S528
SHANNON, P.J. GATT and the environment.

PHILIP J SHANNON

GATT AND THE ENVIRONMENT: REDUCING THE ENVIRONMENTAL IMPACT OF FREE TRADE

LLM RESEARCH PAPER

ADVANCED ENVIRONMENTAL LAW
(LAWS 539)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1994

SR
e
AS741
VUW
A66
S528
1994

TABLE OF CONTENTS

		Page No.
Abstract		2
I	Introduction.	3
II	The Environment - A definition.	6
III	The Environment - Some problems.	7
IV	A Common Thread - Economic expansion.	11
V	Trade and The Environment.	12
VI	Free Trade.	12
VII	The General Agreement on Tariffs and Trade (GATT) Pre-Uruguay.	15
VIII	The Tuna/Dolphin Dispute.	20
IX	GATT - Post Uruguay.	30
X	Anticipated Outcomes of the Uruguay Round.	42
XI	Free Trade and Sustainable Developments - Is it achievable?	44
XII	GATT Conflict with International Environmental Agreements.	46
XIII	Making the Polluter Pay - A Desirable Outcome.	48
XIV	Amendments to GATT - Some Proposals.	51
XV	Conclusion.	60
	Appendix I - GATT Preamble.	62
	Appendix II - Article XX General Exceptions.	63
	Appendix III - Ad Article III.	64
	Appendix IV - Preamble Agreement Establishing the WTO.	65
	Appendix V - Article 2 Technical Regulations and Standards.	66
	Bibliography.	67

VICTORIA
UNIVERSITY OF
WELLINGTON

LIBRARY

ABSTRACT

In this paper the writer proposes to demonstrate the tension and conflict that exists between free trade policies and policies relating to environmental protection. In the course of the paper the writer will examine the link between trade liberalisation and environmental problems.

In particular, the paper will focus on the provisions of the General Agreement on Tariffs and Trade (GATT) and the concessions and exceptions it makes in relation to environmental protection.

The Primary purpose of the paper is to examine and identify some possible legal resolutions to the conflict. Thus, the paper contains analysis of specific GATT Articles and their interpretation by the GATT disputes panel. In addition the paper contains a number of proposals for the amendment of GATT, in order to reduce the potential for conflict with national and international environmental protection laws.

In the opinion of the writer (as argued in this paper) it is possible to provide legal solutions to the conflict that do not undermine the concept of free trade as promoted by the GATT.

STATEMENT OF WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13,500 words.

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

I INTRODUCTION

The second half of the Twentieth century has seen concerted attempts to deal with the key issues facing mankind on a global basis.

As a direct result of a raft of technological advances the activities of one nation can, more than at any other time in our history, have an impact extraterritorially.

An obvious example of this move toward a global co-operative was the emergence in 1945 of the United Nations (UN)[1]. The UN was formed first and foremost to foster international peace, security and co-operation. It now consists of numerous intergovernmental agencies that deal with global issues as diverse as Agriculture[2] and intellectual property[3].

The focus of this paper is on two areas of vital concern to the "global village", those of Trade and the Environment. Both trade and environmental issues have been subject to the international co-operative approach to regulation and resolution referred to above.

In the case of the environment, the last fifty years have seen the emergence of numerous international treaties and

---

[1]The association of sovereign states that succeeded the league of Nations after World War II.

[2]Food and Agriculture Organisation (FAO). This agency deals with, among other things, matters of work nutrition and co-ordinates distribution of emergency food supplies.

[3]World Intellectual Property Organisation (WIPO). This agency is based in Geneva and was formed in 1974 to co-ordinate international protection of copyright in the Arts, Science and Industry.

conventions.[4] An excellent example that illustrates the co-operation achievable at international level has been the collective approach taken to the so called "greenhouse effect"[5].

At the Montreal Protocol Conference in London in 1990 some 98 countries met to work out a timetable for the phasing out of Chloroflurocarbons or CFC's, said to be responsible for depletion of the Ozone layer and global warming. Furthermore, at the Rio de Janeiro Earth Summit the Framework Convention on Climate Charge (FCCC) was signed by more than 150 nations. The convention seeks to ensure that ratifying parties put in place policies in their own nations, that reduce emissions of greenhouse grasses.

