, the Regional Energy Cooperation Working Group was established in 1990. Its tasks are to identify institutional, regulatory, and procedural features affecting investment in energy infrastructure, and to develop a guiding framework to facilitate investment. Its work is aimed at improving environmental performance in the energy sector in order to promote cost effective and environmentally sound products, systems and technologies. So far, several information gathering and dissemination projects have been launched to assist its achievement.

Second, the Marine Resources Conservation Working Group was formed to promote initiatives to protect the marine resources and environment within APEC, and to ensure that the quality of the marine environment continues to yield in socio-economic benefits. So far, work has already been implemented for managing red tide and algal blooms in APEC's waters, and collecting information for coastal zone management.

Third, the Human Resources Development Working Group was created in 1990. It has adopted sustainable development as one of its cross cutting themes. The focus of this working group is to improve environmental understanding through arranged seminars, training, and educational programmes. In October 1996, also under a purview of the Human Resources Development Working Group, an APEC Sustainable Development Information and Training Network was created with a view to promoting domestic environmental management in industries, and enhancing the ability of environmental managers within the APEC region.

Fourth, the Tourism Working Group works towards achieving socio-environmental sustainability in the tourism industry. Among its work on promoting the tourism industry, through promoting human resource development and removal of trade barriers in the service sector, this working group has already conducted a study on eco-tourism management in order to balance the growth of the tourism industry and protection of the environment in APEC.

Fifth, the Industrial Science and Technology Working Group, established in 1990, has adopted a contribution to sustainable development as one of its areas of co-operation under the Osaka Action Agenda. Not much has yet been implemented, however, apart from arranging workshops focused, for example, on cleaner air technologies and monitoring the marine environment.

Sixth, the Fisheries Working Group was established in 1991 largely for the promotion of the conservation and sustainable use of fisheries resources. Some of its achievements to date include co-operation in fish harvest and post-harvest technology, projects related to market information and trade issues, and workshops on aquaculture and destructive fishing techniques.

By and large, it has been observed that although there seems to be plenty of environmentally related projects carried out by APEC's working groups, they are on a small scale and mostly *ad hoc*. In addition, most of them do not extend beyond capacity building.[60] To date, the work of APEC's working groups have thus only been modest and, according to one commentator, "delivered little of substance".[61]

Environmental activities have been taken to a new height by a new project, called Food, Energy, Environment, Economic Growth and Population, or, in short, FEEEP. FEEEP was first proposed by Prime Minister Murayama of Japan at the 1995 Leaders' Summit in Osaka. This sweeping action agenda is to be under the supervision of the Economic Committee. As the name suggests, FEEEP addresses five main areas pertinent to amelioration of major bottlenecks to sustainable development in APEC.[62] Unfortunately, while the prospect of FEEEP seems optimistic as an engine leading towards the long-term goal of sustainable development in APEC, it has been criticised by several commentators. For instance, one commentator has pointed out that "FEEEP

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[60] APEC Secretariat, *Evaluation of Economic and Technical Cooperation Programme*, as cited by André Dua and Daniel C. Esty, *op. cit.*, at 139. From an interview with the former Director of Sustainable Development of APEC, this comment can also be confirmed.

[61] Jason Hunter, 'FEEEP and the Future of ECOTECH', *Connectivity*, 10 September 1997, (Berkeley, USA: Nautilus Institute for Security and Sustainable Development, 1997), at 2.

[62] Ippei Yamazawa, 'How Should We Approach the FEEEP Issue?' in Shigeru Itoga, ed., *APEC: Cooperation for Sustainable Development*, (Tokyo: Institute of Developing Economies, 1998), 11-15, at 11.

had started off on the wrong foot" because it has an "un-funded mandate".[63] Like other APEC activities, the meagre funding undermines the good intention of APEC leaders and perhaps undermines the capability of APEC to take a lead on sustainable development issues. Other commentators have observed that although FEEEP covers "almost everything, [it] emphasises nothing".[64] Moreover, "limited political capital will be spread thin, making concrete progress on sustainable development unlikely".[65]

From these comments, it is discernible that APEC's FEEEP has been viewed pessimistically. Of course, there is a long way to go before FEEEP can yield fruitful results for APEC's sustainable development agenda. In the mean time, it is imperative that more understanding and precise action plans of its targeted areas and, most importantly, sufficient funds are provided. Given FEEEP is still in its early days, it is worth waiting to see if its contribution can really match up to its ambitious aims.

Adding to the pre-existing environmental co-operation in APEC, 1996 brought about another three important "action programmes" relating to advancing co-operation on sustainable development, namely: Sustainable Cities/Urban Management, Clean Production/Clean Technology, and Sustainability of the Marine Environment. These initiatives were laid out at the First Ministerial Meeting on Sustainable Development in Manila,[66] and were subsequently endorsed by the leaders at the Summit in Subic in November 1996. The follow up of the First Ministerial Meeting on Sustainable Development was held in Toronto, Canada, in June 1997.[67]

In substance, Sustainable Cities/Urban Management calls for pollution prevention and control, infrastructure development which is environmentally sustainable, and addresses poor urban settlements. In doing so, the ministers have

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[63] Jason Hunter, *supra*, note 61, at 5.

[64] André Dua and Daniel C. Esty, *op. cit.*, at 141.

[65] *Ibid.*

[66] See APEC Ministerial Meeting on Sustainable Development, Action Programme, Manila, Philippines, July 11-12, 1996, available from: http://www.apecsec.org.sg/minismtg/ mtgsdv96.htm.

[67] See further, Institute for International Sustainable Development (IISD), 'APEC Environment Ministerial Meeting on Sustainable Development, 9-11 June 1997: A Summary Report on the APEC Environment Ministerial Meeting on Sustainable Development', 6(3) *Sustainable Development* (1997).

supported the exchange of information, knowledge and experiences of APEC members as a primary machine.

While the previous programme was led by Canada and Japan, Australia, Taiwan and the United States were the three predominant members who put forward the work programme on Clean Production/Clean Technology in APEC's broad sustainable development agenda. This programme emphasises "making use of the technologies and practices that lead to cleaner production so that the APEC [members] can enjoy socio-economic development while preserving the environment for future generations".[68] In achieving this, members of APEC are, *inter alia*, to promote dissemination of clean technologies and experiences, share information on clean technologies and production policies through electronic means, promote use of ISO 14000, and provide training through the APEC Sustainable Development Training and Information Network.

The Sustainability of the Marine Environment programme has evolved under the Marine Resource Conservation Working Group. Its main focus is on integrated coastal management approaches, reduction and prevention of marine pollution and sustainable marine resources management. Measures employed to realise the goals are familiar: information sharing, training, exchange of knowledge, private-public partnership, and capacity building.

Unfortunately, like other APEC's work programmes, these action programmes on sustainable development have been criticised notably for setting ambitious plans with no implementation efforts. As some critics have succinctly put it, "there exists a serious incongruity between the APEC vision and its action programmes".[69] Indeed, this is perhaps due to the fact that there is only superficial co-operation among APEC members which undermines the construction of any concrete action plans.

In 1997, the Ministerial Meeting and the Leaders' Summit in Canada set high hopes for environmental movement in APEC's development. This may be because Canada has always been at the forefront of environmental protection initiatives, not only

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[68] APEC Ministerial Meeting on Sustainable Development, *supra*, note 66.

[69] André Dua and Daniel C. Esty, *op. cit.*, at 141.

in APEC but in general. As before, only modest results were achieved. Indeed, this is partly because the 1997 meetings were dominated by another pressing issue, i.e. the financial crisis in Asia. However, environmental issues were not altogether neglected. In their Declaration, the APEC leaders have laid out a "vision for the 21st Century" as follows:

> Intense growth in the economies of Asia-Pacific over the past decade has had far reaching impacts on our societies. Growth and employment, as well as improved incomes and quality of life, are welcome benefits. In all of our societies these positive outcomes have been accompanied by structural and *environmental pressures*. Globalization has emerged as a reality. Rapid urbanization and advances in information technology are transforming our cityscapes, as well as the way in which we interact. *Our ability to adapt to new developments will determine our success in achieving sustainable development among and within societies in the region.*[70] (Emphasis added.)

The leaders have further stressed that "achieving sustainable development remains at the heart of APEC's mandate". The leaders have also noted APEC's potential for addressing the issue of climate change. In addition, in the Vancouver Framework for Enhancing Public-Private Partnerships in Infrastructure Development,[71] the leaders called for public-private co-operation in order to meet, *inter alia*, environmental goals. At the ministerial level, an idea of establishing the APEC Environmental Protection Centre in China was also welcomed. As noted above, although some references to environmental issues were made at the 1997 meetings, neither specific nor realistic goals were set. The meetings have merely provided rhetoric reaffirmation of APEC's broad commitments to sustainable development. This trend was repeated at the 1998 meetings in Malaysia. The leaders have merely reiterated the significance and pledged the continuation of APEC's sustainable development agenda and FEEEP. They have also endorsed the APEC Framework for Capacity Building Initiatives on Emergency Preparedness, aiming at strengthening members' co-operative efforts in tackling natural disasters and emergencies. Apart from these efforts, nothing significant has materialised.

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[70] APEC Economic Leaders Declaration: Connecting the APEC Community, Vancouver, Canada, 25 November 1997, available at: http://www.apecsec.org.sg/econlead/vancouver.htm.

[71] The Vancouver Framework for Enhanced Public-Private Partnerships in Infrastructure Development, available on the internet at: http://www.apecsec.org.sg.

## 4.5. Trade and Environment in APEC

Addressing trade and environment problems are not easy. As one can see from Chapter 2, there are several interwoven issues associated with the trade and environment debate. APEC, with its economic dynamism and environmental problems, cannot avoid taking actions on trade and environment issues if it is to sustain its phenomenon.

In 1995, the World Wide Fund for Nature International (WWF) produced a discussion paper, *Trade and Environment in APEC: Avoiding Green Protectionism While Securing Sustainable Development*, as a suggestion of how APEC might accommodate environmental concerns in its trade agenda. It has concluded that "integration of trade and environmental policies in APEC has barely started, and is lagging behind the trade liberalisation process. Unless concrete actions for policy integration are taken now, trade liberalisation in APEC will not support sustainable development".[72] Although this observation was rightly made, given that APEC is comparatively young, *vis-à-vis* other regional or international organisations, and is still struggling to grapple with its trade liberalisation and other agenda, at least some credit must be given to APEC's attempt to deal with the complex trade and environment issues.

Historically, trade and environment issues are not new to APEC. Dating back to the Leaders' Summit at Blake Island in 1993, the leaders recognised the need to "protect the quality of our air, water, and green spaces, and manage our energy resources and renewable resources to ensure sustainable growth and provide a more secure future for our people".[73] Initially, this has provided a mandate for sustainable development for APEC members. This mandate has been taken further by the Bogor Declaration which stipulates:

> Our objective to intensify development cooperation among the community of Asia-Pacific economies will enable us to develop more effectively the human and natural resources of the Asia-Pacific region so

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[72] Charles Arden-Clarke, *Trade and Environment in APEC: Avoiding Green Protectionism While Securing Sustainable Development*, a WWF International Discussion Paper, (Gland, Switzerland: WWF International, 1995).

[73] APEC Leaders Economic Vision Statement, Blake Island., *supra*, note 24, at 2.

> as to attain sustainable growth and equitable development of APEC economies...
>
> Cooperative programmes in this area cover expanded human resource development (such as education and training and especially improving management and technical skills), the development of APEC study centres, cooperation in science and technology (including technology transfer), measures aimed at promoting small and medium scale enterprises and steps to improve economic infrastructure, such as energy, transportation, information, telecommunications and tourism. Effective cooperation will also be developed on environmental issues, with the aim of contributing to *sustainable development*. (Emphasis added.)[74]

In 1996, the leaders reaffirmed their "commitment to sustainable growth",[75] and the First Ministerial Meeting on Sustainable Development was held in Manila. More directly related to trade and environment issues, the pioneer on the issue was the EPG. In its first report, *A Vision for APEC: Towards an Asia-Pacific Economic Community*, the EPG recommends that:

> APEC members should *make sure that their trade and environment policies are mutually reinforcing*, and should endorse a commitment to GATT negotiations toward this end. In addition, the members should broaden their environmental consultations and coordination to focus efforts on standards, data, technologies, and regional approaches to these issues.[76] (Emphasis added.)

From a legal perspective, the 1994 Framework Principles for Integrating Economy and Environment in APEC proclaims as one of its principles that "[members] should support multilateral efforts to *make trade and environmental policies mutually supportive*, consistent with Principle 12 and other relevant principles of the Rio Declaration".[77] (Emphasis added.) To recall Principle 12 of the Rio Declaration, this principle advocates specifically that trade and environmental policies should be mutually supportive, trade measures for environmental purposes should not constitute

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[74] The Bogor Declaration, *supra*, note 4.

[75] APEC Leaders Economic Vision Statement: From Vision to Action, Subic Bay, the Philippines, (Singapore: APEC Secretariat, 1996).

[76] Executive Summary, EPG Report, *A Vision for APEC: Towards an Asia-Pacific Economic Community*, November 1993, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 9-14, at 13.

[77] Framework of Principles for Integrating Economy and Environment in APEC, Principle 6.

an arbitrary or disguised restriction on international trade, and unilateral trade measures for environmental purposes outside jurisdiction are to be avoided.[78] However, the legal status of the Framework Principles is rather weak as it is not legally binding. The Framework of Principles merely represents a moral commitment made by APEC members. The compliance of the principles is thus only guaranteed to the extent of the member's willingness to comply, a form of voluntary compliance. In relation to dispute resolution, although an APEC member cannot rely on the breach of these principles as a ground for initiating the dispute resolution process, these principles may however provide useful guidance on the direction in which the dispute should be decided.

From the above sections, it can be seen that the issues of trade and environment, taken together in a wider concept of sustainable development, have been well recognised in APEC. However, when taken separately the issues of trade liberalisation and environmental protection do not receive the same degree of attention. Thus, trade activities in APEC seem to have been given a higher priority than environmental protection.

### 4.5.1. Possible Trade and Environment Conflicts among APEC Members

Some writers have already observed that there are several implications of trade and environment issues on APEC. From their work, a general conclusion can be drawn that trade and environment issues must be addressed as soon as possible if APEC is to ensure its sustainable growth.[79]

Firstly, in APEC, members have already experienced trade and environment problems as a result of the use of trade-related environmental measures (TREMs). Within APEC itself, the use of TREMs, especially by the United States, has already caused several disputes among APEC members.[80] The US Superfund Tax and the

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[78] Principle 12 of the Rio Declaration, The Rio Declaration on Environment and Development, UN Doc. A/CONF. 151/5/Rev. 1, 13 June 1992; reprinted in 31 *ILM* (1992) 874.

[79] See, for example, André Dua, *APEC and Environmental Protection*, a paper prepared for Global Environment & Trade Study (GETS), 20 June 1996. (On file with author.) Also see Kym Anderson and Jane Drake-Brockman, *The Trade/Environment Debate and Its Implications for Asia-Pacific*, Policy Discussion Paper No. 94/23, Centre for International Economic Studies, November 1994, (Adelaide: University of Adelaide, Australia, 1994).

[80] See Appendix D for selected governing laws of TREMs in APEC member economies.

Marine Mammal Protection Act (MMPA), for example, have already been challenged before the GATT panels on the ground that they hindered trade by according discriminatory treatments to their domestic goods on an environmental basis. A number of Asian APEC members have been hard hit by the United States' trade measures. Evidence of the bans on China and Taiwan over trade in endangered species,[81] and on Thailand and Malaysia over imports of shrimps and shrimp products are but only a few examples.[82] In relation to other trading regimes, some APEC members, like Malaysia and Indonesia, have already been threatened by the Austrian measures on their timber exports.[83] Indeed, these disputes have not only caused economic loss, they have also caused political frictions.

Secondly, besides using TREMs on a unilateral basis, TREMs may be used pursuant to multilateral environmental agreements (MEAs). At present, nearly all current APEC members are signatories to the major MEAs discussed in Chapter 2, namely the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. (See Table 1.) Once ratified, each APEC member would have to implement these MEAs according to their needs, priorities and natural conditions. Therefore, the methods and measures of implementation could vary from one member to another. Such variation could result in the loss of competitiveness or the use of TREMs. Although it is less likely that the use of TREMs pursuant to these MEAs will be challenged, the possibility, however, cannot be ruled out.

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[81] See Wen-Chen Shih, 'Multilateralism and the Case of Taiwan in the Trade and Environment Nexus: the Potential Conflicts Between CITES and GATT/WTO', 30(3) *Journal of World Trade* (1996) 109.

[82] See for a discussion on the Shrimp/Turtle dispute in Chapter 3.

[83] See Brian F. Chase, 'Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development Under the GATT', 17 *Hastings International and Comparative Law Review* (1994) 349, at 374. In this dispute, the Austrian government introduced legislation in 1992 relating to timber imports in order to promote sustainable use of tropical forests in developing countries. The law requires use of "eco-tariff" on products which are composed of 8-70 percent of wood and mandatory "eco-labelling" to differentiate products made of woods harvested in sustainable *vis-à-vis* unsustainable fashion. Against these measures, Malaysia and Indonesia have threatened Austria, in retaliation, with trade sanctions against Austrian goods.

**Table 1: APEC Member Economies' Signatory Status in the Selected MEAs**

| Member Economy | CITES | Montreal Protocol | Basel Convention |
|---|---|---|---|
| Australia | x | x | x |
| Brunei | x | x | |
| Canada | x | x | x |
| Chile | x | x | x |
| China | x | x | x |
| Hong Kong | | | |
| Indonesia | x | x | |
| Japan | x | x | x |
| Korea | x | x | x |
| Malaysia | x | x | x |
| Mexico | x | x | x |
| New Zealand | x | x | x |
| Papua New Guinea | x | x | |
| Philippines | x | x | x |
| Singapore | x | x | |
| Taiwan | | | |
| Thailand | x | x | x |
| USA | x | x | x |

Sources: APEC Economic Committee, *Survey on Trade-Related Environmental Measures and Environment-Related Trade Measures in APEC*, (Singapore: APEC Secretariat, 1999); Mingsan Khawsa-aad and Pisamai Phurisinsitti Iamsakulrattana, *Trade VS Environmental Problems: From GATT to WTO*, (Bangkok: National Resources and Environment Division, Thailand Development Research Institute Foundation, 1997), (in Thai - *Garn Ka VS Punha Singwadlom: Jark GATT thung Ong-garn Ka Lok.*)

Note: The table is based on information before the three new APEC members were admitted.

Thirdly, in addition to the existing practice in the United States, other APEC members, have increasingly used eco-labelling schemes in order to promote "green products". (See Table 2.) The advantage of eco-labels is to provide consumers with environmental information so that they can make informed choices. But, eco-labels, as noted previously, can also create trade distortion. This is because if the consumer behaviour is influenced by the preference for environmentally friendly products, the competitiveness and market access of products which are not environmentally friendly will be affected. This is particularly so where eco-labels are mandatory, i.e. where the law requires a label to be obtained before a product can be brought into the market. In effect, the mandatory labelling schemes will prevent the sale of unlabelled products. So far, no mandatory eco-labelling schemes have been practised in APEC, most schemes existing in APEC are voluntary, i.e. labels are granted voluntarily by public or non-governmental bodies in order to raise consumers' environmental awareness. The effect of trade distortion created by such schemes, therefore, is not as serious as when the

mandatory labelling schemes are used. However, it should not be forgotten that different criteria in granting eco-labels may still cause discrimination between trading partners especially those who cannot satisfy the criteria.

**Table 2: Eco-labelling Schemes in Selected APEC Member Economies**

| APEC Member Economy | Eco-labelling Scheme |
|---|---|
| Australia | Environmental Choice |
| Canada | Environmental Choice Program |
| China | China Environmental Labelling |
| Hong Kong | Energy Efficiency Labelling |
| Japan | ECO Mark |
| Korea | ECO Mark |
| New Zealand | Environmental Choice |
| Singapore | Green Label Singapore |
| United States | Green Seal |

Source: APEC Economic Committee, *Survey on Trade-Related Environmental Measures and Environment-Related Trade Measures in APEC*, (Singapore: APEC Secretariat, 1999).

Fourthly, the use of environmental subsidies is also widespread in the APEC region as many members of APEC are developing countries who still rely heavily on the agricultural sector as their main breadwinner. Such environmental subsidies may distort the competition between agricultural goods from developing and developed members of APEC. So far, a number of APEC governments have granted subsidies in order to promote environmental protection. For example, Australia's Natural Resource Management (Financial Assistance) Act 1992 provides financial assistance for projects relating to soil conservation. China, as another example, has granted subsidy and favourable tax for environmental protection aiming at pollution reduction and cleaner production.[84]

Judging from the foregoing trend, there is a compelling reason to believe that trade and environment tension leading to the disputes among APEC members will continue. There are two ways to deal with the ongoing and future trade and environment problems in APEC. Firstly, APEC could consider formulating an APEC trade and environment policy and, secondly, APEC could deal with the trade and

[84] APEC Economic Committee, *Survey on Trade-Related Environmental Measures and Environment-Related Trade Measures in APEC*, (Singapore: APEC Secretariat, 1999), at 30-32.

environment problems through the dispute resolution process. These options will be discussed below.

### 4.5.2. APEC Trade and Environment Policy

Based on the foreseeable trade and environment tension as discussed in the preceding section, it would be in APEC's own interest if it seriously takes an initiative to formulate an APEC-wide trade and environment policy in order to prevent the conflicts between the trade and environment paradigms from arising, which may undermine economic and diplomatic relations between APEC members.

In order to create a successful trade and environment policy for APEC, it might be necessary for APEC to restructure its institutional arrangement and policy-making process. With regard to the institutional reform, APEC might consider establishing a trade and environment committee to oversee the work on trade and environment relationship, similar to the Committee on Trade and Environment of the WTO. Alternatively, APEC might establish an APEC Environmental Committee or an Environment Working Group.[85] The purposes for these environmental organs are, for example, to provide a discussion forum for APEC's trade and environment agenda; and to undertake a study on trade and environment issues and co-operate with various working groups of APEC on environmental issues. Moreover, it has been suggested that an APEC Environmental Advisory Committee, based on the model of ABAC, be created with a view to receiving input from NGOs, business community and other sources. This Advisory Committee, in turn, would provide advice to APEC leaders and ministers so that an appropriate trade and environment policy for APEC could be formulated.

As for the policy-making process, it is imperative that trade and environment issues must be addressed otherwise sustainable development would not be achieved by

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[85] An idea of establishing an APEC Environmental Committee, Environmental Working Group, or Environmental Eminent Persons' Group has already been proposed. Although it has been argued that there is some value in creating such an organ, it is unlikely to be forthcoming in the near future. See Daniel C. Esty, 'Trade and Environment in APEC', and Hideaki Shiroyama, 'Environmental Policy in APEC', in GETS and Global Industrial and Social Progress Research Institute, *Japan-United States Collaboration on Trade and the Environment*, Draft Final Report, February 1997, 87-102 and 104-120.

APEC.[86] As a starting point, Esty suggests that APEC should address the following three issues.[87] Firstly, APEC should base its trade and environment agenda on the concept of cost internalisation, based on the polluter-pays-principle. Secondly, APEC should reduce, and eventually eliminate, environmentally harmful subsidies with a view to curbing trade distortion. And, thirdly, APEC should focus on the prevention of the "race-to-the-bottom" so that an APEC member would not be encouraged to lower its environmental standards in order to increase its competitiveness. At the same time, an APEC member should not use its own environmental standards as a barrier to trade.

However, both institutional and policy reforms may pose some difficulties for APEC. This is because APEC does not see the necessity to create a separate organ for trade and environment issues. It is believed that trade and environment issues are sufficiently implemented through various APEC mechanisms. However, the lack of co-ordination and integrating institution might repeat the mistake that has been experienced by the fragmented United Nations system, resulting in an ineffective trade and environment agenda.[88]

From an administrative angle, however, it can be foreseen that the policy reform will pose more difficulties to APEC than the institutional reform. This is largely due to the fact that APEC is composed of members from diversified backgrounds. Within this largely diverse group, the interests of each APEC member are not always in line with one another. The experience of developing members, *vis-à-vis* developed members, in APEC tends to show that their priorities lie in economic development rather than in environmental protection. Additionally, different environmental policies and standards have been practised by different members of APEC. This makes the formulation of an APEC environmental standard extremely difficult. Thus, it may take a long time before a common trade and environment policy among APEC members can be negotiated.

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[86] Daniel C. Esty, 'Trade and Environment in APEC', *supra*, note 85.

[87] For more discussions on the reforms on APEC's trade and environment agenda, see Daniel C. Esty and André Dua, *op. cit.*, 145-168.

[88] See Chapter 2.

### 4.5.3. The Need for an APEC's Trade and Environment Dispute Resolution Mechanism

Given that many of the exports of APEC members, particularly the Asian member economies, are environmentally sensitive,[89] it is likely that trade and environment disputes will continue to arise among APEC members. Pending the development of a framework for APEC's trade and environment policy in order provide a long-term solution, if it would at all materialise, APEC would indeed benefit from establishing a mechanism for resolving trade and environment disputes in a mean time. Otherwise, such disputes might cause economic as well as ecological damages to APEC as a whole. As noted by Esty and Dua, there is a pressing need for the creation of the APEC's trade and environment dispute resolution mechanism as there are no fora which can resolve trade and environment disputes in the way that trade and environmental priorities are rightly balanced, even the WTO.[90] Moreover, the trade and environment disputes must be addressed by an environmentally sensitive dispute resolution mechanism in order to prevent ecological concerns and the trade-environment tension from undermining the APEC's regional economic relations.[91] Thus, the APEC's trade and environment dispute resolution mechanism should be established with a view to yielding a balance between trade and environmental interests as well as promoting sustainable development within the Asia-Pacific rim and APEC's integrity as a whole.

The creation of an APEC's own dispute resolution mechanism for trade and environment disputes will also have some collateral implications. Firstly, such a mechanism would especially benefit APEC members who are not yet members of the WTO, for example China, Russia and Vietnam, and whose exports are likely to be challenged on environmental grounds from the developed countries, like the United States, due to the lax environmental standards. Secondly, if the APEC's trade and environment dispute resolution mechanism could strike a trade-environment equilibrium during the dispute resolution process, it might well serve as a model for resolving trade

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[89] It is also worth noting that the goods currently under the EVSL scheme are prone to trade and environment disputes as they are in one way or another related to the environment.

[90] Daniel C. Esty and André Dua, *op. cit.*, at 163.

[91] Daniel C. Esty, 'Trade and Environment in APEC', *supra*, note 85, at 100.

and environment disputes for other regional or global dispute resolution mechanisms, as APEC represent a microcosm of the world.

The next chapter will examine whether or not APEC's dispute resolution mechanism could deal with trade and environment disputes in a balanced fashion and whether or not the creation of the APEC's trade and environment dispute resolution mechanism is possible.

# Chapter 5

## APEC Dispute Mediation Service and its Potential for Resolving Trade and Environment Disputes

Disputes between member governments can have a negative impact on the evolution of the Asia-Pacific Economic Cooperation (APEC) in promoting a free trade and investment environment. Not only can they impair the economic relationship between APEC members, they can also affect their diplomatic relations. But, worst of all, the friction between APEC member governments could ultimately jeopardise the APEC's integrity as an institution and its overall development process. It is necessary, therefore, that APEC create a dispute resolution mechanism in order to ease the conflicts between APEC members and to smooth the operation of APEC.

As discussed in the preceding chapter, trade and environment disputes have already become, and will continue to be, a cause for concern among APEC members. In order to prevent such disputes from harming the APEC progress, APEC needs to be able to address them in an appropriate manner. In other words, APEC must be able to strike a balance between trade and environmental priorities.

This chapter is aimed at providing an introduction to an APEC's dispute resolution mechanism - the Dispute Mediation Service (DMS) - and assessing its potential to resolve trade and environment disputes among APEC member governments. It will be divided into seven sections. The first section will briefly discuss the genesis of the DMS. In the second section, a discussion on the mediation technique of dispute resolution will be given. The purposes of this section are to shed light on what mediation entails, and to review advantages and disadvantages of resolving a dispute by mediation. The APEC's DMS will be examined in detail in section three. Issues which will be discussed include the nature of the DMS, its scope and procedures. The fourth section will discuss some reasons why mediation would work for resolving disputes between APEC members.

Section five will examine how mediation might help resolve trade and environment disputes among APEC members in the balanced fashion, based on some legal and institutional considerations. Section six will posit that the DMS could also be used before the trade and environment conflict escalated into a full-blown dispute, a form of "dispute avoidance". To illustrate how the DMS could be used as a dispute avoidance mechanism, the Shrimp/Turtle dispute will be used as a case study for the reasons that the dispute directly involved some of the present members of APEC: Thailand and Malaysia as complainants, and the United States as a respondent; and the case represents a classic scenario of the trade and environment dispute, i.e. trade bans were used to prohibit imports of unenvironmentally friendly products. The last section will address the relationship between the APEC's DMS and the dispute settlement regime of the World Trade Organization (WTO). By drawing an analogy from APEC's promise to conduct its trade liberalisation programme in the manner consistent with the General Agreement on Tariffs and Trade (GATT), this study posits that the DMS of APEC should also operate coherently with the WTO's dispute settlement system with a view to fostering the intricate relationship between regionalism and multilateralism.