The international partnership approach to environmental problems is a comparatively new development. However, by contrast, international partnerships in trade matters have long been an important and influential part of world history.

Two examples in the last thirty years have been the common markets set up by the Europeans (European Economic Community) and the North Americans (North American Free Trade Agreement). However, of far greater importance, and a central focus in this paper is the General Agreement on Tariffs and Trade or the GATT. The GATT in its present form (following completion of the Uruguay Round of Negotiations) is the first comprehensive agreement regulating world trade. Some 115 nations participated in the latest negotiations. The majority have made commitments to a

---

[4]Two examples are the Convention on International Trade in Endangered Species (CITES) implemented in 1975 and now with more than 100 signatory nations and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal adopted in 1989 and now with more than 50 signatories.

[5]For a brief discussion of the Greenhouse effect see Text below at page 8.

range of subsidy and tariff reductions designed to liberalise international trade.

It is submitted by the writer that there is a clear link between economic development and the environment. Development necessarily requires the use of the earths resources and this consumption necessarily impacts on the environment. Unfortunately often the environmental impact is detrimental in effect.

An important element of economic development is trade. The potential for growth resulting from the freeing up of international trade following the GATT is considered by the Ministry of Foreign Affairs and Trade (MOFAT) as significant.[6] The resultant increase in worldwide consumption of resources will, without doubt, impact on the environment in some cases having a detrimental effect.

In this paper the writer will examine the tensions between freer international trade and protection of the environment in the legal context, concentrating on specific GATT clauses.

The paper also contains proposals as to how the GATT could be amended to better facilitate protection of the environment. The proposed amendments will proceed from the premise that environmental protection measures are essential, but need not be a threat to the concept of free trade as promoted by the GATT.

---

[6]See Trading Ahead The GATT Uruguay Round: Results for New Zealand published April 1994 by the Ministry of Foreign Affairs and Trade, pages 12 to 20.

II THE ENVIRONMENT - A DEFINITION

The writer submits that prior to embarking on any discussion of causes of and solutions to, environmental problems it is essential to establish what is meant by the word "environment".

An inaccurate understanding of the concept and meaning of the word can only inhibit reasoned analysis, discussion and resolution of the problems and issues that relate to the environment and its protection.

The New Collins Concise English Dictionary defines "environment" as:[7]

(i) "external conditions or surroundings" and

(ii) "the external surroundings in which a plant or animal lives."

The Hutchinson Encyclopedia elaborates:[8]

> "environment in ecology, the sum of conditions affecting a particular organism including physical surroundings, climate and influences of other living organisms; in common usage, "The Environment" often means the total global environment, without reference to any particular organism. In genetics it is the external influences that affect an organisms development and its phenotype.[9]

---

[7]The New Collins Concise English Dictionary. 1982 Williams Collins Sons & Co Ltd at page 372.

[8]1992 Helicon Publishing Limited at page 291.

[9]Phenotype in genetics, are the traits actually displayed by an organism, which may be modified by the effects of the environment.

For the purposes of this paper it is necessary to examine how one "living organism", man often detrimentally influences the "total global environment" or the "external conditions or surroundings" in which all organisms exist.

III THE ENVIRONMENT - SOME PROBLEMS

It is useful here to identify some of the problems effecting the global environment, since it is difficult to produce legal solutions without first having some understanding of the nature of the problems we face.

It is generally accepted that the expansion of the human population coupled with economic development and increased production and consumption are among the root causes of many of the environmental problems facing the world today.

These problems include:

A OVER POPULATION

Predictions for the proliferation of the Human Race are alarming. At present rates of increase the twentieth century could end with a staggering 6.5 billion people inhabiting earth. The added pressure on all natural resources by these additional consumers, will effect every aspect of the environment.