## 5.1. The Genesis of the DMS

At the moment, APEC does not have enforcement mechanisms in the form of legal instruments. The presence of a dispute resolution mechanism in APEC could potentially ameliorate or at least ease the tension of disputes, especially before they escalate into a matter for the WTO.[1] For instance, this would prove useful for tensions between the United States and Japan on the automobile industry, the United States and China on intellectual property rights, labour issues and human rights, and the United States and Thailand on environmental protection. Another reason why the dispute resolution mechanism is potentially essential for APEC is that Western companies who invest in the Asia-Pacific region have a growing interest in an effective international commercial dispute resolution as a means to enhance the trade and investment environment.[2]

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[1] Somkiat Tangkijvanich, *Dispute Mediation,* a paper prepared for the roundtable seminar on "Trade Facilitation: Implications an Opportunities of Trade Liberalization of APEC towards Thailand", 19 September 1997, Asia Hotel, Bangkok, Thailand. (In Thai.) (On file with author.)

Due to its diversity, APEC has found it difficult to formulate its own dispute settlement mechanism.[3] The principal division lies between the two so-called "camps", *viz.* the Asian members who prefer an informal style of dispute settlement and the Western members who prefer a formal adjudicatory approach like that of the WTO.[4] Despite such conflicting viewpoints, it seems that members of APEC have agreed to adopt the formulation of a dispute resolution mechanism in the form of a dispute mediation service - the DMS.

Although the DMS was not mentioned until 1994, the work on the DMS in fact started in 1993 by the Eminent Persons Group (EPG) of APEC. In its report, *A Vision for APEC*, the EPG recognises that "APEC could provide a valuable forum for consultations to improve the dispute settlement process".[5] The EPG further notes: "It is essential to ensure that disputes are settled quickly, fairly and without introducing needless uncertainties into regional trade".[6] Together with the weaknesses of the GATT's dispute settlement system, the EPG proposed that APEC's own dispute settlement mechanism be established in order to handle regional disputes. At this stage, there was no mention of the form in which the APEC's dispute settlement mechanism would take shape, hence the DMS was not mentioned. There was even a consideration that the APEC's mechanism should be built on the model of either the present dispute settlement mechanism of the WTO, the US-Canada Free Trade Agreement, or the North American Free Trade Agreement. However, the EPG did recognise that mediation could be a vital approach for resolving disputes between APEC members.[7]

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[2] Brendan P. McGivern, Introductory Note to APEC Dispute Mediation Experts' Group Reports on a Voluntary Consultative Dispute Mediation Service, Vancouver, 17-18 June 1995, 35 *ILM* (1996) 1102.

[3] See James Cameron and Tanya White, 'Dispute Mediation in APEC: Bridging the Legal and Cultural Gaps', in GETS and Global Industrial and Social Progress Research Institute, *Japan-United States Collaboration on Trade and the Environment*, Draft Final Report, February 1997, 122-148. (On file with author.)

[4] *Ibid.*, at 126.

[5] APEC Secretariat, *A Vision for APEC: Towards an Asia Pacific Economic Community*, Report of the Eminent Persons Group, (Singapore: APEC Secretariat, 1993), at 39.

[6] *Ibid.*

[7] APEC Secretariat, *A Vision for APEC*, *op. cit.*, at 40.

A year later, it became clear that the DMS was to be a chosen choice of mechanism for resolving disputes between APEC members. In its 1994 report, *Achieving the APEC Vision*, the EPG makes a remark as follows:

> we believe that bilateral disputes of the intensity of the recent past could threaten the positive evolution of the community of Asia-Pacific economies. Conversely, the evolution of that community requires it to provide additional avenues that can help to resolve economic disputes among its members. Combining these needs with the objective realities of the region, we believe that APEC should develop a *dispute mediation mechanism that emphasizes mediation rather than arbitration.* Hence, we recommend that APEC create a [DMS] that would provide assistance in resolving economic disputes among its members.[8] (Emphasis added.)

The need to create the DMS has also been reiterated by the APEC leaders in November 1994. In their annual declaration, the leaders stated:

> Trade and other economic disputes among APEC [members] have negative implications for the implementation of agreed cooperative arrangements as well as for the spirit of cooperation. To assist in resolving such disputes and in avoiding [their] recurrence, we *agree to examine the possibility of a voluntary consultative dispute mediation service.*[9] (Emphasis added.)

As the EPG ceased in 1995, the work on the DMS has since been continued by the Dispute Mediation Expert's Group (DMEG) under the auspices of the APEC Committee on Trade and Investment (CTI). The first chairman of DMEG is Jonathan Fried, the Director General for Trade Policy at the Canadian Department of Foreign Affairs and International Trade. Up to the time of writing, DMEG has had four meetings. The first meeting was in Vancouver, Canada, on 17-18 June 1995; the second meeting was in Singapore, on 22-23 April 1996; the third meeting was also in Singapore, on 21-22 April 1997; and the fourth meeting was held in Bangkok, Thailand, in April 1998. The next meeting was expected to be held in Singapore in April 1999.

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[8] APEC Secretariat, *Achieving the APEC Vision: Free and Open Trade in the Asia Pacific*, Second Report of the Eminent Persons Group, (Singapore: APEC Secretariat, 1994), at 23.

[9] The Bogor Declaration, 15 November 1994, in APEC Secretariat, *Selected APEC Documents 1989-1994*, *op. cit.*, 5-8.

DMEG is composed of government delegates, representing each member of APEC, from different ministries responsible for trade and investment dispute resolution. In the case of Thailand, for example, delegates to the DMEG meetings are from the Ministry of Justice and the legal division of the Ministry of Foreign Affairs. The meeting is chaired by the Chairperson of DMEG with an assistance from the Director for Dispute Mediation Service programme of APEC. The work of DMEG so far includes: periodic reviews of the DMS progress; and organisations of symposia and seminars on the subjects relating to dispute resolution.

Before the DMS will be discussed in more detail, a brief discussion on the theoretical basis of mediation will be provided with a view to providing some general understanding of the nature of mediation.

## 5.2. The Theoretical Basis of Mediation

### 5.2.1. The Fundamentals

Mediation is a form of alternative dispute resolution (ADR) which has been practised around the world for some years.[10] It can be seen as a "facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed solution of their dispute".[11] The goal of mediation is to achieve an outcome which provides a compromise between the needs of the disputing parties. According to Prof Lon Fuller, the central quality of mediation is "its capacity to reorient the parties toward each other, not only by imposing rules on them, but by helping them to achieve a new and shared perception of their attitudes and dispositions toward one another".[12] A third party mediator's role in the mediation

[10] ADR can be defined as "a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party"; see Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice*, 2nd edition, (London: Sweet & Maxwell, 1999), at 12. However, ADR may be given a wider definition which also includes inter-party negotiations; see for example, Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, (London: Butterworths, 1998). Hence, ADR covers a wide range of non-judicial dispute resolution techniques, comprising both non-adjudicatory and adjudicatory processes, which include negotiations, mediations and arbitration.

[11] Henry J. Brown and Arthur L. Marriott, *op. cit.*, at 127.

[12] Lon Fuller, 'Mediation - Its Forms and Functions', 44 *Southern California Law Review* (1971) 305.

process is to facilitate the parties to reach their own solution. Thus, mediation can be seen as a hy-brid of negotiation and arbitration. The former is a process of communication between disputing parties which involves an exchange of information in order to find a common understanding or joint decision-making.[13] The latter is a kind of dispute resolution which involves a participation of a third party acting as an umpire in the process, who will decide the outcome on behalf of the disputing parties.[14]

Most mediation is voluntary. It is up to the disputing parties to agree among themselves to resolve their dispute by mediation. However, in some cases mediation is mandatory, thus parties have no choice but to enter into the mediation process. In addition, it is not uncommon to find modern contractual agreements requiring an attempt to resolve the dispute by mediation before other means. It must be noted, however, that in either of these types of mediation, it is still the parties who control the proceedings. The mandatory mediation could only compel the parties to a negotiating table, but could not compel them to negotiate.[15]

The process of mediation can be divided into several stages, a variation of which depends on each case. Moreover, different persons may divide the stages of mediation differently but in all cases three common stages may be determined: before mediation, during mediation and after mediation.[16] In each of these stages, there are various steps which may further be identified. However, any identification may not be said to be definitive as it can vary from one case to another, but some essential steps of the mediation process may be identified as guidance below. (See Table 3.)

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[13] For a general discussion on negotiation, see Michael Palmer and Simon Roberts, *op. cit.*, 63-100; P.H. Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective*, (New York: Academic Press, Inc., 1979).

[14] For a general discussion on arbitration, see Michael Palmer and Simon Roberts, *op. cit.*, 212-222.

[15] Henry J. Brown and Arthur L. Marriott, *op. cit.*, at 136.

[16] *Ibid.*, 154-188.

**Table 3: Stages and Steps of the Mediation Process**

| Stages | Steps |
|---|---|
| Before Mediation | ■ Engaging the parties in the mediation forum<br>■ Obtaining commitment and agreeing mediation rules<br>■ Preliminary communications and preparation |
| During Mediation | ■ Establishing the venue and meeting the parties<br>■ Establishing the issues and setting the agenda<br>■ Information gathering<br>■ Managing and facilitating discussions and negotiations<br>■ Employing impasse strategies |
| After Mediation | ■ Concluding the mediation and recording the outcome<br>■ Post termination |

Source: Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice*, 2nd edition, (London: Sweet & Maxwell, 1999), 154-155.

In recent years, mediation has been used as an alternative to the court proceedings in a number of areas including international affairs, family matters, commercial disputes, labour issues and environmental disputes.[17] The success of mediation can be attributable to several factors. The main ones, however, are the parties themselves, the mediator and the issue at hand. These issues will be explored in detail below.

#### 5.2.1.1. The Parties

In mediation, the focus lies in bringing the disputing parties to a solution which can be accepted by both sides with the assistance of a third party mediator. The key players in the mediation process therefore are the parties themselves. A large part of whether a mediation will produce some fruitful results rests upon the disputants' willingness to negotiate a compromise. As the basis of mediation is consensus-finding, there needs to be a presupposition of willingness of the parties before the mediation process can even

[17] See Henry J. Brown and Arthur L. Marriott, *op. cit.*, 131-135. For the use of mediation in international affairs, see J.G. Merrills, *International Dispute Settlement*, 3rd edition, (Cambridge: Cambridge University Press, 1998), 27-43.

be contemplated as a way of resolving their dispute otherwise the exercise of mediation would fail even before it started.[18]

Once the mediation process starts, it is up to the parties to clarify some administrative matters such as the rules and procedures to be used for their case, the venue and the time-frame for mediation. It is also up to the parties to try to co-operate with the mediator and each other in order to find a solution which every party can support. After all, it is up to the parties themselves who retain control over the possibility of settlement and the terms upon which the outcome is agreed. In practice, other factors may have some important influence on the position of the party to compromise, for example the bargaining position of the party, the relationship between the parties and the interest of each party. These factors could indeed make consensus-finding somewhat difficult. Nevertheless, as long as the parties are willing to subject their dispute to mediation and are ready to find a consensual outcome, there is a good chance that a compromise may be forthcoming.

#### 5.2.1.2. The Mediator

The second most important player in the mediation process is a mediator whose intervention transforms a dyad of a dispute into a triadic interaction. A skilled mediator plays a very important part in helping disputants successfully reach their own solution. According to Fuller, a skilful mediator can speed up the negotiations between the parties, reduce the likelihood of miscalculation and help the parties reach a sounder solution.[19] In principle, a mediator plays the role of a facilitator in the mediation process, rather than an adjudicator as in the case of arbitration. As such, he is not empowered to pass a judgment or give a decision that binds the parties in the dispute.[20] However, the degree of intervention of a mediator may vary from case to case which

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[18] John Harrison, 'Environmental Mediation: The Ethical and Constitutional Dimension', 9 *Journal of Environmental Law* (1997) 79, at 81.

[19] Lon Fuller, *supra*, note 12.

[20] P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 209.

opens the door for various categorisation.[21] Some of the categories will be discussed below.

(i) *Passive and Active Mediator*

In the "passive role" the mediator only exercises his skills in order to help parties communicate to one another and encourage the process of information exchange between them. The mediator may just sit quietly in the mediation process and allow his presence to assert some pressure on the parties to "observe minimal courtesy to each other, to reduce personal invective, and to listen and respond with some relevance".[22] The philosophy behind this observation has been noted by Rehmus: "A wise mediator once said that the mere presence of an outsider in collective bargaining negotiations, regardless of anything he says or does, brings about a change in the behavior of the parties at the bargaining table".[23]

Alternatively, the mediator may act as a go-between who relays a message of one party to another. This role is particularly significant where the parties are distant from one another. During the mediation process, the mediator's role extends to the creation of a general ambience, both conducive to and supportive of negotiations.[24] According to Palmer and Roberts, this could be achieved by ensuring that parties acknowledge and adhere to some basic ground rules such as some normative understandings about the conditions of exchange.[25]

Once the communication starts, the mediator should make sure that the viewpoints of each party are clearly articulated and heard by the other party. Should the mediation proceed smoothly and there is a possibility that a solution may be reached, the

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[21] Gulliver, for example, has differentiated the role played by a mediator as follows: virtually passive, chairman, enunciator, prompter, leader and arbitrator. See P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 220-228. Another author has divided the role of mediator into evaluative and facilitative. See Leonard Riskin, 'Mediator Orientations, Strategies and Techniques', 12(9) *Alternatives* (1994) 111, at 111-113.

[22] P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 221.

[23] C. M. Rehmus, 'The Mediation of Industrial Conflict', 9 *Journal of Conflict Resolution* (1965) 118, as quoted in P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 221.

[24] Michael Palmer and Simon Roberts, *op. cit.*, at 117.

[25] *Ibid.*

mediator should make sure that the parties understand what options are available to themselves and their implications on each other's situation.

However, in some circumstances a mediator may be required to take more responsibility which extends his role beyond a mere facilitator, hence an "active" role. In this case, the mediator may act as a chairman during the mediation process, keeping order and directing the mediation process. He may repeat the points made by the parties, emphasise them and direct the parties as to whether those issues should be continued or discarded from the negotiation. The mediator may also make some administrative decisions, such as the venue and time of mediation. In some circumstances, the mediator may be required to remind the parties on the norms and rules pertinent to the case or even give his or her own opinions and recommendations to the parties where the impasses cannot be broken. It is worth noting, however, that in any case the mediator does not have to limit his capacity to just one role.[26] The mediator may strategically change his role to suit the changing circumstances or his own personality and tactics. Flexibility is therefore a vital attribute of a successful mediator.

In an extreme case, a mediator may assume the role of an active arbitrator. The method of dispute resolution which includes a transition from mediation to arbitration is commonly termed "med-arb", an abbreviated form of "mediation-arbitration".[27] Having originated in America, the rationale behind the change of the role by the mediator is that the dispute can be settled by arbitration rather than mediation. But, instead of initiating an entirely new process, the parties may continue their case in a different mode by the mediator's role change. The med-arb approach could therefore be distinguished from mediation which is followed by a separate process of arbitration. This is because the arbitrator in the med-arb method is the same person as the mediator whereas the arbitrator in the separate process is another person altogether.

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[26] P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 226.

[27] For a general discussion on med-arb, see Alexander H. Bevan, *Alternative Dispute Resolution: A Lawyer's Guide to Mediation and Other Forms of Dispute Resolution*, (London: Sweet & Maxwell, 1992), 8-10.

One clear advantage of the med-arb transformation is that the parties will save time and costs. As argued by Brown and Marriott, such transformation is to be agreed at the very beginning of the dispute resolution process, hence before mediation is attempted. This is to prevent a later confusion regarding the format of the mediation process and the role of the mediator.

However, the med-arb process could raise some important considerations which might offset its positive value. Firstly, having known the fact that the dispute resolution process would change from the mediation to arbitration mode, should the former fail, might inhibit effective negotiation between the parties. The parties may be reluctant to disclose certain information which they would like to be kept confidential.[28] Secondly, from the mediator's perspective, a question may be raised as to whether the mediator can use prejudicial information which he has learnt from the mediation stage against the party during the arbitration process. The dilemma which the med-arbitrator has to face could prevent him from performing his role effectively both as a mediator and arbitrator. However, two suggestions have been made in response to this situation. First, a "med-arb-opt-out" process may be used. This process allows the parties to make a choice if they want the mediator to continue as an arbitrator. Secondly, the parties may choose to follow a "mediator-advisor" model, proposed by Brett and Golberg.[29] In this model, where the parties cannot agree on a solution a mediator will provide an advise, as if he is an arbitrator, in the form of a non-binding decision. If the parties choose to proceed with arbitration, they will have to employ someone else as an arbitrator.

(ii) *Disinterested, Interested and Intermediate Mediator*

A mediator can be a "disinterested", "interested" or "intermediate" party to the dispute.[30] The "disinterested" mediator is a mediator who "is not directly related to either disputing parties and his own interests are not directly touched by the dispute or by possible outcomes".[31] He may be chosen because of his acknowledged prestige

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[28] Henry J. Brown and Arthur L. Marriott, *op. cit.*, at 147.

[29] See *ibid.*, at 148.

[30] P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 214.

[31] *Ibid.*

status in the community. The "interested" mediator, by contrast, is a mediator whose "own interests make them concerned with the resolution of particular issues in dispute and with the disputants themselves".[32] The mediator who is categorised as "intermediate" is a mediator who is "more or less equally linked to both" parties in the dispute, for example he may have a political or economic tie with both parties.[33] In this situation, the mediator is accepted by both parties due to his connection with both parties. A mediator may accept to mediate because his interests might be affected by the disputes. This is particularly so where all three parties belong to the same group of network.

(iii) *Non-partisan vs. Partisan Mediator*

Theoretically, a mediator should act in a "non-partisan" role. In the non-partisan role, as defined by Simmel, the mediator is supposed to stand outside the parties' interests or is equally concerned with the interests of both parties.[34] In other words, the mediator acts neutrally in this situation. The mediator who acts in a partisan role is the one who takes side of one of the parties. Although mediators should not take side, in reality they do. Gulliver has argued that once the mediator intervened in the dispute it is inevitable that he would assert a certain degree of influence on the mediation process, hence the mediator became a *de facto* "party in the negotiations".[35] Accordingly, the mediator cannot be neutral, he merely is a catalyst. But, Gulliver has also admitted that there are some mediators who try to be as impartial as possible throughout the mediation process.[36]

A mediator can come from different personal and cultural backgrounds. Such backgrounds, according to some writers, can influence the way the mediator conducts the mediation process.[37] The mediator can be a lawyer, politician, social worker or

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[32] *Ibid.*, at 215.

[33] *Ibid.*, at 216.

[34] Georg Simmel, *The Sociology of Georg Simmel*, (New York: The Free Press, 1950), 149-150.

[35] P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 213.

[36] *Ibid.*, at 218.

[37] Henry J. Brown and Arthur L. Marriott, *op. cit.*, at 142.

doctor. Where the case requires some special technicality, an expert from that particular field may be chosen. Thus, there is no restriction on the background of the mediator as long as he or she possesses the skills which will lead the disputants to an agreed outcome. The ability of the mediator also varies. The more skilful the mediator is, the greater likelihood that the case will be successfully mediated. Some of the necessary skills a mediator should possess include: theoretical knowledge; practical skills; ethical awareness; emotional sensitivity; sound judgment; personal empathy; substantive knowledge; creativity; flexibility; balance; ability to listen; ability to observe non-verbal communications; and ability to question.[38]

In certain circumstances, more than one mediator may be needed. This is particularly so in the large commercial dispute where a multidisciplinary team of mediators are required, hence "co-mediation". As noted by Brown and Marriott, co-mediation inevitably involves larger expenses. But the cost factor must be taken into consideration and weighed against the overall benefits of the case, including effectiveness and time scale. In a complex case, a team of mediators may work more efficiently than a single mediator, for instance an information gathering process could be speeded up, hence the dispute could be resolved within a shorter period of time. However, a drawback is that co-mediators must work coherently and with respect to one another if co-mediation is going to be fruitful.

#### 5.2.1.3. The Issue of the Dispute

The third most important factor for a successful mediation process is the issue of the dispute. Despite the fact that mediation has been used in several fields of activity, not all cases may suitably be resolved by mediation. However, as the subject matter of each case is different, there is no conclusive guidance regarding when mediation is going to be an appropriate choice of dispute resolution method. In a study on environmental mediation, for example, the author has generalised some criteria which make mediation appropriate.[39] These are as follows: (i) some element of interdependence between the parties must exist, i.e. both parties must have something to exchange on a reciprocal basis; (ii) all parties must participate in the mediation process and agree to implement

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[38] *Ibid.*, at 328-346.

[39] John Harrison, *supra*, note 18, at 83.

the outcome; (iii) the timing for mediation must be right, i.e. the dispute must be ready for negotiations; and (iv) the dispute must not involve a clash of fundamental values or moral absolutes.

Moreover, there have been concerns about an inappropriateness of using mediation to resolve a multiparty dispute for reasons that this kind of case is complex and it is difficult to persuade all the parties to agree on the same thing. Conversely, there has also been an argument that the multiparty dispute is appropriate for mediation since it is too expensive and complex to litigate.[40] The use of mediation to resolve a multiparty dispute has also been supported by other writers on the basis that the complexity and multiplicity of parties are no hindrance to mediation. Indeed, it is inevitable that a multiparty dispute will involve more difficulties and complexities in terms of administrative procedures, but this may be overcome by a good organisation of the mediation process.

It must be remembered, however, that the guidance mentioned above is by no means conclusive. Each dispute must be assessed on its own merits as the success of mediation does not solely depend on the issue at hand, it also depends on the parties themselves and the mediator in each case.

### 5.2.2. Pros and Cons of Mediation

There are several pros and cons which are inherent to the mediation technique of dispute resolution.[41] These considerations need to be taken into account when parties are deciding whether or not to use mediation *vis-à-vis* other available methods of dispute resolution. Some of these considerations will be discussed below.

Regarding the pros, mediation, first of all, offers informality and flexibility. These positive attributes have been some of the major benefits offered by mediation which attract its use. The informality of the mediation process may encourage the

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[40] Henry J. Brown and Arthur L. Marriott, *op. cit.*, at 149.

[41] For a discussion on the pros and cons of mediation, see, for example, Alexander H. Bevan, *op. cit*, at 61-67.

successful resolution of a dispute in some ways. For example, the less formal environment may make the parties feel more at ease during the mediation process. The parties may focus better on the issues under negotiation as they would feel less intimidated. The flexibility allows the parties to choose their own rules and procedures for mediation, including the time period, the venue and, most importantly, the mediator, it is more likely that they might be more willing to accept the outcome compared to when a judgment is involuntarily imposed on them.

Secondly, mediation offers confidentiality. Privacy and confidentiality offered by the mediation process are sometimes preferred to the more public nature of litigation. One important implication of confidentiality is the ability to save faces of the parties. Other dispute resolution methods, especially litigation, often expose the parties to the public. As a result, the credibility of the party may be tarnished by an adverse publicity. However, as the parties retain authority throughout the mediation process, it is possible that some information may be publicly disclosed upon the wishes of the parties.

Besides saving a reputation from publicity, mediation may save faces of the parties who have been put into the situation where "they can't retreat and they do not themselves wish to fight".[42] In this dilemma, the parties may use the respect for the mediator as an excuse for agreeing on a compromise even though they have no alternatives.

Thirdly, mediation offers a better chance to prolong a good relationship between the parties. In the court proceedings, parties are compelled to enter into the legal process and involuntarily accept the judgment imposed on them. This often results in a difficulty, or even an inability, to mend a broken relationship between the parties. In contrast, mediation operates on the basis of consent right from the start of the process, it is therefore more likely that the disputants will be less aggressive towards one another. As a result, the consensus-finding approach of mediation offers the parties a chance to co-operate in order to find a common solution instead of concentrate on winning their own cases regardless of the parties' connection which may end in acrimony.

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[42] P.H. Gulliver, *Disputes and Negotiations*, *op. cit.*, at 219.

Fourthly, mediation offers a speedier resolution of the dispute. In principle, this is because the mediation process does not follow formal procedures which are time-consuming. The experience shows that the court proceedings, for example, may take a few years to settle and can be very expensive. As a result, not only will the dispute take longer time to be resolved it will also involve more expenses. However, it must be admitted that not all mediated cases will take shorter period to be resolved than the cases which have been resolved in court. Moreover, there is no guarantee that mediation can successfully resolve all cases as the parties' consensus-finding effort may be stalled once an impasse cannot be overcome, hence no common ground. The unsuccessful attempt to resolve the dispute by mediation thus may be perceived as a waste of time, expenses and effort.

As for the drawbacks, one must firstly consider the fact that mediation can only result in a non-binding outcome. Unlike the court or arbitration where the parties can legally enforce the judgment, the outcome of mediation is technically non-enforceable. It is thus up to the party to morally carry out their obligations. However, this drawback can be overcome by the parties entering into a mediation contract in order to safeguard against non-compliance with the outcome of the case. Another implication of the non-binding nature of mediation is that the doctrine of precedent does not apply. Thus, the subsequent mediation does not need to follow the outcome of the previous case. The absence of the doctrine of precedent could arguably lead to inconsistency in the practice of the DMS and make APEC's jurisprudential development more difficult.

A second drawback of mediation is that the chosen mediator may be incompetent. Mediation does not depend on successful proofs of factual and legal issues, as it is a consensus-finding practice, as much as the litigation or arbitration process. The success of mediation, therefore, mostly depends on the skills of the mediator to facilitate the negotiation between the disputants. In practice, it is uncommon that a mediator is incompetent. This is because the parties choose the mediator themselves and they would ensure that the mediator is competent for their case.

A third worry posed by mediation is the power imbalances. In certain circumstances, the two parties do not possess the same bargaining position. One party

may have a stronger bargaining position than another in terms of economic, political or other advantages. Where the power imbalances are so significant, mediation is thought to be inappropriate. However, this is not a view accepted universally.[43] One commentator has argued: "Mediators frequently write and talk of 'balancing' power and the mediator is enjoined to either disempower the overly powerful party or empower the powerless party".[44] In effect, the mediator attempts to strike a balance between the parties' bargaining position. In doing so,

> the mediator provides the necessary power underpinning to the weaker negotiator - information, advice, friendship - or reduces those of the stronger. If he cannot balance the power relationship, the mediator can bargain with or use his power against the stronger negotiator to constrain the exercise of his power.[45]

Accordingly, although some discrepancy in terms of the bargaining power might exist between the disputing parties, the mediator could technically use his skills in order to adjust any power imbalance, hence making mediation suitable for most cases.

## 5.3. Mediation under APEC

### 5.3.1. The Nature of the DMS

Mediation, in the form of the DMS, has now been accepted as an appropriate approach for resolving disputes between APEC members rather than other methods of dispute resolution.[46]

Guidance on the nature of the DMS was provided by its pioneer - the EPG - in its report, *Implementing the APEC Vision.*[47] Accordingly, the DMS should: (i) apply to

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[43] Michael Palmer and Simon Roberts, *op. cit.*, at 134.

[44] G. Chornenki, 'Mediating Commercial Disputes: Exchanging "Power Over" for "Power with",' in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative*, (London: Cavendish Publishing, 1997), 163-168.

[45] *Ibid.*

[46] See APEC DMEG, *Report to CTI on 1997 DMEG Meeting*, (Singapore: APEC Secretariat, 1997).

[47] APEC Secretariat, *Implementing the APEC Vision*, Third Report of the Eminent Persons Group, (Singapore: APEC Secretariat, 1995).

*all issues*, thus ranging far *beyond the dispute settlement mechanism in the WTO*; (ii) *emphasise mediation and conciliation* rather than arbitration, in which the mediator tries to bring the parties together to arrive at their own settlement of the dispute or, failing that, offers his or her own proposals for settlement; (iii) feature *shuttle diplomacy* by a mediator moving between the two sides in an effort to reconcile their differences and foster a settlement between them; (iv) be implemented by individual mediators chosen voluntarily by the APEC members that are parties to a dispute from a list originally nominated by each member and maintained by the APEC Secretariat; (v) enable third parties to make their views known at the outset of the process; and (vi) encompass a second stage through which, if mediation and conciliation fail, a special review panel would make an objective assessment of the dispute that would be released publicly if one or more of the parties failed to accept its proposals.