Each new addition to the human race requires, food, shelter and clothing. Particularly in the developing world where population growth is the most rapid, the effects on the environment are obvious. These effects include, habitat destruction, and over-intensive agriculture leading to problems of malnutrition and starvation.

B GLOBAL WARMING (GREENHOUSE EFFECT)

Scientists have calculated that the world's temperature has increased by 0.5% since 1900.

This has been linked to the increasing presence of carbon dioxide (CO_2) in the atmosphere preventing the escape of solar radiation absorbed and re-emitted from the earths surface.

Anticipated results include the possible melting of the polar icecaps causing a rise in sea levels and flooding of existing populated areas. There is a general consensus in the scientific world that increased CO_2 emissions and the use of Chloroflurocarbons[10] (CFC's) resulting from rapid industrialisation are causing the problem.

The need for action to be taken to reduce CO_2 emissions and the use of CFC's has been recognised by the international community.[11] However targeted reductions of up to 80% seem unrealistic when the developing world is likely to continue to rely heavily on fossil fuels.[12]

C OZONE DEPLETION

This phenomenon is also linked to chloroflurocarbons. The ozone layer is an important part of the earths upper atmosphere. It protects organisms on earth from the harmful effects of the suns ultraviolet rays. The layer

---

[10]A chloroflurocarbon is a synthetic chemical used as a propellant in aerosol cans, refrigerators and air conditioners, among other uses. When released into the atmosphere under influence of ultraviolet radiation it can break down into chlorine atoms which destroy the ozone layer.

[11]For example the Second World Climate Conference held in Geneva in 1990 attended by some 137 nations.

[12]Non-fossil fuel technologies are not presently sufficiently developed to represent a cost effective alternative.

has been damaged to such an extent that a continent sized hole has been detected over the Antarctic.

The results anticipated, include an increase in the incidence of skin cancers caused by greater exposure to ultraviolet radiation. It is calculated that a reduction in the ozone layer as small as 5% would lead to a 10% increase in the incidence of skin cancers.

In addition to the health risk to both humans and wildlife, it is thought possible that ozone layer depletion may cause the earths surface temperature to increase. This is considered to be a likely result of the increase in the amount of ultraviolet radiation penetrating the atmosphere.

D SPECIES EXTINCTION

Mostly due to human activity, the loss of entire species is occurring at an alarming rate. Destruction of habitats due to pollution, unsustainable economic development and overpopulation are among the causes. One possible result, if the trend is not reversed, could be the damage or destruction of the whole food chain and eventual extinction of the human race.

E DEFORESTATION

In simple terms this involves the destruction of forests for timber and or clear-felling for agricultural use, without replanting to replace the lost trees. Results, include soil erosion, flooding and drought as well as species extinction caused by destruction of habitat. It is also thought to contribute to the greenhouse effect, by

reducing the impact trees have on the carbon cycle through photosynthesis.[13]

Large scale commercial exploitation of the world's tropical forests is a particular problem. There is huge demand for wood and wood products especially in the developed countries of the northern hemisphere. Africa, Asia and South America have suffered large scale depletion. In some instances the trees are burnt to clear the land for agricultural use, releasing more CO_2 into the atmosphere and adding to global warming.

F ACID RAIN

Acid rain is rain water droplets that contain manmade chemical air pollutants and are linked to industrial emissions of sulphur dioxide and to automobile exhaust fumes. Acid rain is a form of transboundary pollution, since the rain being airborne can pick up pollutants from one nation and deposit them as "wet" fallout in a neighbouring nation. Its results include pollution of soil and waterways, destruction of fish, crops and trees caused by the high concentrations of sulphuric and nitric oxides contained in the rain when it falls.

As the authors of one text have observed[14]:

> "By the middle of the next century, more than half of Europe's soil may ... be nitrogen saturated, with unfortunate side effects for fresh and coastal sea waters ... forest damage

---

[13]Photosynthesis in plants is the synthesis of organic compounds from carbon-dioxide and water using light energy absorbed by chlorophyll in the plants.