Since the dissolution of the EPG in 1995, the group of experts especially commissioned for developing the DMS - DMEG - has continued the work on the DMS and held periodic meetings in order to update its progress. In pursuing its work, DMEG relies upon three premises, *viz.* (i) any DMS set up within APEC must be *complementary* to, and must not detract from, the newly agreed procedures of the WTO; (ii) DMS must be entirely *voluntary*, without prejudice to the rights of any government to enforce fully its WTO rights at any time; and (iii) *no new institution should be created* within APEC for the purpose of dispute mediation.[48]

Further guidance on the operation of the DMS can be found in the 1994 Bogor Declaration. The APEC leaders have indicated that the DMS is to be used as a "voluntary consultative" dispute resolution mechanism and only to be used as a supplement to the WTO's dispute settlement mechanism. They have further affirmed that the WTO's dispute settlement mechanism is to be "a primary channel for resolving disputes".[49] The underlying reason behind the intention of the leaders is that the DMS should not duplicate or compete against the WTO's dispute settlement arrangements.[50]

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[48] Brendan P. McGivern, *supra*, note 2.

[49] The Bogor Declaration, *supra*, note 9.

[50] APEC Secretariat, *Implementing the APEC Vision*, *op. cit.*, at 12.

### 5.3.2. The Scope of the DMS

There are four targeted areas where the DMS would be used, *viz.* (i) the mediation of disputes between APEC governments; (ii) the mediation of disputes between APEC governments and private entities; (iii) the mediation of disputes between private entities; and (iv) the avoidance of trade disputes through increased transparency of laws, regulations, administrative guidelines and policies related to trade and investment.

(i) *The Mediation of Disputes between APEC Governments*

With regard to the possible disputes between the governments of APEC members, the prime channel for resolving such disputes is the WTO' s dispute settlement mechanism. DMEG concluded that the WTO's Dispute Settlement Understanding (DSU) should be resorted to where the WTO's obligations are involved. In effect, this has reflected the intention of the APEC leaders as stated earlier and the guiding principles given by the EPG on the nature of the APEC's DMS. In helping APEC members to familiarise themselves with the use of the WTO's dispute settlement mechanism and the operation of the DSU, the meeting of DMEG has acted as a forum where APEC members can share their practical experience in using the WTO as a forum for settling the dispute. DMEG has also provided further assistance to APEC member economies by organising a seminar on the WTO DSU and a simulation exercise of the WTO's panel process in 1997.[51]

For disputes on the matters which fall outside the scope of the WTO, in principle they will be left open for the operation of the DMS. DMEG has recommended that the Trade Policy Dialogue (TPD) of the CTI should be used in order to allow parties in the possible dispute to have a chance to ease out the tension and allow peer review before it escalates into a full blown dispute. At the time of writing, no detailed proposals, however, have yet been made about the use of the TPD to support the DMS. Perhaps, one explanation for the delay in the drafting of the guiding principles for the use of the DMS for resolving disputes between APEC governments is due to the fact that there has not yet been a conclusive agreement on the use of the TPD as a venue for the DMS

[51] See APEC DMEG, *Report to CTI on the DMEG Seminar on the WTO DSU*, (Singapore: APEC Secretariat, 1997).

among the DMEG delegates.[52] Without any practice of the DMS in resolving governmental disputes, it thus remains to be seen how the DMS would operate in order to ease the tension between the APEC members where a dispute arises.[53]

(ii) *The Mediation of Disputes between APEC Governments and Private Entities*

There are no set rules or procedures governing disputes between APEC governments and private entities. DMEG has encouraged APEC members to accede and utilise existing international agreements which contain provisions for settling disputes, like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[54] and the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[55] So far, nearly all APEC members have acceded to these two international conventions.

In order to facilitate the resolution of a dispute under this heading, DMEG organised a symposium on Alternative Mechanisms for the Settlement of Transnational Commercial Disputes in Bangkok on 27-28 April 1998.[56]

(iii) *The Mediation of Disputes between Private Entities*

As for the disputes between private entities of APEC members, DMEG has undertaken studies of the ADR mechanisms currently used under the domestic laws of each APEC member including mediation, conciliation, and arbitration. In 1997, a *Guide to*

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[52] From the author's observation during the DMEG meeting in Bangkok in 1998, Thailand strongly supported the use of the TPD as a venue for the DMS while Australia, Canada, and Chile were still sceptical about this matter.

[53] See APEC DMEG, *Report for the Committee on Trade and Investment*, (Singapore: APEC Secretariat, 1998).

[54] New York Convention, 10 June 1958, in force 7 June 1959, 330 *UNTS* 3; *UKTS* 26 (1976), Cmnd. 3655.

[55] 18 March 1965, in force 14 October 1966, 575 *UNTS* 159; *UKTS* 25 (1967), Cmnd. 3255.

[56] For papers presented at this symposium, see The Arbitration Office, *APEC Symposium 1998: Alternative Mechanism for the Settlement of Transnational Commercial Disputes*, (Bangkok: The Arbitration Office, Ministry of Justice, Thailand, 1998).

*Arbitration and Dispute Resolution in APEC Member Economies* was published.[57] This guidebook provides essential information for APEC members on the laws and regulations currently in force in each member economy of APEC and venues to which disputes may be taken. However, more seminars on private dispute resolution was felt necessary in order to facilitate the use of ADR in APEC member economies.[58]

(iv) *The Avoidance of Trade Disputes through Increased Transparency*

For the purpose of avoiding disputes through an increase in transparency, DMEG has called on APEC members to make information regarding their laws, regulations, administrative guidance and policies related to trade and investment readily and promptly available. Information on these issues should be made available from the APEC web-site.[59] Furthermore, DMEG has also called for an independent appeal procedure for reviewing and correcting any administrative action with regards to trade and investment. DMEG, additionally, has underscored the promotion of dialogue and understanding to encourage avoidance or resolution of disputes.[60]

### 5.3.3. The Procedures of the DMS

Even though the work on the APEC's dispute settlement mechanism had started since 1993, no concrete procedural guidelines were developed until 1995. These guidelines are provided in Annex 1 to the third report of the EPG, *Implementing the APEC Vision.*[61] (See Appendix E.) In these guidelines, several procedural and administrative aspects of mediation are discussed, including: the request for mediation; expenses; third party's participation; and the roles and qualifications of the mediators.

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[57] APEC Committee on Trade and Investment Dispute Mediation Experts Group, *International Commercial Disputes: A Guide to Arbitration and Dispute Resolution in APEC Member Economies*, (Singapore: APEC Secretariat, 1997).

[58] See APEC DMEG, *Report for the Committee on Trade and Investment, op. cit.*

[59] The address is: www.apecsec.org.sg.

[60] APEC Experts' Group on Voluntary Consultative Dispute Mediation, Report form the Vancouver Meeting, 17-18 June 1995, 35 *ILM* (1996) 1107.

[61] APEC Secretariat, *Implementing the APEC Vision, op. cit.*

In summary, there are three stages of the APEC's mediation process: (i) information gathering; (ii) assessing strengths and weaknesses of each party's arguments; and (iii) stratigising and negotiating. Mediation would be convened once the disputing parties have expressed their willingness to participate in mediation to the DMS administrator. The location for mediation would then be agreed upon by the parties. Unless the parties agreed otherwise, the location for the mediation process would be the APEC Secretariat in Singapore.

During the information gathering stage, a joint session would be arranged. This meeting would be attended by all parties involved in the dispute, including third party who might be "materially affected" by the outcome of the case. The mediator would then remind the parties of his function, i.e. to assist the parties to find a common ground upon which the settlement would be based, not to pass a judgment on the dispute. Each party would make a brief presentation of its case in order to identify the subject matters of the dispute. The third party would be allowed to make presentations and clarify its interests in the dispute.

The second stage of the mediation process starts when private caucus sessions are arranged. In each session, the mediator would meet each party in private and at a separate location. The mediator would ask each party to assess the strengths and weaknesses of its case and the expected outcome. Discussions during these private sessions are to be kept confidential, unless a party gives its consent to disclose the information to another party.

At the third stage of the mediation process, the mediator would move back and forth between the parties, listening to the points made by one party and relaying them to another party, hence facilitating the negotiations. The mediator would have to use his skills during these negotiations in order to persuade the parties to reach a compromise. Once such a compromise has been reached, the mediator would translate it into a written agreement which should be duly signed by the parties. The expenses for the mediation process are borne equally by the parties. Third party, however, has to bear its own cost.

With regard to the qualifications of the mediators, the guidelines suggest that similar conditions as required in the case of the WTO panellists are to be used.

Accordingly, the DMS mediators could be one of the followings: former representatives of APEC members; individuals who teach or have published on international law or policy; a senior trade policy official of an APEC member; or individuals who come from the business or private sectors. A list of APEC mediators is to be kept at the Secretariat. In each dispute, one to three mediators could be chosen, and they are to act in an independent capacity. A potential mediator *shall* not be chosen if his economy is involved in the dispute unless agreed otherwise by the parties, or if his economy is a member of a subregional trade arrangement to which any disputing party is also a member.

## 5.4. Why Mediation Works for APEC?

While the WTO's dispute settlement regime also offers disputing parties an opportunity to use mediation as a means of resolving the dispute, the record of the WTO has shown that mediation has hardly been used. One might ask, therefore, why mediation would work for APEC? There are some compelling reasons to support the use of mediation for resolving disputes among APEC member economies. They will be discussed below.

First of all, the DMS is a result of a compromise between the two camps of the APEC members: the Eastern and Western economies. APEC members who represent the Eastern economies are those of the Asian origin, for example the ASEAN member countries and China.[62] The Western economies encompass APEC members who are not of the Asian origin, such as the United States, Canada, Australia and New Zealand. Differences in terms of culture, religion, legal and political environment, and economic development have played an important part in the selection of an appropriate method for the APEC's dispute resolution mechanism.

In general, the Eastern economies adopt the so-called "Asian ways of doing things" philosophy as guidance for their *modus operandi*.[63] A long history of the ways

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[62] ASEAN members who are members of APEC include: Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand.

[63] The "ASEAN way" or sometimes "Asian way" was understood to connote the utilisation of "consensus and consent, rather than rule and compulsion". See Simon S.C. Tay, 'The Way Ahead for Asia', in Simon S.C. Tay and Daniel C. Esty, eds., *Asian Dragons and Green Trade: Environment, Economics and International Law*, (Singapore: Times Academic Press, 1996), 189-199 at 197. Also see Michael Haas, *The Asian Way to Peace: A Story for Regional Cooperation*, (New York: Praeger, 1989), 2-5. He notes

Asian nations live their lives shows that they have tried to avoid confrontation as much as possible. Evidence of this is the fact that although ASEAN has already established a dispute settlement mechanism, members of ASEAN have never resorted to using it.[64] Matters which imply a conflict of interests between ASEAN members are to be resolved *amicably*.[65] Other evidence suggesting that Asian nations are not in favour of resolving their disputes by adjudicatory means can be seen from the practice of GATT or the WTO which often shows that the Western nations are more likely to initiate the dispute settlement procedures than their Asian counterparts.[66] Perhaps, this may explain the fact that Asian members of APEC, particularly China, Indonesia, South Korea and Singapore, fully support the formation of the DMS rather than other methods of dispute resolution.[67]

However, from the perspective of the Western members of APEC, the idea of using diplomacy as a means of resolving a dispute might not sit well with their cultures. These economies tend to prefer the use of an adjudicatory technique for resolving their disputes - hence, a rule-based dispute settlement system, like that of GATT or the

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that the Asian way developed after the World War II when Asian nations recognised that the international relation approach of the Western counties was not suitable for them. It is a "cultural theory of international cooperation". (at 21). See also, Paul J. Davidson, *The Legal Framework for International Economic Relations: ASEAN and Canada*, (Singapore: Institute of Southeast Asian Studies, 1997), 31-32. He noted that the ASEAN way is derived from the Malay concept of *musyawarah* and *mufakat*. The former is "the process of decision making through discussion and consultation". The latter is a traditional approach involving "intensive informal and discreet discussions behind the scenes to work out a general consensus which then acts as the starting point around which the unanimous decision is finally accepted in more formal meeting".

[64] From a personal communication with Dr Vitit Muntrabhorn, Faculty of Law, Chulalongkorn University, Bangkok, Thailand. From the history of ASEAN, the first mention of the dispute settlement system came 10 years after the inception of ASEAN. Provisions regarding dispute settlement among the ASEAN members are contained in the Declaration of ASEAN Concord, and the Treaty of Amity and Co-operation of 1976. It was not until 1996 that the ASEAN members agreed on a Protocol on Dispute Settlement Mechanism which is to govern the settlement of disputes arising out of ASEAN economic agreements. For more details on the ASEAN Protocol on Dispute Settlement Mechanism, see Paul J. Davidson, *op. cit.*, 153-165.

[65] For example, the 1976 Declaration of ASEAN Concord stipulates that "Member states, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful processes in the settlement of intra-regional differences". Another example can be seen from the 1976 Treaty of Amity and Co-operation which provides more binding and treaty-like provisions in Chapter IV - the Pacific Settlement of Dispute. Under this Chapter, Art. 13 states that "parties shall at all times settle disputes among themselves through friendly negotiations"; and Art. 15 further provides that other steps may be taken only "in the event no solution is reached through direct negotiations".

[66] See Brendan P. McGivern, *supra*, note 2.

[67] See further in James Cameron and Tanya White, *supra*, note 3, where the authors note that Hong Kong has rejected the idea of DMS, and preferred to use the WTO instead.

WTO, is more preferred. For example, evidence can be seen from the table below (Table 4) which shows that the United States, with 61 cases, has initiated the panel proceedings under Art. XXIII of GATT more than any other Asian countries.

**Table 4: GATT Dispute Settlement Procedures Initiated by APEC Members between 1947-1994**

| Initiating Member from APEC | Consultations Under Art. XXII of GATT | Consultations Under Art. XXIII of GATT |
|---|---|---|
| United States | 27 | 61 |
| Canada | 7 | 18 |
| Australia | 7 | 13 |
| Chile | 10 | 9 |
| New Zealand | 4 | 3 |
| Japan | 2 | 3 |
| Hong Kong | 1 | 2 |
| Mexico | 0 | 2 |
| Thailand | 1 | 1 |
| The Philippines | 0 | 1 |
| Brunei | 0 | 0 |
| Indonesia | 0 | 0 |
| Korea | 0 | 0 |
| Malaysia | 0 | 0 |
| Singapore | 0 | 0 |

Note: Adapted from WTO, *Analytical Index: Guide to GATT Law and Practice*, volume 2, (Geneva: WTO, 1995).

Given the fact that the Asian economies represent more than a half of the APEC's membership, mediation seems to be the right choice of technique for resolving the disputes among APEC members. Mediation is a compromise between the Asian and the Western ways of doing things. It would also support the sense of community which APEC has tried to build.[68] It is evident that the DMS would be useful for APEC members as it would provide an alternative forum for dispute settlement in the Asia-Pacific rim. Members of APEC who are not yet members of the WTO, like China,

[68] APEC Secretariat, *Implementing the APEC Vision*, *op. cit.*, at 13.

Taiwan and Russia would clearly benefit from the creation of the DMS as they have no right to use the WTO's dispute settlement mechanism.[69]

Additionally, given that APEC has not yet translated its commitments into hard-law instruments, it is unforeseeable in the near future that APEC would be willing to formulate its own rules on dispute settlement based on the model of the WTO DSU. Indeed, as the more formal methods of dispute resolution, like arbitration, require rules governing their process and procedures, it would not be appropriate for APEC to create an arbitration process or the panel process like that of the WTO.[70]

Secondly, mediation entails a dispute resolution process which is geared towards the finding of a consensual solution which is acceptable to all parties to the dispute. It does not involve the same degree of formality as required by other methods of dispute resolution. The entire operation of mediation depends on the willingness and voluntariness of the parties to settle their dispute and implement the outcome. This might raise a concern about the effectiveness of the DMS. However, this concern might be argued otherwise. Rather than acting as disadvantages, informality, flexibility and voluntariness arguably could give advantages to the successful resolution of the dispute between APEC members. Firstly, the parties are not subject to any particular rules or procedures unless they are set up for themselves Parties could thus discuss a wider range of issues or tools for implementation. Unlike the WTO's dispute settlement regime, matters which could be brought before the DMS are not limited only to the issues under the rubric of the WTO. Socio-economic issues such as environmental protection, competition, labour and human rights could therefore be resolved before the DMS. The ability to successfully resolve disputes involving these socio-economic issues is important for APEC in the light of the growing tension between APEC members caused by those issues in the recent years.[71] Secondly, as the disputing parties must voluntarily agree on the use of mediation, it is likely that they will try to find a solution - so that mediation would not be a waste of time - and implement the outcome accordingly - as the parties have formulated such an outcome themselves. Thirdly,

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[69] APEC Secretariat, *A Vision for APEC*, *op. cit.*, at 40.

[70] APEC Secretariat, *Achieving the APEC Vision*, *op.cit.*, at 23.

[71] APEC Secretariat, *Implementing the APEC Vision*, *op. cit.*, at 12.

APEC's mediation would "offer an intermediate channel between bilateral negotiation and the 'win or lose' confrontations of the WTO".[72] In other words, a successful mediation would put the disputants in a "win-win" situation.

One should note, however, that the potential of the DMS to resolve disputes between APEC members might be undermined as there still exists some issues which remain unclarified. Firstly, what is still lacking from the operational aspect of the DMS is guidance as to whether the DMS and the WTO's dispute settlement mechanism could be used conjunctively. This issue needs some further clarification, expecially in the light of environmental matters which both APEC and the WTO arguably could have co-jurisdiction. The guiding principles given by the EPG, as expounded previously, only provide that all matters under the scope of APEC could be resolved by the DMS. However, it has been noted that the purpose of creating the DMS is not to "duplicate or compete" against the WTO's dispute settlement system.[73] Does this mean that the DMS cannot be used to resolve matters concerning the WTO's issues at all? But if a dispute could be resolved in a forum which could better resolve such a dispute, would it not be advisable to resolve the dispute there? Trade and environment disputes could arguably fall into such a category of dispute. This issue will be discussed in more detail in the next section.

Indeed, what is needed in order to resolve the APEC/WTO conflict of laws problem is a set of some guiding principles, articulating the determination of the jurisdiction and the choice of law in each case. As a suggestion, one model which APEC could use as guidance in this regard is NAFTA. More details on this issue will be given in the next chapter.

Secondly, according to DMEG, APEC should not create a new institution for the purpose of dispute mediation. This might raise concerns about the workload and, consequentially, the efficiency of the DMS administrator. As there has been no mention of who is the DMS administrator, it is assumed that the APEC Secretariat will take on this role. Given that the APEC Secretariat in Singapore employs only a small number of

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[72] *Ibid.*, at 13.

[73] *Ibid.*, at 12.

staff in comparison to other international organisations such as the WTO, it is foreseeable that the work of the Secretariat will be overloaded. As a solution, it might be advisable to establish a group of APEC officials, perhaps a couple of staff, who would deal with the administration of the DMS. In the long run, this would benefit the operation of the DMS if it proved to be successful and frequently in use.

Thirdly, although there have been some guidelines on the DMS, it has been argued that the DMS still lacks precision in its definition. At one point, DMEG had already attempted to define the DMS. It defined "disputes", in a narrow sense, as differences regarding the implementation or enforcement of rights and obligations, or, in a broader sense, as differences regarding policies or objectives not subject to agreed rules. "Mediation" was defined as avenues to facilitate the parties directly involved to reach a mutually satisfactory resolution of a dispute, rather than to avenues such as arbitration or adjudication that involve the imposition of third-party dispute settlement. As for "service", DMEG referred to a forum or procedure, but does not necessarily involve a formal mechanism or institution.[74] Despite the efforts of DMEG, these definitions appear somewhat vague, imprecise and superficial.

Some commentators have further observed that despite the EPG has set out what the DMS should be, *viz.* handling issues beyond that under the WTO, featuring shuttle diplomacy, a mediator being chosen voluntarily, and so forth, it has failed to provide the exact type of mediation envisioned for the DMS. It also did not state whether the mediation would be binding, confidential, or would allow parties to choose their own representatives. Furthermore, importantly, the EPG did not strictly keep the meaning of "mediation", it seems that the EPG has combined other aspects of alternative dispute resolution into mediation as well.[75] The EPG has suggested that a second stage of the DMS process is the establishment of a special review panel, should the mediation fail. The EPG has gone even further to describe what the panel stage would entail and the time-frame for the panel stage.[76] Indeed, the confusion over the real nature of the DMS,

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[74] APEC Experts' Group on Voluntary Consultative Dispute Mediation, Report form the Vancouver Meeting, *op. cit.*

[75] James Cameron and Tanya White, *supra*, note 3, at 127.

[76] The EPG has suggested that the panel should be requested within 60 days of the end of the mediation process. The panel should be established within 30 days of the request. In any case, the whole panel

in my opinion, has opened the door for further interpretation concerning the use of the med-arb technique as discussed earlier. As such, could the panel of mediators assume the role of the special review panel? Or, does a new panel need to be constituted? Moreover, if the EPG intended that the panel stage should also be an integral part of the DMS, should it not include the elaboration of the panel stage in its mediation guidelines? These issues need to be clarified by APEC before the confusion about the DMS could be eradicated. Unfortunately, the work on the DMS with respect to the resolution of the dispute between APEC governments has not been developed further by DMEG. DMEG seems to emphasise on promoting the understanding of the WTO's dispute settlement mechanism and the exchange of the practical experience of APEC members in using such a mechanism. In order to encourage a smooth operation of the DMS, DMEG should seriously consider the formulation of the more precise DMS guidelines and make them part of APEC's instruments.

In any case, one must remember that the DMS is only in its infancy and evidently falls far short of being fully developed. From an opportunity to attend the DMEG meeting in Bangkok, in 1998, and some interviews with DMEG delegates, it can be concluded that the concept of the DMS is surprisingly still unclear, even to the DMEG delegates themselves. It is hoped that the clarification of the DMS will be provided once the DMS issue is discussed at the CTI meeting some time in 1999.

## 5.5. The Potential of the DMS for Resolving Trade and Environment Disputes in the Asia-Pacific Rim

Mediation has been employed for some time for resolving business and environmental disputes.[77] This is particularly true in the United States and United Kingdom[78] and even in Asia.[79] More recently, the support for using mediation for resolving trade and

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process should take no longer than 90 days. See APEC Secretariat, *Implementing the APEC Vision*, *op. cit.*, at 15.

[77] See Christopher Napier, ed., *Environmental Conflict Resolution*, (London: Cameron May Ltd., 1998).

[78] Christopher Napier, 'The Practice of Mediation in Commercial Environmental Disputes', in Christopher Napier, *op. cit.*, 198-207.

[79] Christopher W. Moore, 'The Practice of Cooperative Environmental Conflict Resolution in Developing Countries', in Christopher Napier, *op. cit.*, 160-195; Lawrence E. Susskind and Joshua

environment disputes among APEC members by the DMS seems to have grown among academia.[80] However, before the potential of the APEC's DMS can be assessed in the light of trade and environment dispute resolution, it should be asked if trade and environment disputes can be suitably resolved by mediation. In my opinion, the answer is "yes". Arguably, trade and environment disputes could satisfy all the criteria which make the dispute suitable for mediation. To recall these criteria: (i) there must be some interdependence between the parties; (ii) all parties must participate in the mediation process and agree to implement the outcome; (iii) the dispute must be ready for negotiations; and (iv) the dispute must not involve a clash of fundamental values or moral absolutes.[81] Satisfying the first three criteria is not difficult. This is because, firstly, the parties in the trade and environment dispute in APEC are trading partners who also are members of APEC, thus they are interdependent. Secondly, as the members of APEC have agreed to use mediation as a means to resolve their dispute, it could be argued that such an agreement implies that once the disputants have chosen to resolve the dispute before the DMS, they undertake to find a consensual solution and implement it accordingly. Thirdly, once the trade and environment dispute has arisen commercial loss would have been inflicted on the disputants. This arguably makes the matter ready to be negotiated as the parties would undoubtedly want to settle the dispute as expeditiously as the could. As for the fourth condition, one might argue that trade and environment disputes are not suitable to be resolved by mediation for the reason that trade and environment paradigms operate differently, as they have different goals and *modus operandi*. However, it could be argued to the contrary that trade and environment paradigms do not contradict each other as they could support one another and work together in the search for the long-term goal of sustainable development.[82] And, as APEC has already expressed its intention to further sustainable development, it

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Secunda, 'Environmental Conflict Resolution: The American Experience', in Christopher Napier, *op. cit*, 16-55.

[80] See, for example, James Cameron and Tanya White, *supra*, note 3; André Dua and Daniel C. Esty, *Sustaining the Asia Pacific Miracle: Environmental Protection and Economic Integration*, (Washington, DC: Institute for International Economics, 1997), 162-164; Charles Arden-Clarke, *Trade and Environment in APEC: Avoiding Green Protectionism While Securing Sustainable Development*, a WWF International Discussion Paper, (Gland, Switzerland: WWF International, 1995); Jane Drake-Brockman and Kym Anderson, *The Trade/Environment Debate and Its Implications for Asia-Pacific*, Policy Discussion Paper No. 94/23, (Adelaide: Centre for International Economic Studies, University of Adelaide, 1994).

[81] See section 5.2.1.3, *supra.*

[82] See Chapter 2.

should not be too difficult to argue that the parties in the trade and environment dispute are working towards the same end - hence no conflicts in fundamental values or moral absolutes.[83]

According to Esty and Dua, the ability of the DMS to resolve trade and environment disputes would undoubtedly add an extra value to the DMS process. However, the true value of the DMS would lie in its innovative structure to address trade and environment tensions. In other words, it is imperative that the DMS is created with the capability to strike a trade and environment balance. Therefore,

> rather than examining whether domestic standards being used to further health or environmental objectives are the "least trade restrictive", the [DMS] should focus on assessing whether the measure is *reasonably* tailored to achieving a legitimate public health or environmental goal and whether it *arbitrarily or capriciously restricts trade.*[84] (Emphasis added.)

Implicitly, Esty and Dua seem to place the "proportionality" concept at the heart of the trade and environment dispute resolution process of the DMS. Thus, the aim of the trade and environment dispute resolution here is not finding whether the trade measure in question would produce the least trade restrictive effect on the trade between APEC members, but to investigate whether that particular measure could fulfil its environmental purpose without placing unnecessary constraint on the trade between the APEC members who are the parties of the dispute.[85]

However, it must be remembered too that the aim the DMS is to encourage the disputing parties to reach a consensual solution. Given that both environmental and economic gains are at stake in the trade and environment dispute, such a consensual solution might be rather difficult to achieve. APEC members indeed may be required to give and take in order to reach a solution which is not only acceptable to the parties but also promotes the APEC's goal of sustainable development as a whole.

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[83] See Chapter 4.

[84] André Dua and Daniel C. Esty, *op. cit.*, at 163.

[85] In effect, this reiterates the criteria for formulating a trade and environment dispute settlement mechanism proposed by Esty as discussed earlier. See Chapter 2, section 2.3.1.

As there is no evidence on which a conclusion could be drawn as to the potential of the APEC's DMS to resolve a trade and environment dispute at this stage, an assessment could only be carried out by speculation. However, APEC could look into the experience of GATT and the WTO, as already discussed in the earlier part of this thesis, in order to gauge the potential of the APEC's DMS. The assessment of the DMS' potential will be made in the light of some legal and institutional considerations in relation to trade and environment dispute resolution.

### 5.5.1. The Legal Considerations

In trade and environment dispute resolution, two sets of law need to be considered. They are the law governing environmental provisions and the law governing the dispute settlement process. These laws will be discussed below.

#### 5.5.1.1. The Law Governing Environmental Provisions

From the legal perspective, the prime concern for the parties in the trade and environment dispute is whether a trade measure in the form of ban, quota, or licensing requirement could justifiably be used for "environmental" purposes, whose wide interpretation would also cover the protection of health and safety of human, animal or plant life or health as well as exhaustion of natural resources as contained in Art. XX(b) and (g) of GATT. As established in the Gasoline decision and reiterated by the Appellate Body in the Shrimp/Turtle case, the test for the justification of trade measures for environmental purposes under the WTO regime is based on two principal steps - the "two-tier" test. In the first step, the party seeking to rely on the environmental justification under GATT Art. XX has to prove that its measure satisfies the so-called "environmental threshold" contained in the sub-paragraphs of Art. XX. Accordingly, the United States, in the Shrimp/Turtle dispute, for instance, bore the burden to prove that its bans on shrimp and shrimp imports from the Asian complaining parties were genuinely environmentally-oriented. Then, as the second step, the United States had to demonstrate that the bans were not used arbitrarily, unjustifiably or as a disguised trade restriction - a kind of "trade threshold".

The WTO's approach of resolving trade and environment disputes shows that it is a restrictive approach. For example, issues which are to be decided are limited by the terms of reference; and parties will place an emphasis on satisfying the test rather than finding an outcome with would provide the best solution for both free trade and environmental protection.