[14]S. Pope, M. Appleton, E. Wheal. The Green Book (Hodder and Stoughton 1991) Pages 1 and 2.

> now affects almost every European country from Spain to the USSR."

IV A COMMON THREAD - ECONOMIC EXPANSION

The environmental problems listed above are some of the major global concerns facing the human race and its future on the planet. There are others of significant importance because of their collective detrimental effect on our world. These include production of hazardous wastes, pollution of the oceans, drift-net fishing and overgrazing. The list is considerable.

In addition to the global problems, each nation has its own specific environmental problems and has a role to play in improving its own environment for the collective benefit of all.

It is submitted that there are two common causative threads linked to all of the environmental problems identified above. Those common threads are the rapid expansion of the human population and the resultant expansion economically.

The exponential increase in the worlds population has placed increasing pressure on the earths resources. As more and more consumers are born into the world there is increased pressure to develop, to expand a nations industrial and agricultural base to cope. The economic equation is simple, more people equals more mouths to feed, equals more demand for land, food, housing and fuel and that equals more potential polluters and pollutants.

V TRADE AND THE ENVIRONMENT

One aspect of the common thread of economic expansion identified above, is trade.

The sale and purchase or exchange of commodities nationally and internationally is fundamental to the global economy. All nations import and export goods and services on a daily basis, and in some cases they import or export environmentally harmful products.

In other instances the manufacturing or production process used in creating the goods for export is harmful to the environment of the exporting nations. Because of the global nature of todays' environmental problems an environmentally damaging production process can have an impact internationally.

The impact of trade on the environment arises not only from the nature of goods produced and the process used in production, but also from non-sustainable use of resources or raw materials. For example, one cause of the deforestation problem is the world wide demand for timbers, encouraging developing nations to clear-fell without established re-planting programmes in place. In such instances a nation is driven by the need for the export dollars it will earn from meeting the demands of its international trading partners.

VI FREE TRADE

Free trade has been defined by the MOFAT as[15] "Trade which is not restricted by Government-imposed trade restrictions or distortions".

---

[15]Above N.6 at page 105.

In reality the concept of free trade has always taken a backseat because of governments motivated by self interest, and desirous of appeasing their own domestic producers.

Protectionism, or the use of restrictions to reduce importation of goods has been a integral part of international trade in the twentieth century. The motivation of a protectionist government is generally to assist local manufacturers to compete with foreign producers of the same goods.

Some of the strategies that have been used include:

A GOVERNMENT SUBSIDY

This may take the form of a direct payment by a government to a manufacturer/producer thereby enabling them to produce and sell their goods domestically and internationally at lower prices than foreign competitors.

B DUTIES OR TARIFFS

A charge or duty may be levied by a government on certain imports thereby increasing the cost of the import to the domestic consumer. The domestic consumer will in most cases purchase the cheaper locally produced product.

C QUOTAS

An export quota imposed on foreign goods by a government is intended to place a limitation on the number or volume of such goods being brought into a country. Quotas are designed to protect the local producer by artificially maintaining demand for its product within the domestic market.

D LICENSING

A government may put in place a system of licensing importers that wish to bring certain goods into a country. By restricting the number of licences issued and placing numerical restrictions on the licensee as to the quantity that may be imported, the local market can be protected from an influx of competing produce.

The abovementioned measures and a number of counter measures[16] have been used liberally by governments throughout the world to look after their own interests. The result has been that nations have always been restricted to some degree as to the extent to which they can freely trade with their neighbours across the world.

The ability of a sovereign state to dictate the terms under which it would permit trade with other nations has always had negative effects on economies around the world. For example, trade barriers raise prices by artificially restricting the choice of domestic consumers and maintaining demand.

However with protectionism in trade, a government also has the option to exclude imports to its shores which are hazardous to the environment.

The concept of free international trade with little or no protectionism can, as will be illustrated below, lead to a conflict of international laws where a decision is made to exclude an import on environmental grounds. The question is, which should have paramountcy, free trade or protection of the environment? Alternatively, can the two concepts co-exist without an unacceptable cost to one or the other?

---

[16]For example a countervailing Duty may be imposed on imports to offset the benefits of subsidies given to exporters from the exporting country.

VII THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) - PRE-URUGUAY ROUND

The GATT is concisely defined by the MOFAT as[17]:

> "A Multilateral trade treaty, involving 115 member countries, which seeks to liberalise world trade and to place trade on a more secure basis through agreed international rules".

GATT was established in 1947 and has been reworked almost continuously since that time by several negotiating rounds of which, the Uruguay round, which commenced in 1986 was the eighth.

For the purposes of this part of the paper I will be discussing the agreement as it existed prior to completion of the Uruguay Round.

The preamble to the pre-Uruguay GATT (PUG) states, among other things, that the signatory states desire to enter[18]:

> "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".

The stated intent of the agreement is to remove trade barriers between nations and thereby raise standards of living, by stimulating international commerce.

---

[17]Above N.6 at page 105.

[18]For a copy of the full preamble refer to Appendix I.

The PUG itself is published in a Text[19] of approximately 100 pages. The latest printing, produced in 1986, consists of four parts comprising 38 separate articles.

For the purposes of this paper some of the more relevant articles are as follows:

A ARTICLE I - GENERAL MOST-FAVOURED-NATION TREATMENT

The article requires equal treatment for goods of all contracting nations. One nation may not be favoured over another in respect of the same or like product.

If Nation A extends an advantage to Nation B to assist with the importation of product X then, Nation A must extend that favour or incentive to all contracting nations in respect of that product X.

B ARTICLE III - NATIONAL TREATMENT ON INTERNAL TAXATION AND REGULATION.

Consisting of ten paragraphs, Article III is drafted with the intent of prohibiting a nation from placing quantitative restrictions on the importation of foreign goods, greater than the restriction it places on its own domestic manufacturers of the same goods.

For example paragraph four, of Article III, in part provides that[20]:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded

[19]GATT Secretariat: Text of the General Agreement, Geneva, July 1986.

[20]Ibid, page 6.

> treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

Thus if Nation A imports product X from Nation B to supplement its own production of product X it must avoid affording protection to its local producers by taxing the imported product. That is, unless nation A Imposes the same restriction or taxation on the local product, that it seeks to apply to the imports from Nation B.

C ARTICLE IX - MARKS OF ORIGIN

This article seeks to prevent restrictive trade practices by the use of mark of origin requirements. Unreasonable labelling requirements can add considerably to the final cost per unit of a given product.

It recognises that marks of origin or product information labelling is to some extent necessary to protect consumers. However, the article requires fairness in that an exporter should not be required to include any more information on its product packaging, than that legally required for the domestic product.

Thus if domestic product X need only display place of manufacture, product name, and consume by date, Nation A cannot require Nation B to specify in addition, ingredients or additives in foreign product X.

D ARTICLE XI - GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

This article places a general prohibition on the imposition of quota restrictions or import licensing controls on the importation of foreign goods. The article still permits the imposition of sales taxes and duties on foreign goods and distinguishes these from quantitative restrictions.

There are also exceptions in paragraph 2 of the article which sets out limited circumstances where a quota may be imposed. However the general import of the article is simply that, were Nation A to pass a government measure limiting imports of product X from Nation B to two million units (even though the market in Nation A could easily consume three times that amount) Nation A would be in breach of the GATT.

E ARTICLE XX - GENERAL EXCEPTIONS

This article is pivotal to a discussion of GATT and reduction of its potential for a detrimental impact on the environment. Whilst the majority of GATT Articles are prohibitive in nature, Article XX contains a list of exceptions.[21]

The exceptions to the general prohibition on the application of trade barriers include what might be termed "environmental exceptions" in Articles XX (b) and (g).

Article XX, on its face would permit Nation A to adopt new, or to enforce existing measures restricting or banning the importation from Nation B of product X. However, to avoid breaching GATT Nation A would have to show that the

[21]For a full copy of Article XX refer to Appendix II.

restriction or ban applied was justifiable in terms of one of the ten exception categories.