The determination of the factual and legal issues rests solely in the hand of the panel. This, however, could pose dangers to the way trade and environment disputes are resolved. As the panel's decision in the Shrimp/Turtle shows, the panel's reasoning could damage the way trade and environment disputes should be resolved. By starting with the test in the chapeau, the panel did not leave any room for the consideration of the genuine trade measures for environmental purposes. It is rather fortunate for the environmentalists that the Appellate Body has overturned the panel's reasoning. Otherwise, if the panel's view is upheld and followed by a later panel, it would indeed set a dangerous precedent and undermine the ability of the WTO to resolve the trade and environment disputes in a balanced manner. On the other hand, the WTO does not follow a *stare decisis* doctrine. It could be argued therefore that the corrective approach as used by the Appellate Body in the Shrimp/Turtle case might not be followed in the next case. As the panel and the Appellate Body retain the authority in the determination of the trade and environment dispute under the WTO's dispute settlement system, it is uncertain to predict the direction in which the trade and environment dispute will be resolved in the future.

In the mediation process, it is the parties who are in control. The outcome of the dispute therefore will be decided by the parties, not a third person and not according to a particular set of rules such as GATT. The fact that the parties are in control of the proceedings could have some environmental implications. Firstly, wider issues could be considered. For example, the parties could refer to the sustainable development argument. APEC has already had the Framework of Principles governing the relationship between the economy and environment which refers to sustainable development and particularly trade and environment issues. The parties could therefore refer to this Framework of Principles in their negotiations. Although these principles contained in the Framework of Principles do not have the hard-law or binding status,

they could however be argued as forming part of APEC soft-law which should at least be voluntarily observed by the APEC members.

Secondly, international law could be taken into account. As the 1992 Earth Summit asserted and reflected in the Framework of Principles for Integrating Economy and Environment of APEC, trade and environment should be made mutually supportive. Accordingly, international trade and international environmental laws should co-exist within the broad framework of international law. As the scope of mediation is wider than the DSU, environmental principles such as precautionary principles or polluter-pays-principle could be taken into consideration during the mediation process. In the Beef Hormone case, for instance, the panel and the Appellate Body failed to honour the precautionary practice of the EU on the basis of insufficient scientific evidence. The encouragement to use international standards may also be viewed pessimistically, as international standards do not always provide an appropriate standard. Often they are set at the lowest common denominator in order to allow the poorest nations to be able to participate in the standard setting process and implement such standards.

Thirdly, mediation could allow a wider consideration for the use of trade measures for environmental purposes. For example, the processes and production methods (PPMs) could be used as a basis for differentiating the treatment between the two products. Under GATT, the basis for comparing the treatment of imports and domestic goods is the "like product" test. If the products are alike, no differential treatment may be undertaken, unless justifications as provided in GATT can be proven. As already discussed in Chapter 3, the WTO' panels and Appellate Bodies in the Gasoline or the Shrimp/Turtle cases still did not explicitly allow the PPMs as conditions upon which the products could be differentiated - albeit the Appellate Body in the latter has shown some sign of a wider interpretation which might allow the distinction based on the PPMs. From the environmental perspective, such a practice is discouraging. This is because goods could have different environmental characteristics while having the same physical attributes. Therefore, the use of trade measures should be allowed to regulate goods which have been produced by environmentally harmful methods.

Another issue which the DMS could address is the use of extraterritorial trade measures. Extraterritoriality of the trade measures under the realm of GATT 1947 had

provoked much criticism. But even under the WTO regime, the clarification of this issue still remains inconclusive - albeit the Shrimp/Turtle case has shown a sign that extraterritorial trade measures might be legitimate. Unlike the WTO, the DMS is going to be used to resolve the disputes between APEC members. As APEC is a smaller community than the WTO, and arguably a closer knitted organisation, the use of extraterritorial measures in order to protect the APEC environment, such as migratory fish stocks or sea turtles, might be found to be more acceptable. Additionally, as APEC has already pursued some work on regional environmental protection, finding a justification for extraterritorial measures should be easier than under the WTO system under which no common environmental agenda has been developed.

#### 5.5.1.2. The Law Governing Dispute Settlement

As described in an earlier chapter, the dispute settlement process of the WTO is governed by the Dispute Settlement Understanding (DSU) - a set of elaborately drafted rules, providing details of each stage of the WTO's dispute settlement process. As the DSU comes in the same package as other agreements under the framework of the WTO, strict adherence to the DSU is thus required by all members of the WTO. While the precise rules and procedures may be argued to provide a more rule-based dispute settlement system, and move the WTO's dispute settlement process a step closer to being a judicial process, they might not be the best route to take as far as the resolution of a trade and environment dispute is concerned. Admittedly, the disputing parties may want to see a "win-lose" situation, hence they do not want a compromise. The WTO's dispute settlement system also provides an enforceable remedy. Therefore, these attributes of the WTO's dispute settlement system might explain why the parties in the Shrimp/Turtle case, for example, were willing to resort to the panel process.

Mediation, on the other hand, offers a "win-win" solution. The aim of mediation is to find a consensual outcome which is reached by the parties themselves with the help of the mediator. The philosophy of mediation would fit in well with the aim of trade and environment interrelationship. As a result, it could be argued that the disputing parties in the mediation process would try to reach a compromise without concentrating on fighting one another with legal criteria.

In mediation, the parties are in control of the process. They are not restricted by the rules like those contained in the DSU. The rules and procedures of the mediation process are decided by the parties. Such informality and flexibility could be beneficial to trade and environment dispute resolution in some ways. Firstly, the informality of the mediation process might encourage disputing parties to exchange their opinions of the issues in the dispute. Rather than concentrating on proving the compatibility of the measures with GATT, the parties might concentrate on explaining their situation to the mediator in a non legal manner, so that the mediator would not be bombarded with legal technicality. Secondly, as mediation does not encourage the parties to fight one another as they might in the judicial process, it may not be necessary to use a specialist counsel - which will incur a lot of expense and not suit the budget of the poorer parties. The cost advantage of the mediation technique also has another implication for the developing members of APEC. As mediation arguably would incur less cost than the litigation method or the WTO quasi-judicial process, more developing members of APEC could have more access to the dispute resolution process. Consequentially, those countries would have more opportunity to challenge the protectionist trade measures exercised by the richer countries.

Where the parties adopt the med-arb style, the situation may be a little different. In this case, more rules and procedures will be needed. At the moment, no rules or procedures have yet been drafted for the APEC med-arb process, let alone the uncertainty of the use of med-arb in APEC, it is worth considering the rules and procedures which would allow more environmental considerations to be taken into account. Apart from the involvement of appropriate personnel, as will be discussed later, one particular issue which needs to be addressed is the burden of proof. While this issue is not so crucial in the mediation process, as a ruling from the third person umpire is not the aim of the exercise, the burden of proof is very important for judicial and quasi-judicial process.

As a customs, in the case of trade and environment disputes, the burden of proof issue under the realm of the WTO is borne by the complainant to establish the violation of GATT. Once the violation is established, the burden will then shift to the respondent to prove its justification for its measures under the relevant provisions for exceptions. But, it would be better, from the environmental perspective, if the burden is borne by the

complaining party all the time. The fact that the respondent has to prove its justification shows that the environmental value of the measure is always questioned. It also means that it is easy to challenge the trade measures for environmental purposes. If the burden to prove the compatibility of the trade measures is borne by the challenging party, it might consider the initiation of the challenge more carefully, hence less incentive to challenge. As a result, less trade-related environmental measures would be challenged. APEC could consider the allocation of the burden of proof along the line of the foregoing during its med-arb process in order to promote the protection of the environment.

Another issue which must be considered in the med-arb process is the source of law. One way which the med-arb could help promote the trade and environment balance is to ensure that both trade and environmental laws are taken into consideration equally. It should allow the mediator/arbitrator to resort to guidance from international law, including customary law relating to environmental protection. And where the measures are taken pursuant to multilateral environmental agreements, there could be a presumption that such measures could be deemed legitimate under realm of APEC.

### 5.5.2. The Institutional Considerations

Whether or not a trade and environment dispute could be resolved in a balanced fashion does not depend only on the law that allows trade measures for environmental purposes to be used as a *bona fide* enforcement tool. Achieving the balance between trade and environmental considerations also depends on an institutional arrangement that reflects environmental sensitivity. What could make one dispute resolution forum more environmentally sensitive than another will be discussed below.

#### 5.5.2.1. An Arbitrator or Mediator with Environmental Background

In a mediation process, it is not compulsory that a mediator should possess some relevant knowledge of the issues involved in a dispute. It is sufficient that the mediator has the skills to encourage the disputing parties to reach a mutual agreement. But in a dispute with a complex nature like a trade and environment dispute - which requires a careful consideration of intertwining issues of more or less equal importance - it is

preferable that the mediator has some interest and sound knowledge of both trade and environmental issues. Arguably, the more knowledgeable the mediator the better ability he has to understand and digest the issues so that he can guide the disputing parties in the right direction, i.e. to find a trade and environment equilibrium. And, where the mediator is required to act in an active role, the mediator who has a good grasp of the subject at hand would be able to rationally perform a complicated balancing act between the trade and environmental interests as well as the needs of the disputing parties.

In the DMS process, there would normally be one mediator in each case. However, in the proposals of the EPG it was envisaged that there might be some circumstances where more than one mediator is needed. In such cases, a panel of three mediators could be formed. From the perspective of trade and environment dispute settlement, this could possibly mean that at least one of the mediators would come from each of the trade and environment domains. As a suggestion, the composition of the panel of mediators should idealistically be one with a trade background, one with an environmental background, and one with both trade and environment backgrounds. This composition would, in my view, provide a perfect combination for the resolution of a trade and environment dispute. It offers a balanced panel of qualified mediators from the two disciplines. Accordingly, the viewpoints from both trade and environment camps would be heard equally and well understood.

In the situation where one of the disputing parties is a developing country, the third mediator could be substituted with a mediator from a developing country - reiterating the WTO's practice as provided for in Art. 8(10) of the DSU.[86] The benefit of having a mediator from a developing country sitting in a panel is that he could at least represent a viewpoint of the developing country, who would have a different priority from the developed country, with a view to provide a balance in terms of bargaining power.

In comparison to the WTO's panellists and Appellate Body so-called "judges" who come from the domain of trade, e.g. trade experts or governmental representatives to the WTO, APEC could have a pool of mediators who come from diverse

[86] This article articulates: "When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member".

backgrounds. No affirmative requirements have yet been set by APEC as to what qualifications must a mediator have for the DMS process. It is a good opportunity for APEC to compile a list of mediators from a wide range of disciplines, including those of trade and environment. APEC arguably pursues a wider range of activities than the WTO. As discussed in the previous chapter, APEC has also commissioned several environmental work programmes among its other activities. The focus of APEC now is not solely trade co-operation as when it was originated in 1989. It also expands to cover issues such as environmental protection, competition policy, human resources development and sustainable development. Moreover, the APEC's DMS is established in order to deal with matters outside the boundary of the WTO. It is foreseeable therefore that some environmentally qualified persons could be listed as APEC mediators.

In the Gasoline or Shrimp/Turtle disputes, while the trade measures satisfied the environment threshold, i.e. the first tier, they failed on both occasions to fulfil the conditions contained in the chapeau, i.e. the second tier. Even though it could not be said conclusively that the outcomes would have been different had the composition of the panels in these cases been a mixture of trade and environment panellists, it would at least have given a better impression to the environmental protagonists that the WTO was in fact environmentally sensitive. Moreover, by having an environmentalist in a panel, it might be possible to argue that more weight could be given to the environmental side of the argument. As a result, the main focus of the dispute would not rest largely on trade considerations. Arguably, this would enhance the panel's ability to reach a balanced decision as the panellists from trade and environmental disciplines will both be present during the deliberation process.

#### 5.5.2.2. An Involvement of Environmental Experts and NGOs

Environmental experts can come from several domains. They may come from government officials, environmentally instituted non-governmental organisations (NGOs) or a specifically created environmental organ within each trade institution. Within the APEC's framework, environmental expertise could be provided by officials from various working groups and committees dealing with environmental matters such as those already described in Chapter 4, for example: the Regional Energy Working

Group; the Marine Resources Conservation Working Group; the Industrial Science and Technology Working Group; and the Fisheries Working Group. Alternatively, the same kind of expertise might be provided by existing NGOs or other non-state actors in the Asia-Pacific region, for example Greenpeace (whose offices are situated in Japan, Australia and New Zealand),[87] the Worldwide Fund for Nature (WWF)[88] and the US-based Nature Conservancy (TNC).[89]

Under the realm of the WTO, environmental expertise so far can only come from outsider environmental experts. Experience of the WTO has shown that environmental experts from the NGOs cannot present their case during the WTO's panel process. The only way their opinions could be heard is through written submissions in the form of *amicus curiae* brief. In the Shrimp/Turtle dispute, two NGOs - the Center for International Environmental Law and the WWF - had already provided an input for the panel from the environmental point of view. There should not be any doubt that such NGOs can indeed provide the panel with valuable environmental information that can assist the panel's reasoning process. As their practice, the NGOs often keep abreast with the development in their particular field of interest, their up-to-date information could indeed help the panel's awareness on the development in the field of environmental protection. For example, the NGOs' opinions could shed light on the implications of the trade measure used in each case. Moreover, the NGOs' information could help the panel come to a more even-handedly decided outcome by providing an offset against trade considerations which still remain dominant in the trade and environment dispute settlement process of the WTO.

Recently, the Appellate Body in the Shrimp/Turtle case ruled that the DSU did not prohibit the NGOs from submitting the *amicus curiae* briefs. But, whether or not they would be considered in the dispute settlement process, it still remained at the discretion of the panel. Indeed, this case shows that although the Appellate Body has opened the door for the future submission of environmental expert's comments, it still remains cautious about allowing use of such information.

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[87] For further information about Greenpeace, see www.greenpeace.org.

[88] See further, www.panda.org.wwf.

[89] For more information, see www.tnc.org.

With regard to the participation of the NGOs in the dispute settlement process, the matter still remains contentious. Under the WTO regime, the NGOs are not recognised as having a *locus standi*, they are not allowed in the hearing stage of the dispute settlement process of the WTO. Apart from submitting written submissions as discussed above, the NGOs could make themselves heard only through the lobbying process as an alternative.

By contrast, the DMS process could involve more participation by environmental experts and NGOs. An expert in the DMS process could be the mediator himself or one of the delegates in the negotiating team which represents the disputing party. However, unlike other judicial or quasi-judicial tribunals, like the court or arbitration, it is unlikely that an environmental expert would be called as a witness during the DMS process as mediation is normally conducted privately. Nonetheless, an environmental expert or representatives from the relevant NGOs could consult with the mediator during the mediation process, i.e. when the mediator discusses in private with each of the disputing parties. Alternatively, environmental expertise could be provided during the mediation process by way of written submissions.

One drawback of the environmental expert issue, however, is that one must be careful in selecting what information could be provided and who could participate in the DMS process. This caution is necessary in order to prevent the DMS process being inundated with irrelevant and unnecessary information. This is because while NGOs are recognised as being able to play a pivotal role in the development of an APEC wide environmental agenda they can also be a nuisance.[90] Where the expert is the mediator himself, there should be no problem in allowing his involvement during the mediation process. But where environmental expertise comes from other non-state actors or NGOs, it might be worthwhile considering a test to assess the legitimacy of the participation or involvement of those persons. Moreover, to help each party decide which information is to be used during the process, an exchange of environmental expert's opinions might be worth considering. What test is to be used will be discussed in Chapter 7 where some recommendations will be made.

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[90] Lyuba Zarsky, 'APEC, Citizen Groups, and the Environment: Common Interests, Broad Agenda', available from the Nautilus Institute for Security and Sustainable Development, Berkeley, California, 1995. (On file with author.)

## 5.6. Dispute Avoidance

In contrast to dispute settlement where the DMS may be used to resolve a dispute once it happens, the DMS could be used as a means of dispute avoidance, i.e. preventing a conflict of interests between the parties from escalating into a full blown dispute which could affect their relationship both economically and diplomatically. Generally, dispute avoidance may take the form of policy formation and information dissemination, i.e. forming a policy which does not result in a conflict of interest with other parties and letting them know about it. Indeed, letting the other trading parties know about what laws and measures are going to be used would undoubtedly minimise the discord which may arise between them. But, in some instances this may not be adequate. It may be necessary that assistance from a third party is required. This is where APEC DMS may come in.

In the Shrimp/Turtle dispute, a series of consultations had been attempted but without success. But, what needs to be remembered is that consultations were arranged after the trade ban had been imposed. By that time, trade loss had already been incurred and trading relations between the disputing parties had certainly been made uneasy. However, by applying the principle of dispute avoidance provided by the APEC's DMS to this situation, the parties might have prevented the conflict from reaching the same magnitude as it did in the real case.

For dispute avoidance to be applied successfully, the initial process of dispute avoidance has to start at a very early stage, i.e. before the United States had deployed its ban pursuant to its law on the import of shrimp or shrimp products harvested without the use of the turtle excluder device (TED) which would affect other countries. From the facts of the case, the time for the dispute avoidance process to have taken place should be in 1996, just after the revised guidelines (1996 Guidelines), whose effect was to extend the scope of Section 609 provision beyond the US jurisdiction, were published in compliance with the order of the Court of International Trade (CIT).

From the previous practice of the US government, it should be able to anticipate the forthcoming difficulties with other shrimps exporting countries. The trading records on the US part should demonstrate that Thailand and Malaysia are two of its main

exporters of its shrimp and shrimp products. Therefore, the US law which would inevitably cause some difficulties to these countries should be discussed with them beforehand. Although this may be time consuming, in the long run all parties involved could appreciate the amount of benefit created by such a meeting. With all the modern technology in the field of communication and the frequency of meetings hosted by the APEC forum, it should not be difficult to arrange such a meeting.

In practice it is perhaps unrealistic to expect the US government to foresee all affected exporting countries, unless there are no flaws in the transparency relating to the publication of measures for environmental purposes which allows ready access to the public both domestically and internationally. The US government could, at the very least, make its measures known publicly. It could use the forum of APEC to lay its cards on the table, for example at the Trade or Environment Ministerial Meeting, or at the regularly held Senior Officials' Meeting. Alternatively, the parties could make use of the Trade Policy Dialogue, under the auspices of the Committee on Trade and Investment, in order to meet up and discuss an alternative.

The DMS could be novel in that it could introduce the third party during the consultation, hence engendering a mediation atmosphere, if parties had found an impasse during the meeting. To break the ice, the third party mediator could indeed play an important role. This third party mediator would act in the same way and for the same purpose as he would in the dispute settlement process. It is also possible that a panel of three mediators could be formed, acting as a team of experts, where the case involves highly technical, scientific or legal complications.

Among the composition of the panel, at least one mediator each could come from the trade and environmental domains. For the same reason as argued in the earlier section of this chapter, the intermingling of both trade and environmental mediators would facilitate the parties in reaching their compromise. However, a set of guiding principles on appointment and conduct of the panellists and the overall process of mediation should be formulated as soon as possible. By having guiding principles formally drawn up, the credibility and consistency of the mediation process would be enhanced. This, in turn, might help attract more members to use the dispute avoidance mechanism.

The panel of expert mediators in the hypothetical DMS Shrimp/Turtle case could help bring Thailand, Malaysia and the United States to a sort of conclusion which would yield a compromise between the US environmental policy and the trade loss of Thailand and Malaysia, amounting to millions of dollars. In so doing, the US government should make their terms and goals explicit to the DMS panel, detailing their concerns for protection of the sea turtles. At the same time, the Thai and Malaysian governments should explain to the panel how much trade loss they will suffer as a result of the US law. These governments may persuade the panel to lean in their favour as trade is a necessary engine for their economic growth. If trade stalls, their striving for economic and developmental betterment would be impaired. The mediators would then exercise their skills to persuade each party to reach a compromise. For example, in this case, the US may be asked to consider an alternative measure which is more proportionate than the trade ban, such as labelling requirements. On the part of Thailand and Malaysia, more time to bring their conservation regimes in line with the American's could be agreed upon. Moreover, technical and financial assistance from the US government could be provided in order to ensure the compliance with the US law.

Apart from having experts as mediators during the process, non-state actors like interested NGOs and industries whose interests are at stake may be allowed to participate either by being present at the meeting or by submitting their view in writing in the form of *amicus curiae* briefs. These documents could provide details of how necessary the measure in question is in order to secure environmental protection. As an alternative, the NGOs from all parties could meet up in parallel to the DMS process. At such parallel proceedings, the NGOs could agree upon a common principle or opinion which could then be presented to the mediator. This would certainly save time as the NGOs would not need to present their opinions individually. In the hypothetical Shrimp/Turtle case, Thailand and Malaysia could have their NGOs submit papers demonstrating that they have had adequate sea turtle conservation programmes.

At the dispute avoidance stage, the problem of admitting *amicus curiae* documents could be less acute. This is because, at this stage a concrete and legally binding decision is not the aim. Instead, the aim of the APEC's DMS dispute avoidance is to steer parties away from the escalation of a conflict of interest into a full blown dispute. Thus, the process of dispute avoidance while helping the parties come to their

compromise also provides a channel for non-state actors to contribute their views. This aspect could prove to be helpful for the development of the trade and environment debate, as information from the non-state actors could be more readily accepted. But again, a set of guidelines might be needed in order to prevent the dispute avoidance process being inundated with NGO's papers.

Indeed, adding another function to the existing APEC's framework would involve some financial sacrifice. With the already tight budget of APEC, funding for the process of dispute avoidance may have to be provided by the parties in the dispute themselves. But, as a number of APEC members are still developing countries, they may not be prepared to pay such a large sum of money. Again, if the APEC central fund is established, those poor members of APEC would not be denied their chance to consult with other trading partners who would introduce a measure for environmental purpose which could adversely effect their market access. As the Shrimp/Turtle case has demonstrated, a large amount of litigation fees was incurred from the start to the finish of the dispute settlement process. By having the APEC central fund in place, Thailand and Malaysia's legal costs could have been funded partly by such a fund. In effect, by shifting some of the legal costs to APEC, it could encourage members to use the DMS dispute avoidance avenue.

Naturally, making all APEC members contribute to the central fund could trigger some unwillingness from some APEC members, hence deterring members from using the DMS avenue. But when comparing this amount of contribution with the amount of trade loss which might result, the establishment of the central fund could prove worthwhile.

Apart from the financial constraint, it has to be borne in mind that in order for dispute avoidance to work successfully, the main driving force is the political willingness of the parties to come together and find a compromise, and such a willingness may not be found in all situations. With the alternative of the WTO forum which could offer a judicial ruling, the idea of dispute avoidance might be overlooked. Some successful results generated by the dispute avoidance process may have to materialise before the credibility and confidence in the system are built up.

Moreover, by dispute avoidance *via* mediation the parties are more likely to reach an outcome which accommodates their interests, rather than focusing on the determination of their legal right which can only render a legal compromise at the end of the proceeding without achieving the underlying purpose of the measure. In trade and environment disputes, this means that, most of the time, rather than the natural resources or the environment being preserved, the parties in the dispute have focused on redeeming their commercial loss. In the Shrimp/Turtle case, for instance, the parties during the dispute avoidance stage could focus their case on how to protect the turtles from being incidentally killed by using a proportionate trade measure instead of focusing on how to retaliate against the offender. Thus, the goals of both trade and environment would be achieved with an optimum result.

If APEC can successfully promote the idea of dispute avoidance, this would be a novel means for dispute resolution in the field of trade and environment as no other forum would have offered a "two track" environmentally sensitive dispute resolution system. (See Diagram D.) The APEC's DMS dispute avoidance would therefore not only be valuable to the Asian members of APEC, by preserving the Asian ways of doing business, it will be beneficial to the North American members too. For the latter groups, the more choice of forum could mean more chance to pursue their environmental priorities.

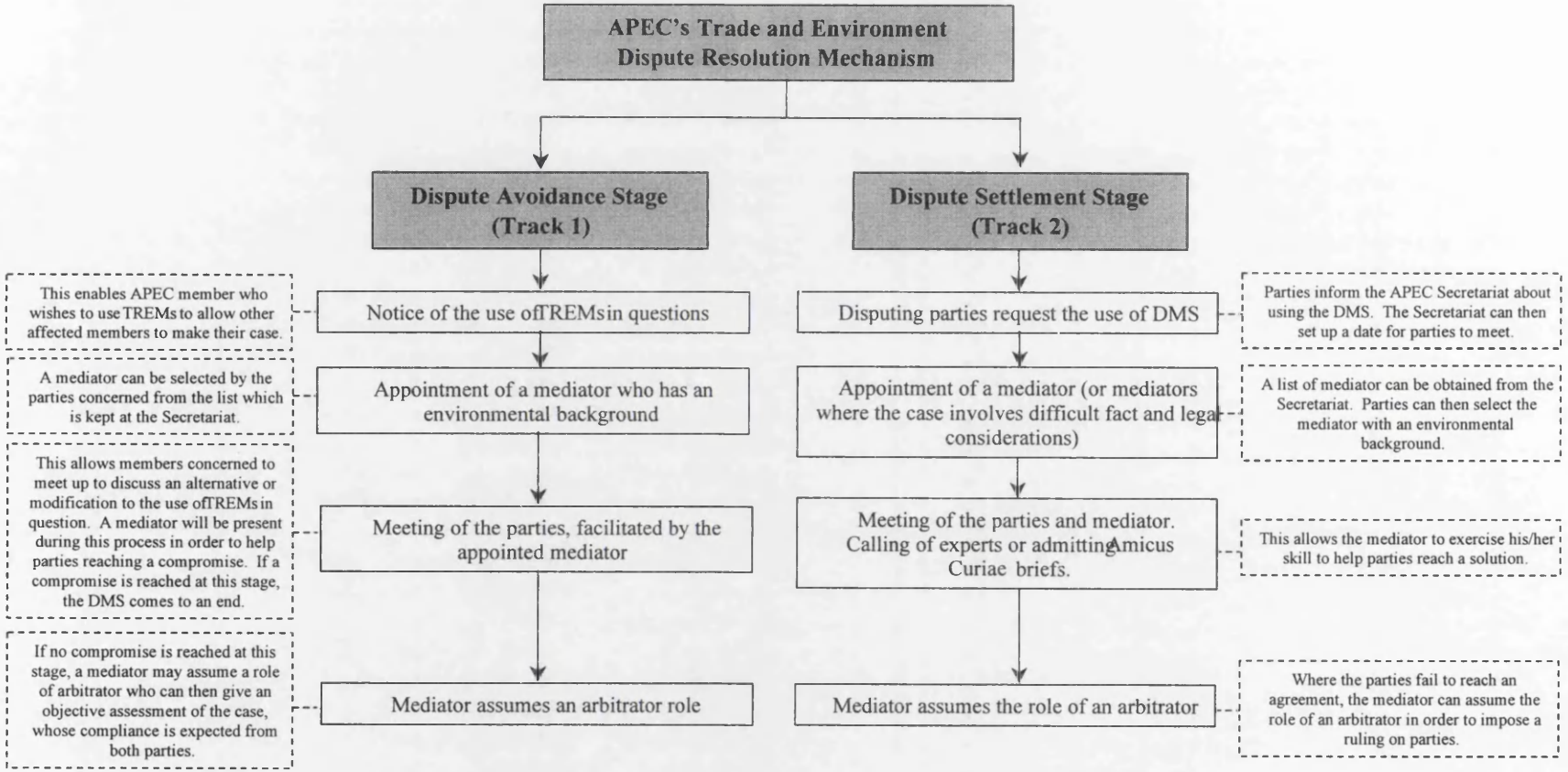


**Diagram D: APEC's Two Track Dispute Resolution Mechanism for Trade and Environment Disputes**

## 5.7.The DMS and the WTO's Dispute Settlement System

In as much as the trade agenda of APEC needs to proceed in a consistent fashion with the WTO's trade liberalisation programmes, the dispute resolution system of the two institutions also need to work coherently. The WTO's dispute settlement mechanism has already been in use for some years and produced several important decisions concerning international trade matters. With more trust and credibility given to the Dispute Settlement Body (DSB), the Appellate Body and the dispute settlement process on the whole, the WTO will indeed continue to be an attractive avenue for resolving the disputes among its members. In contrast, the APEC's DMS is extremely nascent and still developing. Its workability or efficiency is still yet to be tested in practice. It is thus difficult at this stage to conclusively predict if the DMS will receive the similar kind of response that APEC member economies give to the WTO's dispute settlement process. The relationship between the DMS and the WTO's dispute settlement process thus will pose some legal questions which need to be answered including: Do APEC members have a choice of forum where a dispute may be resolved?; Can a dispute resolved under the framework of APEC be reinitiated before the DSB of the WTO?; and Does the use of the DMS mean a waiver of the right to resort to the WTO's dispute settlement mechanism? These questions will be addressed below.

### 5.7.1. The Choice of Forum

The choice of forum is one of the most important decisions the parties of the dispute have to make. In private international law there are rules governing the choice of forum under the law of conflicts. However, in public international law there are no such rules. Public international law by and large operates by the doctrine of consent.[91] Thus, the parties are at their liberty to choose the forum for resolving their case. However, where the disputants belong to a particular international organisation their choice of forum may be limited by the membership of a certain institution. Within the APEC context, at least three choices of forum are available to APEC members for resolving their disputes: the

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[91] James Cameron, 'Dispute Settlement and Conflicting Trade and Environment Regimes', in Agata Fijalkowski and James Cameron, eds., *Trade and the Environment: Bridging the Gap*, (London: Cameron May Ltd., 1998), 16-26, at 17.

DMS; the dispute resolution mechanisms of the sub-regional groupings such as NAFTA, ASEAN and the Closer Economic Relation Agreement between Australia and New Zealand (CER); and the WTO - provided that the disputants are members of the WTO. Each of these fora offers a different way of resolving the dispute. Additionally, the APEC members may agree to resolve their dispute at the International Court of Justice (ICJ) or even the tribunal of the United Nations Convention on the Law of the Sea (UNCLOS).

The choice of forum may also be dictated by the issue of the dispute. For instance, a trade dispute should be resolved at a trade-oriented forum - like the WTO or APEC - and an environmental dispute should be resolved at an environment-oriented forum - like that established by the Montreal Protocol, the environmental chambre of the ICJ[92] or the UNCLOS tribunal.[93] However, for a dispute which can fall into more than one discipline like the trade and environment dispute, it is indeed not easy to decide the forum to which the dispute should be brought. The choice of forum in this instance thus depends on the law and discipline upon which the parties rely as the basis to bring their case. From the practice of the WTO, it has been suggested that where the jurisdiction of the WTO and the multilateral environmental agreement (MEA) is overlapped, a dispute is to be settled by the dispute settlement of the MEA where both of the disputing parties are members of that particular MEA. However, where only one party of the dispute is a member of the MEA, but both parties are members of the WTO, an appropriate forum for dispute settlement in this situation is the dispute settlement mechanism of the WTO.[94]

From the perspective of APEC, the WTO is to be used as a primary forum for resolving a dispute between APEC member governments. It could also be rightly assumed that in many cases the dispute would concern the violation of the WTO rules, as APEC currently does not have hard-law instruments which give APEC the

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[92] For a review of the role of the ICJ in environmental disputes, see Patricia W. Birnie and Alan E. Boyle, *International Law & The Environment*, (Oxford: Clarendon Press, 1992), 136-160.

[93] The UNCLOS tribunal has a jurisdiction to deal with marine conservation and pollution disputes. For further discussions, see Patricia W. Birnie and Alan E. Boyle, *op. cit.*, at 181-182.

[94] See WTO, *Report of the WTO Committee on Trade and Environment*, Document WT/CTE/W/40, 7 November 1996, (Geneva: WTO, 1996), at 11.

jurisdiction to resolve the dispute. In spite of the preference of the WTO over APEC's mechanism there is yet nothing in APEC literature which prohibits the members from resolving the dispute *via* APEC's own mechanism. This is especially so where the WTO's ability to deal with some issues still remain questionable. Environmental issues indeed fall into these kinds of issue. As discussed in Chapter 3, despite the fact that the WTO has resolved trade and environment disputes in a more environmentally friendly way than GATT 1947, there are still some loopholes in the WTO system which remain to be targets of criticism from the environmental community. Indeed, the APEC's DMS may be able to fill in such a gap. From the perspective of the WTO, to use the DMS in order to resolve the dispute should also be welcomed. This is because the DSU already provides for the use of mediation (Art. 5 of the DSU) as a means to resolve the dispute between the WTO members in parallel to the formal dispute settlement process - the establishment of a panel. Moreover, nothing in Art. 5 of the DSU shows any sign of prohibition from resorting to mediation outside the WTO system. The use of mediation is furthermore encouraged by the fact that the Art. 3(7) of the DSU requires the formal quasi-judicial dispute settlement procedures (the panel process) should be requested only when the parties of the dispute consider that such a process would yield a "fruitful" result.

To sum up, in absence of the rules governing the choice of law in the domain of public international law, the disputants have control over the choice of forum for resolving their dispute. In many instances, the choice of forum depends on the agreement between the parties of the dispute. Also, there are other factors which may be influential in the forum shopping process, such as the membership of a particular group, the law and issue of the dispute, and the credibility and the performance of the dispute resolution mechanism. Advantages which the parties may gain from using the DMS in resolving trade and environment disputes have already been delineated in the earlier section, it may be advisable therefore that the APEC members choose the DMS as an avenue for resolving their dispute.

### 5.7.2. Can the Dispute be Reinitiated?

Admittedly, it is not often that mediation can result in an agreement between the disputants. One might question, therefore, what the parties could do if the DMS failed

to deliver an outcome. In general, in this situation the parties may seek other means to resolve their dispute or preserve the status quo. The latter option, however, is not advisable unless the parties no longer have a desire to preserve the relationship between themselves. In the context of public international law, the broken relationship could have several implications. Some of them may be typified by the use of trade embargoes, termination of diplomatic relations, withdrawal from obligations under international agreements, and even declaration of war. As a matter of practice, therefore, the parties will try to resolve the dispute as far as they can.

Technically, the DSU does not prohibit the re-initiation of the dispute as long as the first attempt to resolve the dispute is not *via* the panel process. In other words, the complaining party may request the establishment of a panel in one of these circumstances: before mediation commences; at the same time as mediation begins; or after mediation fails. The DSU only states that mediation can be used voluntarily, subject to the agreement of the disputants,[95] and it can be initiated and terminated at any time.[96] So, mediation can be attempted independently from the panel process. APEC members may choose the DMS to carry out mediation as opposed to under the WTO. One might ask, however, about the correlation between mediation under APEC and the WTO regimes. In theory, there should be no conflicts between the two systems, as they operate independently. One party may attempt to resolve the dispute by the DMS first, then start all over again under the WTO system. But, this approach would be very expensive and time consuming. The better option is to use the DMS as an avenue for mediation in the first place, if no outcome could be achieved then the parties might start the panel process under the WTO system provided that both parties are WTO members. The failure of the mediation process in this case should not be viewed as being futile. Instead, one should see the mediation stage as a testing ground for the disputants' cases, so that should the mediation produce an unsuccessful result the disputing parties would get a second chance to settle the dispute at the WTO.

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[95] Art. 5(1) of the DSU.

[96] Art. 5(3) of the DSU.

### 5.7.3. Waiver of the WTO' s Right?

Another important question one might ask is that once the parties have chosen to use the DMS to resolve their dispute does it mean that they have waived their right to settle the dispute by the WTO mechanism? The answer to this question indeed depends on the parties. The disputants might decide to use the DMS as the only avenue for resolving their dispute. In alternative, they might decide to use the DMS first as a testing ground for their case then proceed to the WTO's mechanism in order to obtain a formal ruling. As discussed above, there is no prohibition in the DSU or by APEC that the parties could not reinitiate the proceedings at the WTO once the DMS had failed. Thus, it entirely depends on the parties' intention whether or not to waive their right to resort to the dispute resolution mechanism of the WTO.

However, there is another important factor which needs to be taken into consideration. That is the point of law in the dispute. In the dispute which involves issues of the WTO, particularly GATT, the parties might wish to use the WTO's mechanism to resolve the dispute since the WTO panel and the Appellate Body would no doubt provide an expert's advice on the law of GATT. But, in the case of trade and environment dispute, the parties may decide to submit the case to the forum which is more environmentally sensitive. An example may be seen from the NAFTA's experience which will be examined below.

In general, it is therefore up to the parties to weigh their considerations between the use of the DMS and the WTO's dispute settlement mechanism before deciding whether or not to waive the right to use the latter. In any intergovernmental disputes not only must the parties of the dispute consider the legal issues before any legal proceedings may be taken, they also have to consider the political, economic, and diplomatic consequences. From the perspective of APEC, frictions between the member economies might eventually damage the integrity of APEC as a regional co-operation institution.

# Chapter 6

# NAFTA as a Model for the DMS?

From the perspective of dispute settlement, if a dispute could be settled it could be said that the dispute settlement process has been successful. However, from the trade and environment perspective, such a dispute could not be treated as settled successfully unless the trade and environment balance has been met. The last chapter has discussed how the Dispute Mediation Service (DMS) of the Asia-Pacific Economic Cooperation (APEC) may be used to resolve trade and environment disputes among APEC members. Mediation could provide an effective alternative to the dispute settlement mechanism of the World Trade Organization (WTO) for resolving trade and environment disputes. However, dispute settlement is only a short term solution. It only deals with the problem on a case-by-case basis. No guarantee can thus be given that the future disputes would be resolved in the same way. In order to ensure the continuity of the trade-environment balance through the dispute resolution mechanism, the North American Free Trade Agreement (NAFTA) is chosen with a view to providing guidance for APEC.

Reasons for choosing NAFTA as a model are as follows. Firstly, NAFTA has been perceived as one of the most environmentally sensitive trade agreements, another being the treaties of the European Union (EU).[1] As will be seen below, NAFTA has owed its "green" reputation to environmental provisions contained in NAFTA itself as well as the environmental side agreement. Secondly, APEC more closely resembles NAFTA in terms of economic integration progression than the EU which is relatively more advanced.[2] The EU is now moving closer to becoming a monetary union - a form

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[1] For discussions on the "green" reputation of the EU, see, for example, Joanne Scott, *EC Environmental Law*, (New York: Longman, 1998); Ernst-Ulrich Petersmann, *International and European Trade and Environmental Law after the Uruguay Round*, (London: Kluwer Law International, 1995).

[2] The EU was established by the Treaty on European Union (TEU) of 7 February 1992. This treaty was a result of a summit held in Maastricht, the Netherlands, in December 1991. The TEU, hence, is also called the Maastricht Treaty. This treaty aims to provide a deeper integration of Europe economically as well as politically. In fact, the evolution of the EU dates back to the 1950s when the European Coal and Steel Community (ECSC) was formed. The aims of the ECSC were to promote rationalisation and integration of the European steel industry. In 1957, the Treaty of Rome establishing the European Economic Community (the EC Treaty) was signed by six founding Member States, namely France,

of economic co-operation which requires that not only a common external tariff is established but also a unified system of monetary regulation - while NAFTA only pursues a free trade arrangement which simply requires the parties to eliminate tariff and non-tariff barriers among themselves. Additionally, the EU has a more complex institutional arrangement which comprises the EU Commission, Council, Parliament and the Courts - the European Court of Justice (ECJ) and the Court of First Instance (CFI). It also has the capacity to legislate a uniform environmental law in the form of Regulation or Directive which the current structure does not allow APEC to do.[3] Thirdly, as NAFTA is already a sub-regional economic arrangement within the APEC boundary, the provisions contained in NAFTA thus would not depart so much from the APEC's practice as APEC (e.g. in the Bogor Declaration) requires that the sub-regional groupings should complement the evolution of APEC, and *vice versa.*

It should be mentioned from the outset, however, that this chapter is not intended to suggest that APEC could entirely emulate NAFTA, as this might not be possible due to the differences between these two institutions. But, viewed optimistically, APEC still can learn from several elements of NAFTA which arguably have made NAFTA one of the most environmentally friendly trade institution of our time.

In assessing what aspects of NAFTA could possibly provide a model for APEC in terms of trade and environment dispute resolution, a brief account of NAFTA and it environmental provisions will be provided. Then, the dispute settlement mechanism of

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Germany, Italy and the Benelux countries (comprising Belgium, the Netherlands and Luxembourg). Later accessions were made by Denmark, Greece, Ireland, Portugal, Spain and the United Kingdom, raising the number of members to 12. The EC Treaty envisages the creation of, *inter alia*, a common market which is based upon an elimination of customs duties and quantitative restrictions on import and export in commodity and measures having equivalent effect to the quantitative restriction (MEQR). A big leap in the evolution of the European integration was the adoption of the Single European Act (SEA) of 1986, which came into force in 1987. The SEA sets out ambitious agendas leading towards the materialisation of the Single European Market under which the free movement of goods, services, capital and people are to be guaranteed. Up to date, the EU is seen as the most advanced form of economic integration. For more discussions on the background of the EU, see Stephen Weatherill and Paul Beaumont, *EC Law: The Essential Guide to the Legal Workings of the European Community*, 2nd edition, (London: Penguin Books, 1995), 1-42; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 2nd edition, (Oxford: Oxford University Press, 1998), 3-48.

[3] For example, Regulation 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the Community, OJ 1993 L 30/1; Directive 92/43 of 12 December 1991 on hazardous waste, OJ 1991 L 377/20; Regulation 594/91 on substances that deplete the ozone layer, OJ 1991 L 67/67; Directive 79/409 of 2 April 1979 on the conservation of wild birds, OJ 1979 L 103/1; and Directive 92/43 of 21 May 1992 on the conservation of natural habitats of wild fauna and flora, OJ 1993 L 206/7.

NAFTA will be briefly examined. The last part of this chapter will discuss aspects which APEC could learn from NAFTA in order to help develop APEC's practice for trade and environment dispute resolution.

## 6.1. NAFTA: A Brief Background

NAFTA is a tripartite trade pact which was entered into by the United States, Canada and Mexico on 17 December 1992.[4] The NAFTA negotiation process started in February 1991 by the enunciation of the then President of the United States, George Bush, President Carlos Salinas of Mexico and Prime Minister Brian Mulroney of Canada. The actual meeting of NAFTA commenced on 12 June 1991 by trade ministers of the three NAFTA members. The series of complex negotiations was completed on 12 August 1992 which produced a document of more than a thousand pages. NAFTA came into force on 1 January 1994.[5] NAFTA is expected to provide a "free trade area" (Art. 101 of NAFTA) for 360 million consumers and more than $6 trillion in annual output.

Historically, the development of NAFTA finds its roots in the formation of the Canada-United States Free Trade Agreement in 1988.[6] (Hereafter "the FTA".) To a certain extent, NAFTA has been seen either as an extension[7] or improved version of the FTA because provisions in NAFTA have largely been borrowed from the FTA.[8]

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[4] North American Free Trade Agreement, 8 December 1992, 32 *ILM* (1992) 289.

[5] For further background of NAFTA, see Richard Buckley, ed., 'NAFTA and GATT: The Impact of Free Trade', *Understanding Global Issues*, 94/2, (Cheltenham, UK: European Schoolbooks Publishing Limited, 1995); D. Lipsey, R. Schwanen and R. Wonnacott, *The NAFTA*, (Toronto: C.D, Howe Institute, 1994); C. O'Neal Taylor, 'Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle', 28 *George Washington Journal of International Law and Economic* (1994) 1; Bijit Bora, 'North American Free Trade Agreement', in Bijit Bora and Christopher Findlay, *Regional Integration and the Asia-Pacific*, (Melbourne: Oxford University Press, 1996), 168-183.

[6] Canada-United States Free Trade Agreement, 22 December 1987, in force 1 January 1989, reprinted in 27 *ILM* (1987) 281. For a brief history of the FTA, see Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (London: Routledge, 1995), 39-45. The FTA regulates trade in goods, services, and investment between the United States and Canada.

[7] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (London: Routledge, 1995), at 45.

[8] Gary Clyde Hufbauer and Jeffrey J. Scott, *NAFTA: An Assessment*, (Washington, DC: Institute for International Economics, 1993), at 2.

However, NAFTA should not be mistaken for a trilateral version of the FTA.[9] Rather, it is a hybrid version of the FTA. This is because the FTA was negotiated in order to accommodate the interests of Canada and the United States, which would be difficult to extend to Mexico in the case of NAFTA.[10] Moreover, the intentions of the parties to the NAFTA negotiations were manifestly different. While an increase in access to each other's market and job creation ostensibly were the main benefits anticipated by NAFTA,[11] there were other hidden agenda as well.[12] For the United States, it saw NAFTA as an opportunity to prolong an economic reform of Mexico after President Salinas stepped down in 1994. Additionally, the United States wanted to manifest its intention to pursue freer trade at any cost, given that NAFTA was negotiated during the long course of the Uruguay Round of Multilateral Trade Negotiations whose success was not ascertained at that time. However, the Canadian motive was somewhat different. Simply, it did not want to be left out. Canada was concerned that its benefits under the FTA would be undermined by the new co-operation between the United States and Mexico.

The main aims of NAFTA are: (i) to phase out all tariffs and most non-tariff barriers (NTBs) to trade in goods and services between the members over 5-15 years; (ii) to promote fair competition; (iii) increase investment opportunities in member countries; and (iv) to strengthen the intellectual property protection in North America.[13] The implementation of these aims is to be carried out *via* several activities which, for example, include: abolishing all tariffs and NTBs between members over the 15 year period; converting NTBs into tariff-rate quotas; establishing the NAFTA rules of origin;[14] and drafting of rules to protect intellectual property - not just patents, but also

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[9] Bijit Bora, *supra*, note 5, at 173.

[10] *Ibid.*

[11] Gary Clyde Hufbauer and Jeffrey J. Scott, *op. cit.*, at 3-5. Also see Jorge A. Gonzalez, Jr., 'The North American Free Trade Agreement', 30(2) *The International Lawyer* (1996) 345, at 351.

[12] See Bijit Bora, *supra*, note 5, at 172-173.

[13] See Art. 102 which sets out the objectives of NAFTA.

[14] The NAFTA rules of origin are both complex and stringent. As such, they create an administrative barrier to trade. The NAFTA rules of origin apply to all except three products: automotive, textiles and some agricultural products. These products are governed by separate rules of origin. At present, in the automotive industry, for example, the percentage of NAFTA components required before a certificate of NAFTA origin can be given is 62.5 percent.

copyright, trademark, and trade secrets. Besides trade issues, other issues have also been addressed under the framework of NAFTA. These issues include: investment, competition policy, financial services, labour and the environment. In my view, these issues have arguably made NAFTA one of the most comprehensive regional agreements ever concluded in this era.

Institutionally, NAFTA is now administered by a NAFTA Free Trade Commission which is composed of cabinet-level representatives or their designees from each member country. The functions of the Free Trade Commission are outlined in Art. 2001(2) of NAFTA, including: supervising the implementation of NAFTA; overseeing its further elaboration; resolving disputes arising out of the application or interpretation of NAFTA; supervising the work of all committees[15] and working groups[16] under NAFTA; and considering any matter that may affect the operation of NAFTA. The Free Trade Commission convenes at least once a year, chaired by each member successively. It is supported by a full-time Secretariat of somewhat unique arrangement.[17] The Secretariat is divided into Sections, one in each member country.[18] Its functions are set out in Art. 2002(3) of NAFTA which include the administration of the dispute settlement provisions of NAFTA, and providing support for the Commission and various Committees and Working Groups.

## 6.2. NAFTA Environmental Provisions

Environmental issues had played an important role during the negotiations of NAFTA. At the beginning of the process, NAFTA contained no separate sections concerning environmental issues albeit they were addressed sporadically in the agreement. However, the environment protagonists considered this to be insufficient. This resulted in a separate environmental side agreement being negotiated - the North American

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[15] There are Committees working on several issues, which include: trade in goods; trade in worn clothing; agricultural trade; sanitary and phytosanitary measures; standards-related measures; NAFTA small business; and financial services. There is also an Advisory Committee on Private Commercial Disputes.

[16] The Working Groups are established for issues relating to: rules of origin; agricultural subsidies; trade and competition; and temporary entry. Also, there are two Mexican-American Working Groups.

[17] Established pursuant to Art. 2002 of NAFTA.

[18] These Sections of the Secretariat are situated in Ottawa, Mexico City and Washington, DC.

Agreement on Environmental Cooperation (NAAEC).[19] This landmark agreement was concluded on 13 August 1993 by the Canadian Minister for International Trade, Thomas Hockin, the Mexican Secretary of Trade and Industrial Development, Jaime Serra, and the US Trade Representative, Mickey Kantor. This sub-section will briefly review environmental provisions contained in NAFTA itself and the NAAEC.[20]

### 6.2.1. NAFTA

#### 6.2.1.1. The Preamble

The starting point for environmental provisions contained in NAFTA itself is the Preamble which makes some clear references to environmental protection and sustainable development. It explicitly enunciates that NAFTA is to:

> contribute to the harmonious development of world trade...in a manner consistent with *environmental protection and conservation*;...promote *sustainable development*...;[and] strengthen the development and enforcement of environmental laws and regulations. (Emphasis added.)

Although the preamble does not have binding force in itself, as it does not set out specific obligations to be followed, it still represents the premise of a synergy between trade, environmental protection and sustainable development, as called for at the 1992 Rio Earth Summit. This premise can be affirmed more concretely by the NAFTA provisions themselves. The main provisions pertinent to environmental protection in NAFTA are Art. 104, Chapter 7B, Chapter 9 and Art. 1114.

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[19] 8 September 1993, 32 *ILM* (1993) 1480.

[20] There is a ample literature on NAFTA and the environment. For example, see Alan M. Rugman, John Kirton and Julie Soloway, 'NAFTA, Environmental Regulations, and Canadian Competitiveness', 31(4) *Journal of World Trade* (1997) 129; Robert Housman, 'The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment', 30 *Stanford Journal of International Law* (1994) 379; Daniel C. Esty, 'Making Trade and Environmental Policies Work Together: Lessons from NAFTA', in James Cameron, Paul Demaret and Damien Geradin, eds., *Trade & The Environment: The Search for Balance*, vol. I, (London: Cameron May Ltd., 1994), 373-386; Pierre Marc Johnson and André Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law*, (Washington, DC: Island Press, 1996).

### 6.2.1.2. Art. 104

Art. 104 of NAFTA governs the relationship between NAFTA and multilateral environmental agreements (MEAs). It technically preserves the right of the NAFTA parties to exercise trade measures in accordance with certain MEAs, namely: the Montreal Protocol on Substances that Deplete the Ozone Layer; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[21] Art. 104(1), in particular, allows the trade obligations under NAFTA to be trumped by the use of trade restrictive measures under the MEAs. Some other bilateral environmental agreements set forth in Annex of Art. 104.1 of NAFTA are also given the same privilege as these MEAs.[22] Article 104(1) of NAFTA states:

> In the event of any inconsistency between [NAFTA] and the specific trade obligations set out in: (a) [CITES]; (b) [the Montreal Protocol]; (c) [the Basel Convention] on its entry into force for Canada, Mexico and the United States; or (d) the agreements set out in Annex 104.1; 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 [NAFTA].

It is worth noting that Art. 104 is not exclusively drafted as Art. 104(2) of NAFTA allows other environmental agreements to be added to Annex 104.1, subject to the parties' agreement in writing. In effect, Art. 104(2) extends the NAFTA overriding status to trade obligations under the future MEAs where they are inconsistent with the NAFTA's obligations.

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[21] Gustavo Alanis-Ortega, 'What We Can Learn From NAFTA', in Simon S.C. Tay and Daniel C. Esty, eds., *Asian Dragons and Green Trade: Environment, Economics and International Law*, (Singapore: Times Academic Press, 1996), 71-77, at 72.

[22] These are the 1986 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 1983 United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area.

#### 6.2.1.3. Chapter 7B

Provisions concerning the North American environmental standards are contained in Chapter 7B of NAFTA. In particular, this chapter provides an imprint of rules concerning sanitary and phytosanitary (SPS) measures.

In substance, Chapter 7B provides that an SPS measure may be adopted, maintained, or applied by each member where such a measure is "necessary for the protection of humans, animals, or plants' life or health in its territory, *including a measure more stringent than an international standard, guideline, or recommendation*".[23] (Emphasis added.) In addition, the measure shall be scientifically based, not be maintained where the scientific basis no longer exists, and based on a risk assessment appropriate to the circumstances.[24] The SPS measure in question is further required to ensure the granting of non-discriminatory treatment to the like goods of another member or non-member alike, hence guaranteeing the national treatment and the most-favoured nation (MFN) principles,[25] and to ensure that such an SPS measure does not amount to an unnecessary obstacle[26] or disguised restriction on trade between NAFTA members.[27]

#### 6.2.1.4. Chapter 9

Chapter 9 of NAFTA sets out rules with regard to technical barriers to trade (TBT) in general which *inter alia* include those related to safety, the protection of human, animal or plant's life or health, and the environment. With regard to the TBT measures, Art. 904 of NAFTA sets out basic rights and obligations whereby each member may adopt, maintain, or apply any standards-related measures so long as they accord non-

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[23] NAFTA Art. 712(1). For provisions on international standards, see NAFTA Art. 713, whereby *inter alia* the SPS measure which conforms to the international standards, guidelines or recommendations is presumed to be consistent with Art. 712.

[24] NAFTA Art. 712(3)(a), (b), (c). For an elaboration of the risk assessment and appropriate level of protection, see NAFTA Art. 715, where a list of what to be taken into account is given.

[25] NAFTA Art. 712(4).

[26] NAFTA Art. 712(5).

[27] NAFTA Art. 712(6).

discriminatory treatment to the like goods[28] and do not create unnecessary obstacles to trade between NAFTA members.[29] Each member may set its own level of protection that it considers appropriate[30] in accordance with the risk assessment procedures.[31] Standards which are set by each member shall be based upon existing international standards or those whose completion is imminent, unless they are not appropriate to its climatic, geographical, technological, or infrastructural circumstances, or fail to live up to the standards the member considers appropriate.[32] Moreover, if the international standards are relied upon, there will be a presumption that the member's standard is neither discriminatory nor an unnecessary obstacle to trade.[33]

#### 6.2.1.5. Art. 1114

Unlike the foregoing provisions, Art. 1114 has set NAFTA apart from any other trade agreements by including the subject of "investment and the environment" in the trade context.[34] Art. 1114(2) discourages the NAFTA parties to waive environmental obligations or lower environmental standard purposely to attract foreign direct investment. It further provides that should such an incident occur, "consultations" can be resorted to "with a view to avoiding any such encouragement".[35]

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[28] NAFTA Art. 904(3).

[29] NAFTA Art. 904(4).

[30] NAFTA Art. 904(2).

[31] NAFTA Art. 907(2).

[32] NAFTA Art. 905(1) and (2).

[33] Richard B. Stewart, 'The NAFTA: Trade, Competition, Environmental Protection', 27(3) *The International Lawyer* (1993) 751, at 760.

[34] For a detailed discussion on NAFTA investment provisions and the environment, see Robert Housman, *Reconciling Trade and the Environment: Lessons from the North American Free Trade Agreement*, (Geneva: UNEP, 1994), 18-21.

[35] Although this provision is well received by the environment protagonists, its implementation still remains doubtful. This is because Art. 1114(2) does not provide any further details of what to do if consultations fail. All it requires is that parties *shall* consult.

### 6.2.2. The NAAEC

The NAAEC is an environmental side agreement that exists alongside the NAFTA trade pact with a view to committing the parties to effectively enforce their environmental laws and regulations. Its purpose is not to alter the trade basis of NAFTA but reinforce the environmental provisions contained in it. This undertaking is reaffirmed in the preamble of the NAAEC itself which states:

> Convinced of the importance of the conservation, protection, and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well being of present and future generations...[and] reconfirmed the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection.

Ten objectives of the NAAEC are set out in Part One, Art. 1. Primarily, they are geared towards the protection and improvement of the environment and the promotion of sustainable development. Some of these objectives are: (i) to foster the protection and improvement of the environment in the territories of the parties for the well-being of present and future generations; (ii) to promote sustainable development based on co-operation and mutually supportive environmental and economic policies; (iii) to support the environmental goals and objectives of NAFTA and avoid creating trade distortions or new trade barriers; and (iv) to strengthen co-operation on the development of environmental laws and enhance their compliance and enforcement, and promote transparency and public participation.

Part Two of the NAAEC encompasses obligations to be followed by the parties, including the general commitments (Art. 2), publication of laws, regulations, procedures and administrative rulings (Art. 4), government enforcement action (Art. 5), private access to remedies (Art. 6), and procedural guarantees (Art. 7). However, what is significantly noteworthy is Art. 3 which governs the level of environmental protection. While the NAFTA members are to pursue the trade agenda, Art. 3 of the NAAEC also mandates that the member "shall ensure that its laws and regulations provide for *high levels of environmental protection* and shall strive to continue to improve those laws and regulations". (Emphasis added.) By accepting NAFTA's obligations, the members have also undertaken obligations under the NAAEC, as the two agreements come in the

same package. Thus, from the wordings in Art. 3, trade liberalisation and a high level of environmental protection are to be realised simultaneously.