Under Article XX (b), Nation A would have to be able to prove that the ban on product X was ... "necessary to protect human, animal or plant life or health."[22]

Furthermore, the product ban may not be a ... "disguised restriction on international trade or a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[23]

Thus it is submitted, Article XX sets out a three stage test. The three limbs of the test are as follows:

1. do the measures imposed by A on B in respect of product X fit within one of the listed exceptions (a) through to (j)? and if they do;

2. have they, nonetheless been applied by A against B in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the two nations where the same conditions apply? and, if not;

3. are they merely a restraint on B in its trade with A in product X, disguised as a conservation measure? This test may be further illustrated by looking at the exception contained in Article XX(g). In the case of XX (g) the three limbs are firstly, do the measures relate to ... "the conservation of exhaustible natural resources ...". That are ... "made effective in conjunction with restriction on domestic production or consumption"? Secondly, if so, are they nonetheless, arbitrary and unjustifiably discriminatory? Thirdly,

---

[22]Above N.19 page 37.

[23]Ibid.

if not, are they a disguised restraint of trade? If any of the requirements of these three limbs cannot be satisfied then it is likely that the measures breach the terms of the GATT.

F ARTICLE XXIII NULLIFICATION OR IMPAIRMENT

Under this Article a dispute resolution procedure has been set up to deal, among other things, with the failure of a contracting party to carry out its obligations under the agreement.

The Article (under paragraph 2) allows for disputes to be referred to the "CONTRACTING PARTIES" (ie, a council representing all the signatories) for investigation and if, appropriate, for a ruling.[24]

It was under Article XXIII (2) that Mexico brought a dispute with the USA over a ban on imports of Tuna, before a panel consisting or representatives of the contracting parties. The dispute and the GATT Tribunals' decision illustrate perfectly the conflict between trade concerns and environmental protection issues. Most significantly, the dispute tested the extent and effectiveness of the protection afforded to the environment by the so called environmental exceptions in Article XX.

VIII THE TUNA/DOLPHIN DISPUTE

A INTRODUCTORY

As discussed above the much analysed and publicised dispute involving the GATT environmental exceptions pitted Mexico against the United States.

---

[24]Article XXII encourages consultation as a first step in the dispute procedure.

Mexico sought the assistance of the GATT dispute resolution mechanism to protect its export of tuna to the US. The US had placed an embargo on the import of the product, ostensibly on the basis that it objected to the method of harvesting used by the Mexican fishing industry.

In order to gain a better understanding of the decision reached by the GATT Tribunal, discussed below, it is important to consider the following background information relating to the case.

B THE PRODUCT: YELLOWFIN TUNA

The Tuna is a member of the Mackerel family. The adult fish can grow as large as 2.5m (8 feet) in length and weigh 200kg (440lbs)[25]. Even an average fish, is of marketable size, and commercially the fish is in huge demand world-wide.

The US market for the "light meat" tuna fish consumes fifty percent of the worlds production clearly making it a hugely important market for nations fishing off the American Coast. The most prized tuna for Mexican fleets fishing off the pacific coast of the USA, is the yellowfin[26].

C THE ENVIRONMENT - EASTERN TROPICAL PACIFIC

The area of ocean from where the yellowfin tuna in this case, were harvested is known as the Eastern Tropical Pacific. The ETP is several million square miles of the Pacific Ocean lying off the West Coast of the American

---

[25]The Hutchinson Encyclopedia 1992 Helicon Publishing Limited at 838.

[26]See D. Mayer & D. Hoch "International Environmental Protection and The GATT: The Tuna/Dolphin Controversy" (1993) (Vol 31) ABLJ 187 for an in depth discussion of the background to the dispute.

continent. Its waters are home to both the Yellowfin Tuna and Spotted Dolphins.[27]

D THE TECHNIQUE - PURSE SEINE NETTING

The purse seine technique of fishing for Tuna was in fact originally developed by the US fishing industry.[28]

It involves encircling the proposed catch with nets often more than a kilometre in length. The main vessel in the fleet then draws in a cable at the top of the net (like a "draw string" purse) in order to capture the fish.