Institutionally, Part Three establishes the Commission for Environmental Cooperation or, in short, the CEC (Art. 8). The CEC comprises a Council, a Secretariat and a Joint Public Advisory Committee. Details of the roles and responsibilities of each of these bodies are provided in Art. 9 to Art. 19. In brief, the Council is composed of cabinet-level officers (or the equivalent) representing each member of NAFTA. Its principal roles are to oversee the implementation of the NAAEC and the Secretariat, and to be responsible for the dispute settlement provisions under this agreement. As will be discussed below, this latter role of the Council is quite significant in terms of ensuring the balance between free trade and environmental protection in North America. The meeting of the Council takes place at least once a year. The Secretariat, staffed by 25 officials, is to provide technical, operational and day to day administrative assistance to the Council and its subordinate groups. Another important task of the Secretariat is to consider submissions in regard to the member's failure to enforce its environmental law put forth by any person or non-governmental organisations (NGOs). The Council and the Secretariat are further assisted by the Joint Public Advisory Committee, composed of five non-governmental individuals from each NAFTA member. The Committee will advise the Council on matters of a technical and scientific nature and provide other information to the Secretariat where demanded.[36]

Collectively, the CEC has an important role to play in the enforcement of NAFTA environmental protection.[37] It has two methods of securing compliance with the parties' environmental laws and regulations. Firstly, the CEC could prepare factual reports and make them publicly available in order to attract public attention in the hope that the public pressure would make the offender take the necessary corrective actions. Secondly, the Secretariat could initiate a dispute settlement process where it considered a party had shown "a persistent pattern of failure to enforce its environmental laws and regulations, through appropriate government action".[38]

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[36] For a further discussion on the institutional aspect of the CEC, see Pierre Marc Johnson and André Beaulieu, *op. cit.*, 131-169.

[37] Jorge A. Gonzalez, Jr., *supra*, note 11., at 354.

The dispute settlement provisions of NAAEC are contained in Part Five, headed "Consultation and Resolution of Disputes". Details of these provisions are given in Art. 22 to Art. 36, which provide an avenue for consultations[39] or an arbitral panel.[40] Additionally, persistent non-compliance with the findings of the panel may result in an imposition of "monetary enforcement assessment".[41] It is worth noting, however, that Canada is not subject to the use of monetary enforcement assessment provision. A different enforcement method for Canada is provided in Annex 36A of the NAAEC, i.e. the enforcement procedures have to be brought before the Canadian court in order to obtain a court order to that effect. In addition, because the enforcement and jurisdiction over the environmental matters in Canada is shared peculiarly between the federal and provincial governments, Annex 41 of the NAAEC provides separate rules for Canada which allow Canadian provinces to be exempted from the operation of the dispute settlement system under the NAAEC.[42]

Unlike the dispute settlement regime of NAFTA, which will be discussed later, individuals and NGOs may petition the Secretariat by virtue of Art. 14 of the NAAEC against the failure to enforce environmental laws by the member government. However, Art. 14 provisions cannot be relied upon lightly. Several conditions contained in Art. 14(1)(a-f) and Art. 14(2) of the NAAEC in fact act as important hindrance on the public participation in the dispute resolution process of the NAAEC.[43] These conditions must

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[38] For a detailed discussion on the NAAEC dispute settlement regime, see Pierre Marc Johnson and André Beaulieu, *op. cit.*, 171-240.

[39] Art. 22 of NAAEC.

[40] Art. 24 of NAAEC.

[41] Art. 34(4) of NAAEC. Also see Annex 34 of the NAAEC for criteria used in the calculation of the monetary sanction, which include: the pervasiveness and duration of the persistent pattern; the level of enforcement which could reasonably be expected from the party subject to its resource constraints; reason for not implementing an action plan; efforts made by the offending party to implement the panel's recommendation; and any other relevant factors.

[42] For further discussions on the relationship between Canada and the NAAEC, see Pierre Marc Johnson and André Beaulieu, *op. cit.*, 224-236.

[43] Art. 14(1) of the NAAEC reads:

> The Secretariat may consider a submission from any nongovernmental 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 in a language designated by that Party in a notification to the Secretariat;

be fulfilled before an individual or NGO could exercise its right given by Art. 14 of the NAAEC.

## 6.3. NAFTA's Dispute Settlement System

NAFTA has opted for a "fragmented" style of dispute settlement system.[44] Although Chapter 20 of NAFTA provides a channel for resolving a dispute between member governments, NAFTA also contains other provisions for dispute settlement. These provisions provide for dispute resolution on specific issues under NAFTA, *viz*: investment (Chapter 11); financial services (Chapter 14); and anti-dumping and countervailing measures (Chapter 19).

Chapter 11 establishes a dispute settlement mechanism for investment disputes with a view to ensuring that all NAFTA investors are treated equally. The disputing investor may have recourse to an international arbitral mechanism of one of the followings: the World Bank's International Center for the Settlement of Investment Disputes (ICSID); ICSID's Additional Facility Rules; or the rules of the United Nations Commission for International Trade Law (UNCITRAL). The award from the international arbitration is also enforceable in domestic courts of the NAFTA members.

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(b) clearly identifies the person or organization 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 promoting enforcement rather than at 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; and
(f) is filed by a person or organization residing or established in the territory of a Party.

Art. 14(2) reads:

> Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:
>
> (a) the submission alleges harm to the person or organization making the submission;
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
> (c) private remedies available under the Party's law have been pursued; and
> (d) the submission is drawn exclusively from mass media reports.

[44] Gabrielle Marceau, 'NAFTA and WTO Dispute Settlement Rules', 31(2) *Journal of World Trade* (1997) 25, at 31-32. The author compared the "fragmented" style of the NAFTA dispute settlement regime with the "integrated" style dispute settlement system of the WTO.

The investor may alternatively choose to seek remedies available in the domestic courts of the host country. Chapter 14 provides a dispute settlement mechanism for financial disputes through Chapter 20 Section B. As will be seen below, Chapter 20 Section B is also used in the resolution of other governmental trade disputes. However, Chapter 14 provides further that a financial services roster of panel, composed of experts in financial law or practice, is to be established in order to handle the financial disputes.

Antidumping and countervailing duties disputes are to be resolved by a dispute settlement mechanism provided for in Chapter 19 of NAFTA. In effect, the mechanism under this chapter replaces the judicial review process, which may be taken under the NAFTA members' domestic courts, by the establishment of the antidumping and countervailing binational panel who would exercise the same standard of review as followed by those domestic courts in order to review whether the antidumping and countervailing measures in the dispute are consistent with the General Agreement on Tariffs and Trade (GATT) and NAFTA.[45] Chapter 19 also provides for an "extraordinary challenge procedure" in Art. 1904 in which a disputing party may appeal against a panel's decision on the ground of the panels' impropriety or gross error.

Under Chapter 20, the dispute resolution mechanism of NAFTA ultimately takes the form of a GATT-like arbitral panel (Art. 2008) and resembles that of the FTA.[46] The panel is composed of five panellists who are selected from a roster of up to 30 individuals.[47] The panel will produce a preliminary report as well as a final report, for which voluntary compliance is required and failing to do so will give the winning member the right to a suspension of benefits affected by the other member's violation.[48] Nevertheless, it must be noted that the retaliation by way of suspension as such must not be "manifestly excessive", as an arbitration may be requested to decide on the magnitude of the retaliatory measure.[49]

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[45] For more discussion, see Jorge A. Gonzalez Jr., *supra*, note 11, at 363-365.

[46] Richard B. Stewart, *supra*, note 33, at 761. Also see Jeffrey P. Bialos and Deborah Siegel, 'Dispute Resolution Under NAFTA: The Newer and Improved Model', 27 *International Lawyer* (1993) 603, at 603.

[47] NAFTA Art. 2011 (Panel selection) and Art. 2009 (Roster).

[48] NAFTA Art. 2019.

[49] NAFTA Art. 2019(3).

**Table 5: Stages of the NAFTA's Panel Process with Estimated Times**

| Article | Stage | Estimated Time |
|---|---|---|
| Art. 2008 | Request for arbitral panel by party filed on | Day 0 |
| Art. 2011(1)(b) | Selection of Chair to be filed | Within 15 days after request for arbitral panel |
| Rule 5 & Art. 2012(3) | Terms of reference may be filed within | 20 days after filing of request |
| Art. 2011(1)(c) | Panel selection to be completed within | 15 days after selection of Chair |
| Rule 7 | Initial written submission (complaining party) to be filed within | 10 days after panel selection is completed |
| Rule 7 | Written counter-submission (respondent) to be filed within | 20 days after initial written submission |
| Rule 7 | Initial written submission (third party) to be filed within | 20 days after initial written submission |
| Rule 26 | List of deliberators and others attending the hearing to be delivered no later than | 5 days before the hearing |
| Rule 21 | Hearing to be held | To be determined by Chair |
| Rule 32 | Supplementary written submission to be filed | Within 10 days of hearing |
| Rule 38 | Request for scientific review board to be filed | Not later than 15 days after the hearing |
| Art. 2016(2) | Initial report to be filed | Within 90 days after panel selection is completed |
| Art. 2016(4) | Comments on initial report to be filed | Within 14 days after presentation of initial report |
| Art. 2017(1) | Final report due | Within 30 days after initial report |

Source: NAFTA Secretariat, available at www.nafta-sec-alena.org.

Chapter 20 also allows the establishment of a scientific review board, chosen by a panel, who may submit a written report on factual issues relating to environmental, health, safety or other scientific matters in order to help the panel deliberate so long as the disputants have been consulted.

Prior to the panel method it is possible to resort to consultations (Art. 2006), and other means of alternative dispute resolution comprising good offices, conciliation and mediation (Art. 2007). In this instance, a Commission of cabinet-level representatives or appointees from the members will be established purposely to endeavour to resolve the dispute promptly.

A third party who is considered as having a substantial interest in the dispute may also participate in the consultations or join in, by a notice in writing, the panel proceedings as a complainant. The third party may attend hearings or make submissions, both orally and in writing, and is entitled to receive the disputants' written submissions.

## 6.4. The Relationship between the Dispute Settlement Systems of NAFTA and the WTO

NAFTA seems to be the only regional trade agreement which clearly sets out rules in relation to the interconnection between the dispute settlement mechanism of a regional trade agreement and that of GATT/WTO. This is not a surprise given that NAFTA was negotiated during the course of the Uruguay Round of Multilateral Trade Negotiations and all members of NAFTA also are members of GATT/WTO. As a number of NAFTA provisions in fact replicate those of GATT, for example the "nullification or impairment test", [50] it is indeed necessary for NAFTA parties to know where they could resolve the dispute given that in certain circumstances NAFTA and GATT may have a shared jurisdiction to resolve the dispute. In other words, the rules which govern the relationship between the dispute settlement mechanisms of NAFTA and GATT/WTO act as a safeguard against duplication of dispute settlement proceedings.

In general, the relationship between the two dispute settlement regimes is governed by Art. 2005 of NAFTA under a heading "GATT Dispute Settlement". In this article, disputes are perceived to be divided into two set of disputes: trade and environment disputes, and other disputes. Although the article does not explicitly stipulate such a division, it could be read into the textual language that the article intended to treat these types of dispute differently. The right to choose a forum where the dispute could be settled is provided in Art. 2005(1) which reads:

> Subject to paragraphs 2,3, and 4, disputes regarding *any matter* arising under both this Agreement [NAFTA] and [GATT], may be settled in either forum at the discretion of the complaining Party. (Emphasis added.)

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[50] See Annex 2004 of NAFTA.

For both trade-environment disputes, and non-trade and environment disputes, Art. 2005(1) provides that the complaining party has the discretion to choose whether to resolve their dispute in either NAFTA or GATT. It should be noted, however, that as the provision also applies to a successor agreement of GATT, the WTO Agreement encompassing GATT 1994 is also covered by this article.[51]

Exceptions to this general rule are provided in paragraphs (2), (3) and (4) of Art. 2005. Where the dispute can be settled in both fora, Art. 2005(2) requires that the party who initiates a dispute settlement proceeding in GATT *shall* notify any third party of its intention. If the third party does not agree, it *shall* promptly inform the initiating party about it so that they can consult one another in order to find an agreement on the dispute settlement forum. If no consensus could be reached, the dispute would normally be settled by the dispute settlement mechanism of NAFTA.

Art. 2005(3) and (4) deal specifically with trade and environment disputes. Art. 2005(3) allows the dispute whose subject matter falls under Art. 104 of NAFTA (governing the relationship between the MEAs and NAFTA) to be settled solely by the NAFTA's dispute settlement mechanism. The article provides that it is the responsibility of the responding party to make a request in writing, expressing its intention to resolve the dispute under NAFTA. Then, the complaining party may act upon that request and recourse to the dispute settlement process solely under NAFTA. Some commentators have argued that the this provision is important from the trade and environment perspective as GATT or any other trade agreement does not provide for similar treatment and NAFTA tends to be more environmentally sensitive than GATT.[52]

Disputes concerning SPS and TBT measures are addressed by Art. 2005(4). This article provides that such disputes may solely be settled under NAFTA, if the party complained against requests to do so in writing and the complaining party chooses to do the same, where the dispute:

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[51] However, "GATT" will be used throughout this section in order to keep the consistency with the NAFTA textual language.

[52] Pierre Marc Johnson and André Beaulieu, *op. cit.*, at 71. Also see Daniel C. Esty, 'Making Trade and Environmental Policies Work Together: Lessons from NAFTA', *supra*, note 20. He has also commended the NAFTA's dispute settlement mechanism for charting a "new course of greater environmental sensitivity".

(a) [concerns] a measure adopted or maintained by a Party to protect its human, animal, or plant life or health, or to protect its environment, and

(b) [raises] factual issues concerning the environment, health, safety, or conservation, including directly related scientific matters.

Further procedural details of Art. 2005 of NAFTA are elaborated in paragraphs (5), (6) and (7). Art. 2005(5) requires the responding party to make a request no later than 15 days after the complaining party has initiated the proceedings with regard to the matters in paragraphs (3) and (4), and to deliver a copy of a request made pursuant to paragraphs (3) and (4) to other parties and to its Section of the Secretariat. Once the complaining party receives a request it "shall promptly withdraw from participation in [other proceedings] and may initiate dispute settlement procedures under Art. 2007" of NAFTA (Good office, Conciliation and Mediation).

For non-trade and environment disputes, Art. 2005(6) of NAFTA prohibits the subsequent recourse to another forum once the procedures in the chosen forum have been initiated.[53] The last part of this article, however, provides an exception to this rule where the dispute is requested to be settled solely under NAFTA pursuant to paragraph (3) or (4). The dispute under GATT is deemed "initiated" once the establishment of a panel in accordance with Art. XXIII(2) of GATT is requested (Art. 2005(7) of NAFTA). As discussed in Chapter 3, the GATT's dispute settlement system also allows use of alternative dispute resolution techniques - like good offices, conciliation and mediation - it could be argued that if the parties use these methods to resolve their dispute their right to choose the forum for resolving the dispute is not subsequently pre-empted.

## 6.5. What can APEC learn from NAFTA?

From the earlier discussions in this chapter, it can be seen that the environmental provisions in NAFTA could benefit the trade and environment dispute resolution in

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[53] Art. 2005(6) states:

> Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected *shall* be used to the *exclusion of the other*, unless a Party makes a request pursuant to paragraph [3] or [4]. (Emphasis added.)

general. There are several interesting elements of NAFTA that could prove useful for APEC as guidance for the formulation of an APEC's trade and environment dispute resolution system. However, given that APEC and NAFTA differ in terms of their legal and institutional arrangements it could rightly be assumed that not all aspects of NAFTA's trade and environment elements could possibly be emulated by APEC at present. Nevertheless, it could be argued that some of the NAFTA's elements could still be implemented by APEC through different approaches which would suit the APEC's legal and institutional designs. What elements of NAFTA would help APEC resolve trade and environment disputes in a balanced fashion and how APEC could implement them will be highlighted below.

### 6.5.1. The Preamble of NAFTA

With regard to trade and environment dispute resolution, the preamble of NAFTA serves two purposes. Firstly, it represents the willingness of the NAFTA parties to take environmental protection and sustainable development seriously.[54] According to Johnson and Beaulieu, the preamble of NAFTA has gone far beyond any other preambular language contained in any trade agreements by explicitly recognising the impact of trade liberalisation on the environment and the need to mitigate such impact.[55] Secondly, the preamble is setting the tone for the "greening" process of NAFTA, i.e. it gives NAFTA a sense of being an environmentally friendly institution without overshadowing its trade institution status.

These two aspects of the NAFTA's preamble have some important implications on the resolution of trade and environment disputes as well as the formulation of rules and policies of NAFTA. Firstly, the preamble provides an important source for interpretation of other provisions of NAFTA, particularly the environmental provisions contained in NAFTA. Although the preamble is not legally binding in itself, the preambular language could be used as guidance for the interpretation of the substantive provisions of NAFTA as Art. 31 of the Vienna Convention on the Law of Treaties recognises that the preamble of an international treaty is a legitimate source for legal

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[54] Pierre Marc Johnson and André Beaulieu, *op. cit.*, at 67.

[55] *Ibid.*, at 66-67.

interpretation.[56] As such, the NAFTA panel should refer to the preamble when there is doubt in the interpretation of the NAFTA's environmental provisions. Being environmentally-oriented, the NAFTA's preamble arguably should help the NAFTA panel to resolve the dispute in a more environmentally benign approach.

Secondly, the preamble would give an environmentally-minded party of the dispute the sense of fairness as both trade and environmental issues are considered as essential for NAFTA. In this regard, it could be argued that NAFTA creates an impression that the dispute resolution process would at least consider both trade and environmental arguments on an equal basis. In my opinion, this is an important element for the trade and environment dispute resolution as it would instil confidence in the disputing parties with regard to the ability of the panel to resolve the trade and environment dispute in a balanced manner.

What APEC could learn from the preamble of NAFTA, therefore, is that it should create an impression that it is capable of handling trade and environment disputes fairly. The question, however, is how APEC could engender such an impression given that APEC is not the same as NAFTA in terms of legal arrangement. Suffice it to say that APEC would not be able to create an agreement like NAFTA at present. APEC, therefore, may have to find another way to create its environmentally friendly image. The current image of APEC from the environmental viewpoint is not so encouraging. As already discussed in Chapter 4, even though APEC has already commissioned a number of important environmental projects, they have only been implemented rather shallowly or ineffectively. Most of the work programmes are targeted at capacity building and information dissemination.

APEC, however, could make use of its existing Framework of Principles for Integrating Economy and Environment in APEC. Most importantly, APEC could give more impetus to this Framework of Principles and ensure that it would be seriously taken into account when the DMS is requested for resolving trade and environment disputes among its members. APEC members should resort to the preamble together

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[56] Art. 31(2) of the Vienna Convention on the Law of Treaties states: "The context for the purpose of the interpretation of a treaty shall compromise, in addition to the text, including its *preamble* and annexes...". (Emphasis added.)

with other nine principles contained in the Framework of Principles as guidance for trade and environment dispute mediation.

However, one important obstacle concerning the use of the Framework of Principles is that not only is the preamble of this Framework of Principles not binding, the other principles also do not have the force of law. Technically, the Framework of Principles cannot compel APEC members to follow the details contained therein, it merely signifies the good will of APEC members to uphold those principles. An APEC member also cannot invoke the breach of the preamble or principles as the ground for initiating the DMS *per se.* Thus, the Framework of Principles only represents another piece of soft-law instrument promulgated by APEC. However, if APEC members regularly resort to the Framework of Principles during the dispute mediation process as guidance for the way trade and environment disputes should be resolved, it arguably could become a customary practice among APEC members themselves.

### 6.5.2. The Provision relating to the MEAs

The provision relating to the MEAs under NAFTA has undoubtedly been one of the most important contributions of NAFTA towards trade and environment dispute resolution. Art. 104 of NAFTA specifically allows trade measures taken in pursuance of certain MEAs to override NAFTA's free trade obligations. From the perspective of trade and environment dispute resolution, this is an extremely encouraging move. Art. 104 has provided an excellent example with regard to the clarification of the interrelationship between the MEAs and a trade agreement. With the exception of the EU which deal with the MEAs differently, no other trade agreements so far have used this provision, including the 1994 version of GATT.[57]

However, the party implementing the trade measure as authorised by the named MEA might be challenged on the ground that the "least inconsistent" measure with NAFTA could be used instead where available. As Makuch argues, the requirement that

[57] As the EU is far more advanced in terms of economic integration than any other existing trade agreements, and arguably is moving closer to becoming a super-state, the EU does not need to use the same provision as Art. 104 of NAFTA. Obligations of the EU under the named environmental agreements contained in Art. 104 of NAFTA has been made part of the EU law through the EU secondary instruments. Once the MEAs have been made part of the EU law, they are fully enforceable just like other Community law.

the least inconsistent measure is to be used where possible could undermine the NAFTA's environmental goal and also render ineffective the measure undertaken by the NAFTA party implementing the MEA.[58] Moreover, this requirement would do nothing but repeat the deficiency of GATT, as demonstrated for example in the Tuna/Dolphin I, which also required use of the measures that were least trade restrictive and GATT inconsistent without considering that such measures might not achieve the environmental standards envisaged by its member. The better approach from the environmental perspective is therefore to allow the trade measures taken in pursuance to the named MEA to withstand the challenge form other NAFTA members.[59] This is because the measures authorised by the MEA are multilaterally negotiated and thus should provide an assurance that such measures are internationally accepted as necessary.

What APEC could learn from Art. 104 of NAFTA is that, it should recognise the legitimacy of the trade measures taken in pursuance of the MEAs. Whether all or only some selected MEAs that authorise use of the trade measures would be recognised by APEC remains to be explored further. This is because not all members of APEC are signatories to the same MEAs.[60] For example, Hong Kong and Taiwan do not have the recognition of statehood under international law which enables them to sign an international treaty. Singapore is not a signatory of the Basel Convention. An appropriate option for APEC, therefore, is to follow NAFTA and allow only certain MEAs to which all APEC members are signatories to take precedence over APEC trade activities. There should also be a presumption that the trade measures authorised under the MEAs are legitimate even though they might not be the least trade restrictive measures.

What APEC should do in order to give effect to the MEA-based trade measures in the light of the suggested recognition is to explicitly include such recognition as one of the principles in the Framework of Principles for Integrating Economy and

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[58] Zen Makuch, 'The Environmental Implications of the NAFTA Environmental Side Agreement: A Canadian Perspective', in James Cameron, Paul Demaret, and Damien Geradin, *op. cit.*, at 420.

[59] *Ibid.*

[60] See Table 1, Chapter 4.

Environment in APEC and take it into consideration when the trade and environment dispute arises as a result of the use of such measures.

### 6.5.3. The Environmental Standards Setting

As discussed earlier, the environmental standards setting under NAFTA are governed by Chapter 7B and 9 of NAFTA. Two kinds of environmental standards are regulated by these provisions: the standards relating to the SPS and TBT measures. In effect, these chapters of NAFTA provide the precaution against the "downward harmonisation" or "dilution of North American standards to their lowest common denominator".[61] Both of these chapters explicitly allow a NAFTA member government to set or maintain its own level of environmental protection which is considered appropriate, even though the domestic level exceeds that set internationally, subject to some qualifications as discussed earlier.

As a model for APEC, these provisions could provide the example that a trade agreement could also accommodate high environmental standards. Chapters 7B and 9 give an example of what conditions need to be taken into account in order to legitimise the use of the member's own environmental standard. An advantage which NAFTA shows in relation to the trade and environment nexus is that different countries may pursue their own environmental standards which they consider appropriate. But in doing so, they must ensure that the trade among the members of NAFTA is not affected. This provides an excellent model for APEC whose members pursue different environmental standards. Although the harmonised standards based on international standards are ideal, APEC's membership ranges from economies situated in the very hot to very cold climate, and from very poor to very rich economies. Therefore, each economy needs to pursue its own level of environmental protection to suit its environmental problems as well as its technological and financial capacity.

Another point which needs to be made with regard to the SPS and TBT provisions of NAFTA is that during the dispute settlement process, it is the challenging

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[61] Sarah Richardson, 'Some Implications of NAFTA and the NAAEC for Dispute Settlement', in James Cameron and Karen Campbell, eds., *Dispute Resolution in the World Trade Organisation*, (London: Cameron May Ltd., 1998), 285-310, at 293.

party who bears the burden of proof. From the environmental viewpoint, this is indeed a welcoming practice. The fact that the challenging party has to discharge the conditions, especially the scientific and risk assessment criteria, in order to establish that the measure pursued by another NAFTA member is inappropriate could well act as a deterrent from initiating the dispute settlement process.

Although the APEC's DMS is not the same as the NAFTA's panel process, thus the burden of proof issue may not be so significant, APEC could require the challenging party to undertaken the scientific investigation to prove the inappropriateness of another member's measure. Admittedly, this might be disadvantageous to the developing members of APEC as they might not have the necessary funding or technical resources in order to challenge the measures of, for example, the United States or Canada who often exercise high environmental standards. But, this difficulty might be offset by the fact that the discriminatory element under both chapters are relatively easier to prove. Therefore, it seems that NAFTA Chapters 7B and 9 can provide the way to allow the proportionate measures to withstand the challenge while discourage the use of protectionist trade measures on the environmental basis, hence better for sustainable development on the whole.

### 6.5.4. The NAAEC and CEC

The NAAEC can be seen as one of the highlights of the NAFTA negotiation process. As discussed earlier, the NAAEC is an "environmental" agreement by character, containing provisions setting out obligations and dispute resolution procedures. However, as it also forms a part of NAFTA - by being a side agreement - the NAAEC has effectively enhanced the environmentally friendly image of NAFTA. Several critics see the creation of the NAAEC as a step closer towards trade and environment integration, as the NAAEC was created with a view to achieving sustainable development and enhancing the level of environmental protection while simultaneously preserving the objectives of NAFTA.[62] But, the NAAEC has also been viewed rather

[62] See, for example, Gustavo Alanis-Ortega, *supra*, note 21, at 77; and Sarah Richardson, *supra*, note 61, at 297.

pessimistically, for example, as lacking effective enforcement powers and will only have little effect on environmental compliance in North America.[63]

From the perspective of APEC, at least, the incorporation of the NAAEC into the NAFTA's framework provides a good model for the integration of trade and environment disciplines where the constitution of the organisation does not permit the establishment of common environmental policy. In effect, the NAAEC has gone a step further than environmental provisions, which appear in different places in NAFTA, which only deal with the interaction of trade and environmental considerations predominantly in the context of trade and environment dispute resolution.

However, creating an APEC equivalence to the NAAEC perhaps would be unthinkable at this stage. APEC is composed of many different economies from vastly diversified backgrounds. It would be extremely difficult to obtain consensus from the APEC parties in order to reproduce the NAAEC in the APEC context. Additionally, as environmental standards vary from one member of APEC to another, if the enforcement of environmental protection of an APEC member is allowed to be challenged, as allowed under the NAAEC, it would only create disorder in APEC. For example, the United States would probably challenge many of the environmental enforcement initiatives carried out by the Asian members of APEC. China, for example, might regularly be challenged just like the way it has been done in the domain of human rights.

Nonetheless, a lesson for APEC from the NAAEC is the establishment of the CEC purposely to promote environmental compliance and to play an important role in resolving environmental disputes between the NAFTA parties. The CEC is to co-operate with the NAFTA Free Trade Commission in the trade and environment dispute settlement process. The CEC is composed of environmental experts from different levels of the NAFTA members' governments. It is also to provide environmental expertise to the Free Trade Commission where necessary.

Indeed, it might be in APEC's interest to consider creating an APEC counterpart to the CEC. APEC at present does not have an organ specifically instituted for

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[63] Zen Makuch, *supra*, note 58, at 429.

environmental purposes. So far, the APEC environmental agenda is implemented though various working groups and committees. The creation of an APEC Environmental Commission, for example, could be one of a few suggestions. This Commission could offer mediation when requested by APEC members. As the mediator comes from the APEC Commission, the recognition, credibility and status of the mediator would enhance the mediation process.

### 6.5.5. The Investment Provision

Art. 1114 of NAFTA provides an interesting example for APEC in regard to how investment and environmental protection should interact in order to promote sustainable development - the "environmental havens" issue. As this article deals with an investment issue, it does not directly govern the trade issue like other provisions of NAFTA. However, one could argue on the economic basis that investment generates trade. Thus, the more foreign direct investment, the more trade will be created. But, one must not also forget the fear of the environmental community that more trade could also mean more environmental degradation. The purpose of Art. 1114 of NAFTA therefore is to curb the use of low environmental standards to attract foreign direct investment.

However, the practicality of Art. 1114 has not overwhelmingly been supported by critics as this article attracts both positive and negative comments. On the one hand, Alanis-Ortega, for example, views Art. 1114 as "one of the most relevant environmental provisions of the NAFTA".[64] On the other hand, Makuch, argues that Art. 1114 in fact creates a reverse effect. As a result, instead of discouraging the use of lax environmental standards to lure foreign direct investment, Art. 1114 encourages industries to relocate to the environmental havens, such as the maquiladora region of Mexico where environmental standards are already lower than those practised by the United Sates or Canada.[65] This is because Art. 1114(2) only says that the NAFTA parties *should not* waive or otherwise derogate from measures in order to encourage the

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[64] Gustavo Alanis-Ortega, *supra*, note 21, at 73.

[65] Zen Makuch, *supra*, note 58, at423.

establishment, acquisition, expansion, or the retention of an investment or investor in its territory". It does not use the words that show the sense of a binding obligation.

Another doubtful aspect of Art. 1114 of NAFTA concerns an enforcement method. The only remedy provided by Art. 1114 is consultations "with a view to avoiding such encouragement" (waiving or lowering environmental standards to attract investment), not a binding dispute resolution. Therefore, no sanctions, countervailing measures, or imposition of tariffs can be used in order to give "bite" to this article.[66] From the environmentalists' perspective, it would be a better approach if the tactical relaxation of environmental standards could be seen as constituting unfair trade practice, which allows remedial measures to be taken by other NAFTA members.[67] Furthermore, it has been argued that if Art. 1114 has an environmental character but cannot be enforced, the preamble of NAFTA would also be rendered little practical meaning.[68]

As APEC's activities also include investment, APEC might consider including the similar provision in its investment agenda. As APEC's work programmes are carried out voluntarily, it cannot be foreseen that APEC would be able to compel its members to obligate themselves not to reduce their environmental standards to attract investment from other APEC members. However, what APEC might be able to do is to allow use of the DMS where an APEC member tries to encourage foreign direct investment by lowering or waiving its environmental standards with a view to avoiding such an act.

### 6.5.6. The Expert's Opinions

Expert involvement is another area of NAFTA which could provide a lesson for APEC. NAFTA permits the seeking of expert advice during the dispute settlement process where the party so requested (Art. 2014). NAFTA also allows an expert review board (the Board) to be established, under Art. 2015, where the issue in the case concerns environmental, health, safety, or other scientific matters, subject to the request of the party of the dispute. The Board's task is to produce a written report on any factual issue

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[66] Daniel C. Esty, 'Making Trade and Environmental Policies Work Together: Lessons from NAFTA', *supra*, note 20, at 382.

[67] Gary Clyde Hufbauer and Jeffrey J. Scott, *op. cit.*, at 95.

[68] *Ibid.*

concerning those issues. Members of the Board are selected from highly qualified independent scientific experts. Art. 2015(4) requires that the NAFTA panel take into consideration when preparing its report any comments made by the Board.

As the role of environmental experts has been recognised as indispensable for a balanced trade and environment dispute resolution process,[69] the establishment of an independent expert review board could prove to be useful for resolving trade and environment disputes. The Board could provide a more insightful environmental and scientific information which could enhance the quality of the outcome decided by the panel. The requirement that the panel "shall", as opposed to "may", take into account the Board's report provides a further assurance that both trade and environmental viewpoints will be considered even-handedly as it is prescribed in a binding language.

With regard to APEC, the creation of a scientific review board is desirable. The APEC scientific review board could serve well in the mediation process by providing the environmental comments to the mediator as well as the disputing parties, hence a better decided mediated outcome. However, it must be remembered that as APEC does not have dispute resolution procedures like the NAFTA's, it will largely depend on the wishes of the parties to request for consultations with the scientific review board.

### 6.5.7. The Diffused Dispute Settlement System

Unlike the WTO's dispute settlement system, NAFTA opts for a diffused style of dispute settlement system comprising dispute settlement regimes for different aspects of NAFTA. The main dispute settlement regime is Chapter 20 of NAFTA under which the majority of governmental disputes are resolved. Chapter 11 contains a dispute settlement regime for investment issues while disputes concerning financial services are to be resolved by Chapter 14 provisions. In addition, Chapter 19 deals with dispute settlement in relation to anti-dumping and countervailing measures.

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[69] See, for example, Charles Arden-Clarke, *Trade and Environment in APEC: Avoiding Green Protectionism While Securing Sustainable Development*, a WWF International Discussion Paper, (Gland, Switzerland: WWF International, 1995).

The main form of the NAFTA's dispute settlement system is a binational arbitral panel process. This form is not adopted by APEC at the moment. However, what APEC can learn from the NAFTA's style of dispute settlement system is that APEC might consider creating a trade and environment dispute resolution regime as an addition to the DMS. The basic mechanism for this new avenue will be the same as the APEC's DMS, i.e. using mediation as the main method of dispute resolution. However, in order to differentiate the trade and environment dispute resolution avenue from the DMS, some environmental elements could be incorporated in order to enhance a balanced decision, for example better access to the DMS for environmental NGOs, and the use of an environmentally-minded mediator. The APEC's DMS might also emulate Chapter 14 dispute settlement provision by establishing a roster of trade and environment experts who may act as a mediator in a trade and environment dispute.

### 6.5.8. GATT/WTO and NAFTA

With respect to the relationship between the dispute settlement mechanisms of the WTO and NAFTA, Art. 2005 of NAFTA provides an interesting example for APEC. This is particularly so in the case of trade and environment disputes. As previously discussed, trade disputes with an environmental character receive different treatment from other trade disputes. The party defending its trade-related environmental measure taken in pursuance of the MEA named under Art. 104 of NAFTA has an option, expressed in the term of "may", to demand to have the dispute be settled by a NAFTA panel, instead of GATT/WTO panel even though such a measure might cause nullification or impairment to the benefits under GATT. By choosing to settle the dispute this way, the party defending its measure could make use of an advantage given by the Art. 104 trumping status. Hence, more chance that its measure will survive the challenge.

Similarly, for disputes concerning the use of the SPS and TBT measures, Art. 2005(4) allows the complaining party to choose to resolve the dispute solely by the NAFTA's dispute settlement mechanism where the defending party makes a request to that effect. From the environmental perspective, this is more advantageous because the burden of proof for the SPS and TBT measures lies with the challenging party. As a result, this could give the SPS and TBT measures which genuinely promote the higher environmental standard more likelihood to survive the challenge since the allocation of

the burden of proof on the challenging party may deter it from initiating a complaint. On the other hand, it could be argued that as the challenging party does not have to chose to settle the dispute under NAFTA, such an advantage may not be fully enjoyed in practice.

From the NAFTA's approach concerning the relationship between its dispute settlement and that of GATT/WTO, a valuable lesson APEC could learn is that it may provide that where a trade and environment dispute arises between its members, the use of the APEC's DMS could be requested by the party defending its trade-related environmental measure. If the DMS could provide a more environmentally friendly way of resolving a trade and environment dispute as envisaged in the last chapter, more trade-related environmental measure would go unchallenged, hence better environmental protection in the Asia-Pacific region.

# Chapter 7

# Conclusions and Recommendations

In this last chapter, conclusions of the thesis will be given. They will be followed by some recommendations, suggesting the way forward for trade and environment dispute resolution in the Asia-Pacific rim. Next, the chapter will highlight issues which have not been addressed by this thesis with a view to suggesting the basis upon which further research might be taken. This thesis will be drawn to an end by a short epilogue.

## 7.1. Conclusions

Having examined the Asia-Pacific Economic Cooperation (APEC) as an institution, its trade and environmental aspects, and its dispute resolution mechanism, this thesis posits that APEC with its dispute mediation service (DMS) should have the potential to strike a balance in resolving trade and environment disputes. However, it must be admitted that finding a trade-environment balance is not an easy task as the relationship between trade liberalisation and environmental protection in itself is indeed complex. As discussed in Chapter 2, the interdependency between trade and the environment could have positive as well as negative implications. While it has widely been acknowledged that trade and environment paradigms could and should exist coherently, differences in terms of culture, policy, legal principles and their *modus operandi* have to a certain extent inhibited these two regimes from existing mutually. One particular issue which has caused concerns for both trade and environmental communities is the use of trade-related environmental measures (TREMs). TREMs which are used to further protectionism do not yield benefits for either trade or environmental activities. On the contrary, they hinder the efforts to promote trade liberalisation as well as environmental protection. And often, such a protectionist use of TREMs is the main cause of a trade and environment dispute.

In the Asia-Pacific rim, trade expansion - as a result of trade liberalisation programmes under both the World Trade Organization (WTO) and APEC regimes - has been achieved at the cost of environmental degradation. Certain countries in this region,

particularly the United States, have already resorted to using TREMs as a means to enhance environmental protection within, and sometimes outside, their geographical boundaries. As APEC does not yet have its own dispute settlement mechanism to resolve trade and environment disputes, the members of APEC up until now have to resolve such disputes at fora other than APEC itself, i.e. the WTO and its predecessor - the General Agreement on Tariffs and Trade (GATT).

In the light of the cases like Tuna/Dolphin I, Gasoline, Shrimp/Turtle and Beef Hormone which have been discussed in this thesis as examples in order to shed light on how trade and environment disputes were resolved by GATT/WTO, the general impression that one could perceive is that although the WTO's rule-based style dispute settlement system seems to be successful as far as the resolution of trade disputes is concerned, Chapter 3 has demonstrated that the resolution of trade and environment disputes under the GATT/WTO system has not always produced a trade-environment balance. As a result, the GATT/WTO has been criticised heavily by the environmental community for not being a suitable forum for resolving trade and environment disputes. The GATT/WTO's inability to balance the trade and environmental interests is partly owed to the way the GATT/WTO panel and Appellate Body have interpreted the so-called environmental provisions under the GATT Art. XX(b) and (g), including the chapeau of Art. XX general exception. Another aspect of the GATT/WTO's dispute settlement which remains an area of dissatisfaction in the eyes of the environment protagonists is the way the panel process operates in practice. The secret style of operation does not bode well for the environmentalists' approach which emphasises transparency and public participation.

Although the way in which the WTO's dispute settlement organs resolved trade and environment disputes in the past recent years seems to suggest that several improvements to the trade and environment dispute settlement under the realm of GATT/WTO have been made, especially with regard to the reinstitution of the "two-tier" test by the Appellate Body in the Shrimp/Turtle case and more lenient interpretation of the environmental sub-paragraphs in Art. XX which has enabled TREMs to pass the environmental threshold, the trade threshold as contained in the chapeau still appears to be a difficult obstacle to overcome. With respect to the health and safety issues, the Beef Hormone has also shown that although the WTO's dispute

settlement organs did recognise the ability for a WTO member to pursue it own level of environmental protection, criteria as contained in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), such as risk assessment and scientific justification, were restrictively applied, resulting in the difficulty to justify the domestic measures used in pursuance of the high health and safety standards.

As examined in Chapter 5, the strict criteria which have to be observed in the panel procedures under the WTO regime may hinder the finding of the balance between trade and environmental interests. The parties would concentrate on winning by proving their case within the limited scope of legal issues without the real intention to find the best solution optimal for a trade-environment balance. In other words, the WTO's dispute settlement system is simply not "interest-based". An alternative to the panel procedures is to use mediation as will be offered by the APEC's DMS, provided that both parties of the dispute are APEC members. However, this thesis has not argued that the trade and environment disputes could be better resolved by mediation. Rather, it has posited that mediation could provide an effective alternative for resolving trade and environment disputes among APEC members. This is because, firstly, mediation suits the APEC style of doing business. It is a product of a compromise between the Western and Eastern members' style of dispute resolution. And, secondly, mediation could fit well with the ideal way to resolve trade and environment disputes - i.e. finding a compromise. On the whole, not only does mediation offer the chance for the disputing to be in control of the negotiating process which is facilitated by the mediator, the flexibility and informality of mediation could offer the parties to focus on their interests. The mediated outcome could also have a wider implications than the more formal methods of dispute settlement, as a wider range of remedy may be available.

In the domain of trade and environment dispute resolution, the APEC's DMS could offer two tracks of resolving the conflicts.[1] As Track 1, the DMS could be used as a means of "dispute avoidance" with a view to preventing a conflict between APEC members from escalating into a full blown dispute. As Track 2, the DMS could be used for resolving the dispute itself once it has arisen, i.e. a means of "dispute settlement". At each track of dispute resolution, the DMS could incorporate several elements which

[1] See the last chapter, Diagram D: APEC's Two Track Dispute Resolution Mechanism for Trade and Environment Disputes.

could promote the more balanced trade and environment dispute resolution, including the involvement of environmental experts, the NGO's participation, and the resort to environmental law principles such as those contained in the Rio Declaration or the Framework of Principles for Integrating Economy and Environment in APEC as a yardstick for a decision making exercise during the mediation process.

Mediation, however, does not yield a legally binding outcome. But, as the parties themselves were the decision makers in the mediation process, it is more likely that they will abide by their undertaking, hence rendering the mediated outcome a status of a contract between the disputing parties. However, it must be admitted that mediation would not always compel parties to perform its part of the bargain. In this circumstance, the disputing parties may opt to use the more elaborate form of mediation, i.e. "med-arb", in order to prevent waste of time should the parties during the mediation stage not reach a consensual solution. The med-arb process would allow the med-arbitrator to deliver an objective assessment of the situation which should be voluntarily observed by the disputants.

However, it would be a mistake to think that only APEC offers mediation. Mediation could also be undertaken under the WTO's framework, alongside the formal panel procedures. But, evidence of the WTO has shown that mediation has hardly been used. Parties tend to move from the consultation phase to the panel proceedings rather quickly without even resorting to mediation or good offices which the parties could ask the Director-General to collaborate. Additionally, disputing parties knew that they always have an option to request for the establishment of a panel which arguably could provide more effective remedy in terms of settling the dispute, hence a "win-lose" situation. Trade and environment disputes, on the contrary, would be successfully resolved only if both trade and environmental interests are equally taken into consideration, and such an equilibrium is reflected in a compromise between the parties, hence a "win-win" situation.

Indeed, where the parties have a selection of forum to resolve their dispute, the "choice of forum" problem may arise. Chapter 5 has examined the relationship between the APEC's DMS and the WTO's dispute settlement system. It was found that the two systems could co-exist and complement each other. For example, APEC members

could use mediation as provided by the DMS in order to resolve their disputes before initiating the WTO's dispute settlement process.

The North American Free Trade Agreement (NAFTA), as discussed in Chapter 6, has also provided a model for APEC with regard to the relationship between the dispute settlement regimes. However, the NAFTA model seems to suggest that the dispute settlement system of NAFTA or GATT/WTO is to be chosen to the exclusion of each other. The choice depends on whether or not the parties want to benefit from the NAFTA's environmental attributes. These attributes are perceived through: allowing the trade measures taken pursuant to certain multilateral environmental agreements (MEAs) to take precedence over NAFTA's obligations; allowing environmental, health and safety standards to be set at a higher level than those set internationally; allowing environmental experts' opinions to be taken into account; and discouraging the lowering of environmental standards to attract foreign direct investment.

Chapter 6 has also shown that such environmental attributes could provide important guidance for APEC's trade and environment dispute resolution mechanism with a view to enhancing the trade-environment balanced outcome. However, not all aspects of NAFTA's environmental qualities can be emulated by APEC at present due to differences in terms of legal and institutional arrangements.

## 7.2. Recommendations

Despite its potential to resolve trade and environment disputes in the balanced fashion the DMS could undergo some changes in order to fully realise its potential. Two main areas where reforms may be necessary are legal and institutional arrangements concerning the DMS. They will be discussed below.

### 7.2.1. Legal Reforms

#### 7.2.1.1. A Mediation Agreement

It is now common that a mediation agreement is drawn up by the disputing parties when the use of mediation is contemplated. The purpose of the mediation agreement is to enhance compliance with the outcome that the parties have agreed.[2] It can be argued that this is necessary as there is no law which governs the enforceability of the mediated settlement.[3]

In the agreement, the parties may draw up an undertaking to use the mediation service offered by APEC and a promise to comply with the outcome resulting from the mediation process. Technically, such a promise only acts as a precaution against non-complying party. The outcome which is reached by mediation is often given effect to by the parties as it is the parties themselves who agreed on the outcome. Compliance with the mediated solution is likely to be expected as the solution is commonly treated as a contract between the parties. Moreover, the parties may agree to convey the jurisdiction to resolve the dispute solely to the APEC mediator. Such an agreement would effectively act as an estoppel and provide an incentive for the parties to reach an agreement.[4]

As discussed in Chapter 5, a simple mediation could be transformed into a more elaborate version, i.e. the "med-arb", if the parties preferred. Should the parties decide to use this form of mediation, they should also clearly express their intention in the mediation agreement in order to prevent any later query about such a transformation.

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[2] See C. A. McEwen and R. J. Maiman, 'Small Claims Mediation in Maine: An Empirical Assessment', 33 *Maine Law Review* (1981) 237 as cited in Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision Making*, (London: Butterworths, 1998), at 144.

[3] See Neil Gold, 'Prospects, Problems and Potential: An Assessment of Trends and Issues Regarding Mediation in Canada', in The Arbitration Office, *APEC Symposium 1998: Alternative Mechanism for the Settlement of Transnational Commercial Disputes*, (Bangkok: The Arbitration Office, Ministry of Justice, Thailand, 1998), 281-332.

[4] See Professor Jeffrey Talpis, 'Enforcement of Agreements in Quebec Private International Law', unpublished paper, (Montreal: Faculté de droit, Université de Montréal, 1996), as cited by Neil Gold, *supra*, note 3, at 306-307. Talpis argues that "effective conflict resolution of transborder disputes by mediation requires: (i) the enforcement of agreements to mediate to the exclusion of competing procedures, for example, litigation; and (ii) the enforcement of the mediated settlement such that the result is final and not reviewable through subsequent proceedings".

The agreement should also set out whether or not the mediator could continue to resolve the dispute as the arbitrator, as in some cases the parties might prefer a different person to be an arbitrator.

#### 7.2.1.2. Guidelines for the Mediation Process

APEC has adopted an informality as its method of operation. As a result, action programmes of APEC are conducted voluntarily. To give effect to APEC members' promise to carry out certain work programmes, soft-law instruments have therefore become the norm of APEC. These instruments by and large take the form of a declaration, a framework agreement or a set of principles. Up until now, no hard-law instruments have ever been used by APEC and as long as APEC continues to develop under the present approach such instruments are unlikely to be formulated in the near future.

With the restriction on the kinds of legal instrument which could be used, it is indeed difficult for APEC to formulate the rules like the Dispute Settlement Understanding (DSU) with the law binding force as used by the WTO. What APEC could do instead is try to agree on certain procedures which could be followed during the course of mediation as broad guidelines. Provisions should also be made to allow the wishes of the disputing parties to be respected in reflection of the true nature of mediation. In other words, the new APEC guidelines would only be used as a model for the APEC's mediation process in the same way as the UNCITRAL Model Law on Commercial Arbitration, a product of the United Nations Commission on International Trade Law, is used with respect to private international trade disputes.[5] Accordingly, the APEC's mediation guidelines should only provide a broad description of the steps of the mediation process but leave the disputing parties to decide whether to add any special features or preferences into the mediation process.

In fact, APEC could develop a new set of DMS guidelines, based on the existing one as proposed by the EPG. However, as noted in Chapter 5, these guidelines are not

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[5] For discussions on the UNCITRAL Model Law, see, for example, Gerold Herrmann, 'UNCITRAL Model Law: Its Contribution to the International Arbitration Community and the Experience with the Law'; and Neil Kaplan, 'The UNCITRAL Model Law - A Worthwhile Model', in The Arbitration Office, *op. cit.*, 109-131 and 133-157.

comprehensive insofar as the DMS is concerned. Issues which could be included in the DMS guidelines comprise: the stages of the mediation; the timing of each stage mediation should take place - to precipitate the mediation process and reduce the time wasted; the choice of mediator - in the case of trade and environment disputes, for instance, the chosen mediator may be required to possess some trade and environmental backgrounds to ensure that there would be no bias towards one discipline or another; the representatives of interested parties or non-governmental organisations (NGOs); compliance procedures, including the time to implement the agreed outcome; and transparency - the outcome reached by the parties may be made publicly accessible *via* the APEC Secretariat.

The guidelines for the DMS should also contain procedures for the med-arb, in case the disputing parties chose to use this method for resolving their dispute. In contrast to the simple form of mediation, more detailed procedural rules must be drawn up. These rules should cover matters such as: the choice of arbitrator; the burden of proof; what evidence could the arbitrator take into account during the proceeding; the effect of the arbitration ruling; the compliance procedures with the arbitration ruling; the methods of enforcement - the guidelines should detail the options available to the winning party which might include suspension of the trade benefits, retaliation and compensation. For provisions concerning the enforcement measures, some guidelines should be provided, suggesting how the amount of trade suspension, retaliation or compensation is to be calculated.

### 7.2.2. Institutional Reforms

As the DMS has not yet come into operation it may be too early to suggest reforms. On the contrary, it is better that the areas which need to be reformed are identified now so that they could be corrected in advance. Some institutional reforms for the DMS which would make it better equipped for resolving trade and environment disputes are suggested below.

#### 7.2.2.1. Experts' Involvement

Experts are important for achieving a successfully balanced trade-environment outcome. They could provide relevant information which might enhance the trade-environment balance. The experts could be either the mediator in the DMS process itself or persons from whom environmental information, including scientific evidence and environmental impact assessments, could be obtained.

For the expert who is also the mediator, the name of such an expert could be included in the pool of mediator and registered with the APEC Secretariat. Once the parties know that an environmental expert is available in the APEC pool, they might agree to choose him as the mediator. However, it might be advisable if APEC requires a mediator with environmental expertise to conduct the dispute resolution process in the case of trade and environment disputes. Although a mediator may not necessarily need certain expertise in order to conduct mediation, as long as he has the skills to persuade the parties to reach an agreement, it is arguably more beneficial to the parties as he would understand the issues at hand better than a non-expert. The depth of knowledge and the experience possessed by the mediator might act as persuasive forces and facilitate the achievement of an outcome.

For experts who do not serve as mediators, they could provide environmental information as interested persons or organisations. In the Asia-Pacific region, it is not difficult to find such experts. Several members of APEC have already undertaken several environmental protection activities, government officials from their environment department or ministry could serve well as the experts. In addition, several environmental NGOs have already been established within the APEC region. They too could act as experts, providing advice to the governments of their nationalities or the mediator.

However, it is envisaged that the determination of who are the experts could become problematic. APEC thus needs to formulate some guiding criteria which set the experts apart from the non-experts. Factors which might be included as such criteria could include: the length of time he has participated in certain field of environmental

protection; the amount of experience he has; and whether or not both parties recognise him as an expert.

#### 7.2.2.2. Participation from Non-State Actors

Non-state actors such as NGOs should be allowed to participate in the DMS process. Not only would this enhance the transparency of the dispute resolution proceedings, the NGOs could also provide necessary opinions which would promote the achievement of trade-environment balance as they would have in-house environment experts who could give better analyses and assessments on environmental issues.

The participation of the NGOs could be allowed in one of these two ways. Firstly, the NGOs may be allowed to be present during the meeting (in the case of mediation) or hearing (in the case of med-arb) as the case might be. They might be allowed to make some comments or present their points of view. Alternatively, the NGOs might be permitted to submit their views in writing in the form of an *amicus curiae* brief, which the mediator should take into account.

However, APEC should formulate some guiding criteria upon which the participation of the NGOs could be decided as a safeguard against the NGOs who do not have a direct interest in the case. As a suggestion, a test on the basis of "sufficient interest" could be used.[6] Additionally, some guidelines are needed with regard to the admissibility of the information provided by the NGOs. For example, the guidelines might suggest that only legal, factual, or scientific information could be admitted on the basis of relevancy.

#### 7.2.2.3. Provision of Funding for the DMS

Just like in the dispute settlement system of the WTO, the developing members must be able to participate effectively in the APEC's DMS.[7] One way of ensuring that this would happen is to provide funding for APEC developing members. The funding would

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[6] Beatrice Chaytor, *Reform of the WTO's Dispute Settlement Mechanism for Sustainable Development*, a WWF International Discussion Paper, July 1999, (Gland, Switzerland: WWF International, 1999) at 16.

[7] Beatrice Chaytor, *op. cit.*, at 20.

enable them to prepare their cases. The parties might hire private lawyers who have the expertise in trade and environment issues who would be able to help the parties better understand each other's position and come to a solution that promotes sustainable development.

Funding could be provided by an APEC central fund to which all APEC members make a contribution. However, making all APEC members contribute to the central fund could trigger some unwillingness from some APEC members, hence deterring members from supporting the DMS. But when comparing this amount of contribution with the amount of trade loss which might result, the establishment of the central fund could prove worthwhile. Furthermore, due to each member's economic development, it would not be possible to require each APEC member economy to contribute the same amount. Thus, some formula must be created in order to determine the amount of money each member must contribute towards the central fund.

## 7.3. Further Research

As both trade and environment, and APEC issues develop constantly, there are other issues pertinent to these topics which need further exploration in order to provide a better understanding on this complex subject so that APEC's trade and environmental policies can develop at the same pace as global trade and environmental initiatives.

### 7.3.1. Policy Formation, Capacity Building and Transfer of Technology

In relation to the trade and environment debate, dispute resolution is one of the ways to help reconcile trade liberalisation process and environmental protection. It merely represents a corrective approach which only provides a short term solution to the trade and environment dichotomy. A long term solution for trade and environment integration needs to be addressed by other means such as policy formation, capacity building and transfer of environmental technology.

Firstly, with regard to policy formation, more study is needed in order to find the way in which national and international trade and environmental policies of APEC member economies can be reconciled, making those policies more mutually supportive.

Such a study could be conducted on country-by-country or sector-by-sector basis. There should also be a study into how trade and environmental policies in different APEC member economies can be made coherent. Speaking in one voice, APEC members could help reduce conflicts between their common position before the world trade and environmental fora.

Secondly, there should be a further study on how capacity building can be enhanced in APEC. This will involve the increase in capacity building on both individual and institutional bases. With regard to the former, more work is needed in order to find the ways in which capacity building programmes of APEC can be effectively implemented. Issues such as who will provide funding and technical assistance should be clarified. As for the latter, rather than increasing the capacity of each individual government official and other relevant individuals, there should be a study into how to encourage well trained individuals to remain in the workforce so that such a capacity will remain intact within the institution. Making sure that the institution is constantly well endowed with capable personnel will indeed prepare it to tackle future trade and environment policies.

Lastly, the transfer of environmentally friendly technology is a necessary part of trade and environment integration. There should be more research into an issue of which technology should be transferred to whom. This is because different countries produce different goods and face different kinds of environmental problem. There is also a need to explore further how developing countries may be helped in obtaining clean technology. Generally, such technology is owned by multinational enterprises in the developed countries, in order to assist the transfer of such technology to the developing countries, a financial support scheme may be necessary. It is useful therefore to have a study on the possibility of setting up an APEC Environmental Fund to help developing members of APEC obtain environmentally sound technology, as more than a half of APEC members are developing countries

### 7.3.2. Intellectual Property, Investment and Services

Beyond the discussion on the nexus between trade in goods and environmental protection, linkages between issues like intellectual property, investment and services,

and environmental protection have become more well known. APEC cannot ignore these issues. It should develop clearer policy guidelines and instruments which can encourage the synergy between these disciplines. For example, APEC needs to find a balance between the protection of intellectual property rights and the need to help its members obtaining environmentally sound technology. While it can be argued that stricter intellectual property protection laws can attract more innovation, as the inventors' innovations are better protected, such laws may offset against the dissemination of, for example, energy efficient technology or less environmentally harmful methods of catching fish. Thus, it is useful to study if a shorter period of intellectual property protection may be feasible and what incentives need to be given to the inventors in order to remunerate them for their innovation.

With regard to the investment issue, it has often been argued that a country may lower its environmental standards in order to attract investment. While pursuing the NAFTA Art. 1114 type of commitment is an attractive option, a study of other alternatives to this option may be useful, for instance how to restrict the ability of investors to use natural resources in an unenvironmentally friendly manner and how to make the investors repair the damages they cause to the environment. As an enforcement mechanism for Art. 1114 is lacking, it is worthwhile to explore if APEC can provide a better solution.

Environmentally sound services also cannot be viewed in isolation from the trade and environment debate as clean services can help achieve the cleaner environment. Although APEC has set up a working group on tourism whose activities include sustainable tourism, more work is needed to expand the issue of services and the environment into other areas of APEC activities such as government procurement, as what the governments choose to buy could have some important environmental impact on their countries and also APEC as a region, where goods or services purchased can cause transboundary environmental damages.

For further research on the issues of intellectual property, investment and services, APEC may investigate how these issues have been dealt with elsewhere and how they can be translated into APEC's framework and APEC's way of doing business. APEC should also encourage the establishment of a dispute resolution system to cover

these other areas in the future similar to the mechanism which has been proposed for trade and environment dispute resolution.

### 7.3.3. New Issues

Environmental issues evolve with time and technology. Matters like genetically modified organisms (GMOs) or biosafety continue to attract attention from the media and environmentalists all over the world, especially those in the United States and Europe. The legitimacy of using trade measures in relation to them - especially in the light of the Cartagena Protocol on Biosafety which covers most trade related to living GMOs - needs to be further clarified. Like other multilateral environmental agreements, the question of compatibility of this Protocol and the world trade regime needs to be addressed both globally and from APEC's perspective.

### 7.3.4. APEC's Progress

Although APEC is only an organisation of economic co-operation at the moment, further study on its evolution may be valuable. Given the fact that regional integration has spawned world-wide, research on APEC's progress to a deeper level of economic integration may prove useful. APEC's future direction in regard to its institutional arrangements may provide a necessary yardstick for the direction in which its dispute resolution mechanism will evolve. Moreover, in the light of the growing number of economic co-operation arrangements, it can be envisaged that APEC's activities may set an example for other similar organisations to follow, such as the recently formed ASEAN-EU Meeting (ASEM) - a forum set up in order to promote economic co-operation between the ASEAN and EU regional groupings.

## 7.4. Epilogue

It is now widely acknowledged that trade and the environment, although existing as two separate paradigms, also exist interdependently. The proliferation of trade liberalisation around the world has allowed people in many countries to enjoy a better lifestyle as well as made our environment suffer. The only way forward to ensure that both trade liberalisation and environmental protection work together for all of us is to make trade

and environmental policies mutually supportive. Admittedly, this is a demanding task. Conflicts between trade and environmental polices have generated a number of trade and environment disputes which are not easily resolved. Even if such disputes could be settled, dispute resolution is only a short term solution. In the long run, what is needed are changes in both trade and environmental policies. Such changes could not be accomplished merely by political rhetoric, they also need some affirmative actions both domestically and regionally. APEC, with its resources and technologies, stands in a good position to set an example of how trade and the environment could co-exist successfully. If APEC could provide a way forward for the trade and environment nexus on a regional scale, it could be an important impetus for the global trade and environment movement, given that APEC is a microcosm of the world. The ability to bridge the gap between trade and environment ideologies would not only ensure that sustainable development could be achieved in the Asia-Pacific rim, it would also continue the APEC's phenomenon into the future.

# Appendices

## Appendix A

## APEC Economic Leaders' Declaration of Common Resolve (Bogor Declaration)

1. We, the economic leaders of APEC, came together at Bogor, Indonesia today to chart the future course of our economic cooperation which will enhance the prospects of an accelerated, balanced and equitable economic growth not only in the Asia-Pacific region, but throughout the world as well.

2. A year ago on Blake Island in Seattle, USA, we recognized that our diverse economies are becoming more interdependent and are moving toward a community of Asia-Pacific economies. We have issued a vision statement in which we pledged:

    - to find cooperative solutions to the challenges of our rapidly changing regional and global economy;
    - to support an expanding world economy and an open multilateral trading system;
    - to continue to reduce barriers to trade and investment to enable goods, services and capital to flow freely among our economies;
    - to ensure that our people share the benefits of economic growth, improve education and training, link our economies through advances in telecommunications and transportation, and use our resources sustainably.

3. We set our vision for the community of Asia-Pacific economies based on a recognition of the growing interdependence of our economically diverse region, which comprises developed, newly industrializing and developing economies. The Asia-Pacific industrialized economies will provide opportunities for developing economies to increase further their economic growth and their level of development. At the same time developing economies will strive to maintain high growth rates with the aim of attaining the level of prosperity now enjoyed by the newly industrializing economies. The approach will be coherent an comprehensive, embracing the three pillars of sustainable growth, equitable development and national stability. The narrowing gap in the stages of development among the Asia-Pacific economies will benefit all members and promote the attainment of Asia-Pacific economic progress as a whole.

4. As we approach the twenty-first century, APEC needs to reinforce economic cooperation in the Asia-Pacific region on the basis on equal partnership, shared responsibility, mutual respect, common interest, and common benefit, with the objective of APEC leading the way in:

- strengthening the open multilateral trading system;
- enhancing trade and investment liberalization in the Asia-Pacific; and
- intensifying Asia-Pacific development cooperation.

5. As the foundation of our market-driven economic growth has been the open multilateral trading system, it is fitting that APEC builds on the momentum generated by the outcome of the Uruguay Round of Multilateral Trade Negotiations and takes the lead in strengthening the open multilateral trading system.

   We are pleased to note the significant contribution APEC made in bringing about a successful conclusion of the Uruguay Round. We agree to carry out our Uruguay Round commitments fully and without delay and call on all participants in the Uruguay Round to do the same.

   To strengthen the open multilateral trading system we decide to accelerate the implementation of our Uruguay Round commitments and to undertake work aimed at deepening and broadening the outcome of the Uruguay Round. We also commit ourselves to our continuing process of unilateral trade and investment liberalization. As evidence of our commitment to the open multilateral trading system we further agree to a standstill under which we will endeavor to refrain from using measures which would have the effect of increasing levels of protection.

   We call for the successful launching of the World Trade Organization (WTO). Full and active participation in and support of the WTO by all APEC economies is key to our ability to lead the way in strengthening the multilateral trading system. We call on all non-APEC members of the WTO to work together with APEC economies toward further multilateral liberalization.

6. With respect to our objective of enhancing trade and investment in the Asia-Pacific, we agree to adopt the long-term goal of free and open trade and investment in the Asia-Pacific. This goal will be pursued promptly by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital among our economies. We will achieve this goal in a GATT-consistent manner and believe our actions will be a powerful impetus for further liberalization at the multilateral level to which we remain fully committed.

   We further agree to announce our commitment to complete the achievement of our goal of free trade and open trade and investment in the Asia-Pacific no later than the year 2020. The pace of implementation will take into account differing levels of economic development among APEC economies, with the industrialized economies achieving the goal of free and open trade and investment no later than the year 2010 and developing economies no later than the year 2020.

   We wish to emphasize our strong opposition to the creation of an inward-looking trading bloc that would divert from the pursuit of global free trade. We are determined to pursue free and open trade and investment in the Asia-Pacific in a manner that will encourage and strengthen trade and investment liberalization in the world as a whole. Thus, the

outcome of trade and investment liberalization in the Asia-Pacific will not only be the actual reduction of barriers among APEC economies but also between APEC economies and non-APEC economies. In this respect, we will give particular attention to our trade with non-APEC developing countries to ensure that they will also benefit from our trade and investment liberalization, in conformity with GATT/WTO provisions.

7. To complement and support this substantial process of liberalization, we decide to expand and accelerate APEC's trade and investment facilitation programs. This will promote further the flow of goods, services, and capital among APEC economies by eliminating administrative and other impediments to trade and investment.

   We emphasize the importance of trade facilitation because trade liberalization efforts alone are insufficient to generate trade expansion. Efforts at facilitating trade are important if the benefits of trade are to be truly enjoyed by both business and consumers. Trade facilitation has also a pertinent role in furthering our goal of achieving the fullest liberalization within the global context.

   In particular we ask our ministers and officials to submit proposals on APEC arrangements on customs, standards, investment principles and administrative barriers to market access.

   To facilitate regional investment flows and to strengthen APEC's dialogue on economic policy issues, we agree to continue the valuable consultations on economic growth strategies, regional capital flows and other macro-economic issues.

8. Our objective to intensify development cooperation among the community of Asia-Pacific economies will enable us to develop more effectively the human and natural resources of the Asia-Pacific region so as to attain sustainable growth and equitable development of APEC economies, while reducing economic disparities among them, and improving the economic and social well-being of our people. Such efforts will also facilitate the growth of trade and investment in the Asia-Pacific region.

   Cooperative programs in this area cover expanded human resource development (such as education and training and especially improving management and technical skills), the development of APEC study centers, cooperation in science and technology (including technology transfer), measures aimed at promoting small and medium scale enterprises and steps to improve economic infrastructure, such as energy, transportation, information, telecommunications and tourism, with the aim of contributing to sustainable development.

   Economic growth and development of the Asia-Pacific region has mainly been market-driven, based on the growing interlinkages between our business sectors in the region to support Asia-Pacific economic cooperation. Recognizing the role of the business sector in economic development, we agree to integrate the business sector in our programs and to create an ongoing mechanism for that purpose.

9. In order to facilitate and accelerate our cooperation, we agree that APEC economies that are ready to initiate and implement a cooperative arrangement may proceed to do so while those that are not yet ready to participate may join at a later date.

   Trade and other economic disputes among APEC economies have negative implications for the implementation of agreed cooperative arrangements as well as for the spirit of cooperating. To assist in resolving such disputes and in avoiding its recurrent, we agree to examine the possibility of a voluntary consultative dispute mediation service, to supplement the WTO dispute settlement mechanism, which should continue to be the primary channel for resolving disputes.

10. Our goal is an ambitious one. But we are determined to demonstrate APEC's leadership in fostering further global trade and investment liberalization. Our goal entails a multiple year effort. We will start our concerted liberalization process from the very date of this statement.

    We direct our ministers and officials to immediately begin preparing detailed proposals for implementing our present decisions. The proposals are to be submitted soon to the APEC economic leaders for their consideration and subsequent decisions. Such proposals should also address all impediments to achieving our goal. We ask ministers and officials to give serious consideration in their deliberations to the important recommendations contained in the reports of the Eminent Persons Group and the Pacific Business Forum.

11. We express our appreciation for the important and thoughtful recommendations contained in the reports of the Eminent Persons Groups and the Pacific Business Forum. The reports will be used as valuable points of reference in formulating policies in the cooperative framework of the community of Asia-Pacific economies. We agree to ask the two groups to continue with their activities to provide the APEC economic leaders with assessment of the progress of APEC and further recommendations for stepping up our cooperation.

    We also ask the Eminent Persons Group and the Pacific Business Forum to review the interrelationships between APEC and the existing sub-regional arrangements (AFTA, ANZERTA and NAFTA) and to examine possible options to prevent obstacles to each other and to promote consistency in their relations.

APEC Economic Leaders
Bogor, Indonesia
November 15, 1994

# Appendix B

## APEC Environmental Vision Statement

This meeting of APEC Ministers for the Environment forged consensus on a wide range of issues, sharing the spirit of the Rio Declaration on Environment and Development. We reaffirmed the inseparable linkages between environment protection and economic growth to build an enduring foundation for sustainable development in our region.

We want to see the continued dynamic growth and growing interdependence of APEC member economies which has transformed our region. We are concerned that degradation of our environment will adversely affect our ability to sustain our economic growth. Our efforts to assure stable and sustainable development must take account of the effect of our economies and our populations on the natural environment. To this end we support the outcomes of UNCED.

We, the Asia Pacific economies are agreed that we must protect our environment and conserve natural resources. In particular, we have to improve the quality of air, water and manage energy resources to ensure sustainable development and provide a more secure future for our people. We agree to develop co-operative programs to this end.

We recognize that problems such as climate change, biodiversity loss, pollution and waste, deteriorating water quality and availability, soil erosion, population pressures, and growing energy consumption challenge all of us to cooperate more effectively in dealing with these issues. APEC should take the lead in addressing these global problems and solutions in line with the global consensus reached at UNCED.

All APEC members share a commitment to sustainable development. We support enhanced protection for our environment and greater sensitivity and concern for the environment in our economic decision-making processes by integrating environmental considerations into relevant policy development and economic decisions throughout the region. To this end, we encourage APEC working groups and policy committees to integrate environmental concerns into their work programs.

Members recognize that the market can be an efficient an flexible means of allocating resources but that market outcomes do not always take into full account relevant environmental concerns. The challenge is to achieve sustainable development while taking advantage of the dynamism that market economies provide.

We welcome the call of the Eminent Persons Group (EPG) for APEC members to embark on a course of sustainable development, without creating new forms of protectionism. We would hope the important EPG work of developing a long term vision for APEC would address equally relevant environmental and economic considerations.

We think APEC's work on the environment should add value to other environmental activities in the region through mutually beneficial work complementary to other multilateral institutions and fora.

We believe sound environment and sound economic policies are mutually supportive and that preventing environmental degradation is fundamental to sustainable development.

We will work together with our APEC Ministers to promote sustainable development, trade and investment in the region, through a vision for APEC that encourages members to integrate environmental considerations into their policy making having regard to the attached framework of principles for integrating environmental considerations within APEC, at all levels.

APEC economies recognize the inter-relationship among poverty, unsustainable patterns of production and consumption, population growth, natural resource depletion and environmental degradation, and the potential for regional approaches in addressing global environmental problems. We encourage an enhanced dialogue focused on opportunities for regional co-operation in priority areas such as environmental technologies, environmental education and information, policy tools, and sustainable cities as well as earth observation and global changes research.

We urge each APEC economy to broaden consultations on sustainable development issues to provide multi-sectoral input into their policy development process. We encourage the private sector to observe their role and obligations in achieving sustainable development. We also encourage APEC senior officials (SOM) to develop ideas for multi-sectoral exchanges at the regional level, including the possible exploration of an Asia Pacific Round Table on the Environment and the Economy, and we encourage APEC economies to develop their own mechanisms for contacts with the private sector and major groups.

We call on APEC senior officials to build on the environment work already underway in APEC working groups to develop a strategic approach, based on sustainable development principles, environment considerations to be fully integrated into the program of each APEC working group and policy committee.

We are committed to develop policies that are sound economically and environmentally. We agree that sustainable development depends upon successful implementation of policies and programs that integrate economic, environment and social objectives. We believe that APEC should take the lead in achieving sustainable development.

APEC Ministers Responsible for the Environment
Vancouver, Canada
March 25, 1994.

# Appendix C

## Framework of Principles for Integrating Economy and Environment in APEC

### Preamble

The challenge of sustainable development requires integration of economy and environment in all sectors and at all levels.

The experience of APEC members is that a market economy can be a very efficient and flexible means of allocating resources to meet individual preferences. Competitive market economies make for a dynamic and innovative society.

But the market will not necessarily deliver other objectives that society may have, such as meeting the basic needs of all citizens, environmental quality, an access to resources for future generations.

In seeking to reconcile the objectives of economic growth and efficiency with improved environmental outcomes, the following principles could be taken into consideration by member economies to achieve sustainable development.

### Principle: Sustainable Development

Member economies should promote sustainable development and a higher quality of life for all people. All the possible measures should be seriously considered to bring about a society where "...environmental protection shall constitute an integral part of the development process and cannot be considered isolation from it" (from Principle 4, Rio Declaration on Environment and Development).

Member economies should promote the complementary principles of reduction of poverty and improvement of the environment, consistent with Principle 5 of the Rio Declaration.

### Principle: Internalization

Members should "endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment" (from Principle 16, Rio Declaration).

### Principle: Science and Research

Scientific research should be fostered to increase the community's understanding of ecological system, and their interactions with the economy, employment, and human communities.

**Principle: Technology Transfer**

Member economies should cooperate to strengthen capacity-building for sustainable development through exchanges of scientific and technical knowledge. They should enhance the development and transfer of technologies, including new and innovative technologies, consistent with Chapter 34 of Agenda 21.

**Principle: The Precautionary Approach**

Member economies should, according to their capabilities, widely apply the precautionary approach in accordance with Principle 15 of the Rio Declaration: "...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 measure to prevent environmental degradation".

**Principle: Trade and the Environment**

Member economies should support multilateral efforts to make trade and environment policies mutually supportive, consistent with Principle 12 and other relevant principles of the Rio Declaration.

**Principle: Environmental Education and Information**

Member economies, industry, consumer groups, and environmental groups should provide to all citizens information and educational opportunities that will enhance informed choices that affect the environment.

**Principle: Financing for Sustainable Development**

Member economies should cooperate to meet the goal of mobilizing financial resources for sustainable development, including the exploration of innovative approaches to fund raising schemes and mechanisms, taking into account conditions and priorities of APEC members.

**Principle: Role of APEC**

APEC members should, in promoting regional cooperation, make the best use of existing multilateral and bilateral fora, and activities of APEC to attain sustainable development. These fora and activities have contributed to the implementation of Agenda 21 in the fields of environmental priority setting, accumulation of scientific knowledge, and enhancement of capacity building. APEC member should seek appropriate ways and means by which APEC can add concrete value to these ongoing activities, avoiding duplication of functions.

Meeting of APEC ministers responsible for the environment should be held on an ad hoc basis as the necessity arises.

APEC members should consider ways to better incorporate sustainable development into the work of APEC Working Groups and Committees, where relevant, including consideration of these issues at the levels of Senior Officials Meetings and APEC Ministerial Meetings.

APEC members should achieve the integration of economy and environment considerations through conscious efforts to incorporate environmental concerns into decision making for sustainable development at all levels.

APEC Ministers Responsible for the Environment
Vancouver, Canada
March 25, 1994

# Appendix D

## Selected Governing Laws of TREMs in APEC Member Economies

| Member Economy | Governing Law of TREMs |
|---|---|
| Australia | • Motor Vehicles Standards Act 1989<br>• Environment Protection (Sea Dumping) Act 1982<br>• Quarantine Act 1908<br>• Fisheries Act 1905<br>• Ozone Protection Act 1989<br>• Ozone Protection Amendment Act 1995<br>• Hazardous Waste (Regulation of Exports and Imports) Act 1989<br>• Wildlife Protection (Regulation of Exports and Imports) Act 1982 |
| Brunei | • Vehicle Emission Standards<br>• Petroleum Mining Act<br>• Water Supply Act<br>• Fisheries Enactment & Fisheries Regulation<br>• Forest Enactment & Forest Rules<br>• Forest Act 1934 |
| Canada | • Benzene in Gasoline Regulations (SOR/97-493)(CEPA)<br>• Fuels Information Regulations, No.1(C.R.C.,c.407) (CEPA)<br>• Motor Vehicle Safety Regulations (C.R.C., c. 1038) (Motor Vehicle Safety Act)<br>• New Substances Notification Regulations (SOR/94-260) (CEPA)<br>• Energy Efficiency Regulations (SOR/94-651)(Energy Efficiency Act)<br>• Ozone-depleting Substances Regulation (SOR/95-576)<br>• Ozone-depleting Substances Products Regulation (SOR/95-584)<br>• Export and Import of Hazardous Wastes Regulation 1992 (SOR/92-637)<br>• Wild Animal and Plant Trade Regulations (SOR/96-263)<br>• Export of Logs Permit (C.R.C., c. 612)(Export and Import Permits Act)<br>• Fish Health Protection Regulations (C.R.C., c. 812)(Fisheries Act) |
| Chile | • Emission Related to the Discharge of Liquid Industrial Wastes into Sewers<br>• Emission Related to the Discharge of Liquid Industrial Wastes into Surface Water<br>• Maximum Permissible Levels of Annoying Noise Generated by Fixed Sources |
| China | • Environmental Protection Law of PRC<br>• Marine Environment Protection Law<br>• Law on the Prevention and Control of Water Pollution of PRC<br>• Law on the Prevention and Control of Air Pollution of PRC |

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| | • Law on the Prevention and Control of Noise Pollution of PRC<br>• Law on the Prevention and Control of Environmental Pollution by Solid Wastes of PRC<br>• Law on Preventing Environment Pollution by Solid Wastes 1995<br>• Provisional Regulations on Environmental Protection Management of Waste Imports 1996<br>• Wildlife Protection Law 1988<br>• Regulations on the Protection of Land-born Wild Animal 1992<br>• Circulation from the State Council on Prohibiting the Trade of Rhinoceros Horn and Tiger Bone 1993<br>• Regulations on the Protection of Wild Aquatic Animals 1993<br>• Foreign Trade law of PRC<br>• Interim Rules for the Import of Electromechanical Products<br>• Interim Rules of Limitation for the Import of Ordinary Goods |
| Hong Kong | • Air Pollution Control (Motor Vehicles Fuel) Regulation<br>• Noise Control (Air Compressors) Regulations (Cap. 400)<br>• Noise Control (Hand Held Percussive Breakers) Regulation (Cap. 400)<br>• Air Pollution Control (Motor Vehicle Design Standards)(Emission) Regulation<br>• Ozone Layer Protection Ordinance (Cap. 403)<br>• Ozone Layer Protection (Products Containing Scheduled Substances)(Import Banning) Regulation<br>• Waste Disposal Ordinance (Cap. 354)<br>• Animals and Plants (Protection of Endangered Species) Ordinance (Cap. 187)<br>• Air Pollution Control Ordinance (Cap. 311) |
| Indonesia | • Environmental Management Law<br>• Technical Guidelines for the Reporting of Containment of Impacts on Living Environment in the Industrial Sector (Ministry of Industry Decree No. 250/M/SK/10/1994)<br>• Minister of Industry and Trade Decree No. 137/MPP/Kep./6/1996<br>• Minister of Industry and Trade Decree No. 111/MPP/Kep/1/1998<br>• Minister of Industry and Trade Decree No. 110/MPP/Kep./1998<br>• Minister of Trade Decree No. 99/kp/IV/1992<br>• Minister of Trade Decree No. 349/kp/XI/1992<br>• Minster of Trade Decree No. 94/kp/V/1995 |
| Japan | • Chemical Substances Control Law<br>• Law concerning the Disposal and Cleaning of Wastes (Law No. 137 of 1970)<br>• Law for the Conservation of Endangered Species of Wild Fauna and Flora 1992<br>• Law concerning the Protection of the Ozone Layer 1998<br>• Law for Control of Export, Import and Others of Specified Hazardous Wastes and Other Wastes 1992 |
| Korea | • Air Quality Preservation Act<br>• Water Quality Preservation Act<br>• Noise and Vibration Control Act |

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| | • Act Relating to Treatment of Sewage, High Soil, and Livestock Wastewater<br>• Noxious Chemical Substance Control Act 1990<br>• Drinking Waste Management<br>• Act Relating to Transboundary Movements of Wastes and Their Disposal 1992<br>• Act of control on the production, etc. of specified substances for the protection of the Ozone Layer 1991 |
| Malaysia | • Environmental Quality (Clean Air) Regulations 1978<br>• Environmental Quality (Prohibition on the use of Controlled Substance in Soap, Synthetic Detergent and Other Cleaning Agents) Order 1995<br>• Motor Vehicles (Control of Smoke and Gas Emission) Rules 1977<br>• Environmental Quality (Control of Lead Concentration in Motor Gasoline) Regulations 1985<br>• Environmental Quality (Motor Vehicle Noise) Regulations 1987<br>• Wildlife Protection Act No. 76, 1972<br>• Customs (Prohibition of Imports) Order 1988<br>• Customs (Prohibition of Exports)(Amendment)(No. 2) Order 1993<br>• Customs (Prohibition of Imports)(Amendment)(No. 3) Order 1993 |
| Mexico | • Project NOM-020-SCT2-1995<br>• Project NOM-105-ECOL-1000<br>• NOM-006-FITO-1995<br>• NOM-097-ECOL-1995<br>• NOM-097-ECOL-1995<br>• Declaration of Basel Convention on the Control of Cross-boundary Transportation of Hazardous Wastes and the Treatment of Hazardous Wastes |
| New Zealand | • Transport Act 1962<br>• Import Control (Hazardous Waste) Conditional Prohibition Order 1994<br>• Ozone Layer Protection Act 1996<br>• Trade in Endangered Species Act 1989<br>• Customs Export Prohibition Order 1996<br>• Customs Import Prohibition (whales and whale products) Order 1975<br>• Smoke Free Environments Act 1990<br>• Customs Export Prohibition Order 1996<br>• Marine Mammals Protection Act 1978 |
| Papua New Guinea | • Environment Contaminants Act 1978<br>• International Trade (Fauna and Flora) Act 1979<br>• Crocodile (Trade & Protection) Act 1982 |
| Philippines | • Presidential Decree 984: Pollution Control Law<br>• National Air and Water Act<br>• Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990 (Republic Act No. 6969)<br>• Pre-Manufacturing and Pre-Importation Notification (PMPIN) |
| Singapore | • The Clean Air Act and Regulations<br>• The Sale of Food Act and the Food Regulations |
| Taiwan | • The Management Code of the Permissible Vehicle Energy Exhaustion Standards<br>• Toxic Chemical Control Act<br>• Motor Vehicle Noise Control Regulation<br>• Regulations Governing the Application of Petroleum |

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| | Coke Import Permits<br>• Regulations Governing the Import Permits Application of Used Diesel Generators and Air Compressor<br>• Management Regulations on the Imports, Exports and Transshipment of Hazardous Waste 1993 |
| Thailand | • Enhancement and Conservation National Environmental Quality Act B.E. 2535<br>• The Ministry of Commerce Notification Regarding Imports (No. 120) B.E. 2540<br>• The Wild Animal Reservation and Protection Act 1960<br>• Hazardous Substances Act B.E. 2535<br>• The Ministry of Commerce Notification Regarding Imports: Import prohibition (No. 99) B.E. 2536<br>• Non-automatic licensing (No. 34) B.E. 2508; (No. 107) B.E. 2538; (No. 91) B.E. 2521; (No. 50) B.E. 2512; (No. 66) B.E. 2515; (No. 88) B.E. 2512; (No. 85) B.E. 2534 |
| USA | • The Clean Air Act<br>• The Clean Air Act, 1990 Amendment<br>• 1974 Safe Drinking Water Act<br>• Air Quality Preservation Act<br>• The Endangered Species Act 1973<br>• Solid Waste Disposal Act 1965<br>• Marine Mammal Protection Act 1972, 16 U.S.C. § 1361-1421h<br>• Pelly Amendment to the Fisherman Protective Act of 1967, 22 U.S.C. § 1978<br>• Conservation of Sea Turtles, 16 U.S.C. § 1537note<br>• Lacey Act Amendments of 1981, 16 U.S.C. § 3371-3378 |

Source: APEC Economic Committee, *Survey on Trade-Related Environmental Measures and Environment-Related Trade Measures in APEC*, (Singapore: APEC Secretariat, 1999).

Note: This table is a compilation of some selected laws which allow use of TREMs either unilaterally or in pursuant to MEAs.

# Appendix E

## Details of the APEC Mediation Process

From the mediator's perspective, there are three stages of the mediation process: (1) information gathering; (2) probing or analyzing strengths and weaknesses of each party's contentions; and (3) strategizing and negotiating. The mediator's role is set forth in the following description of the proposed mediation process.

Sine the APEC Dispute Mediation Service (DMS) would be an entirely voluntary and nonbinding procedure, and would be a supplement to the WTO dispute settlement mechanism , APEC members submitting their disputes to the DMS must be willing participants with a belief that it can help lead to an agreement. The DMS would convene a mediation session promptly after the mutual request of the parties to the DMS administrator. The location would be agreed upon by the parties, with a default location being the site of the APEC Secretariat in Singapore. Expenses for the mediation would be born equally by the parties, subject to a settlement which otherwise allocates such expenses. Expenses for third parties wishing to participate in the mediation process would be borne by themselves and not by the principals to the dispute.

The mediation process should begin with a joint session attended by all interested parties (we assume hereinafter that there are two parties to the dispute), including third party states who may be materially affected by the outcome of the settlement. At this meeting, the mediator first explains the format of the session and discusses the nature of the procedures. The parties are informed that the mediator's function is to assist them in finding common points upon which to base a settlement, and that the mediator will not be judging them or directing them to take any particular action.

After these introductory remarks, the mediator will ask each party to make a brief presentation of its case to put the major issues on the table and identify areas of dispute. At this time, third parties will also make presentations to clarify their interest in the dispute. The presentations should provide each party with a clear outline of the issues which are regarded as being important by the other party, and they should also provide the mediator with a broad overview of the case.

Once the parties complete their presentations, the mediator shifts the mediation to the private caucus sessions and the parties move to separate locales. The mediator meets privately with each party, at which time he informs them that these private sessions are confidential and that nothing will be disclosed to other party without the express consent of that party. If additional information is required by one party after the closing of the joint session, then the mediator must request such information from the other party since there will not be another joint session.

During the private caucus session, the mediator should ask each side to analyze the respective strengths and weaknesses of its own case, and the projected outcome, given the information it received during presentations in the joint session. At the close

of each caucus, the mediator and the party should discuss what specific information may be disclosed to the other party and identify what information should remain confidential.

From this point on, the mediator moves back and forth between the parties, listening to their points and relaying information and arguments for the other party. After the parties agree with the mediator that all of their points have been effectively communicated to the other party, the mediator may privately ask each party for its "bottom line" or least acceptable solution. It is then largely up to the sill of the mediator to move each party towards a mutually acceptable settlement.

Once a settlement is reached, the mediator should ensure that it is captured in written form. The final language should be prepared and signed at the time of the mediation.

We propose that a list of DMS mediators be maintained by the APEC Secretariat. From that list, one to three mediators would be selected upon agreement of the parties to the dispute to guide the parties through the mediation process. Such selection would be completed within ten days after a request for mediation, subject to passage of a 30-day period of direct prior consultations between the parties to the dispute.

The qualifications of DMS mediators should be similar to those of WTO panelists. The list could include individuals who have previously served as a representative of a member of APEC, taught or published on international law or policy, served as a senior trade policy official of a member of APEC, or come from the business/private sector. DMS mediators should be selected to ensure their independence of judgment from any APEC government, their diverse background, and a wide spectrum of experience.

Potential DMS mediators from member economies whose governments are parties to a dispute shall not serve as a mediator to that dispute unless the parties to that dispute agree otherwise. Neither shall mediators serve who are from economies that are members of the same SRTA [Subregional Trade Arrangement] as a party to the dispute. DMS mediator shall serve in their individual capacities and not as representatives of governments nor of any other organization. APEC member economies will not seek to influence the mediators.

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