It differs from the drift or gillnet technique which does not encircle the pray but rather acts as a fine mesh wall drifting in the water and entangling almost any marine life in its path[29].

Both methods are destructive to marine life in general, in that they cannot distinguish between the preferred catch and other marine animals.

E ENVIRONMENTAL IMPACT - DOLPHIN DESTRUCTION

It is this inability of the purse seine technique to discriminate between the prey and other marine life that has lead to the large-scale destruction of the dolphins, in particular. Part of the reason is that fishermen have learnt from experience that where there is a school of

---

[27]Ibid at 189.

[28]Ibid at 190.

[29]See N.14 above at 49.

spotted dolphins in the ETP ocean there will usually be yellowfin tuna swimming underneath[30].

Because the dolphin and tuna travel in groups, the dolphins are targeted by fleets using the purse seine technique. The nets are set around the dolphin and drawn in. Many dolphins, unable to leap over the nets are caught and drowned as the nets are closed off from below.

F ENVIRONMENTAL LEGISLATION - MARINE MAMMAL PROTECTION ACT

At its peak in the mid 1960's over 300,000 dolphins were slaughtered in a calendar year.[31]

Partly in response to the public outcry the US enacted the Marine Mammal Protection Act (MMPA) in 1972. Among other things the MMPA requires that:[32]

> "the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

A basic premise of the MMPA is the recognition of the intrinsic value to mankind of marine mammals.[33] Accordingly, the MMPA prohibits the capture or import of marine mammals where this is necessary to maintain an optimum sustainable population of a specie.

---

[30]See N.26 above at 189.

[31]Ibid at 190.

[32]Marine Mammal Protection Act 1972 16 USC S1371(a).

[33]Ibid S1371(6). This part of the Act recognises the aesthetic, recreational and economic value of Marine Mammals.

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

However, as with may environmental measures, the US legislation created exceptions to the general moratorium. One of the exceptions to the moratorium is an apparent concession to the US and international fishing industries. This allows for a commercial fishing exemption to be granted by the National Marine Fisheries Service (NMFS) to fishing operators.

Where an operation is granted an exemption, a permit is issued allowing capture of marine mammals provided it is incidental to commercial fishing operations.[34]

For the purposes of this paper, and the international trade and environmental issues it seeks to address there is another important aspect to the MMPA. That aspect, is that the Act extends the general prohibition to waters in which foreign fishing vessels also operate. Foreign vessels within the defined area are subject to US jurisdiction, and the prohibition.

The MMPA uses the term "Waters under the Jurisdiction of the United States". The term means:

1. the territorial sea of the United States and

2. the waters included within a zone, contiguous to the territorial sea of the United States of which the inner boundary is a line coterminous with the seaward boundary of each coastal state, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial area is measured.[35]

[34]Ibid S1371(a) (1)-(3).

[35]Ibid S1362 (15) (A) (B).

G CONTINUED DOLPHIN DESTRUCTION

Despite the existence of the MMPA dolphin deaths did not reduce sufficiently to appease public opinion nor environmental groups.

A 1976 decision of the Federal Court of the District of Columbia (an action taken by environmentalists) resulted in a tightening of the rules relating to the issuance of exemption permits by the NMFS.

The judge in Committee for Humane Legislation v Richardson[36] decided among other things that:[37]

> "the interests of the fishing industry are to be considered only after protection of the marine mammals has been secured".

One of the results of the decision was the imposition of a quota on the US tuna fishing fleet which required incidental dolphin deaths be limited to 20,500 annually. This quota became a condition of exemption permits issued under the MMPA.

For environmentalists this still did not go far enough. A quota of 20,500 deaths did not equate with the MMPA goal of a "zero mortality rate"[38]. Furthermore, although rescue techniques used by US vessels, reduced dolphin deaths to record lows in the early 1980's foreign fleets were recalcitrant.

---

[36] 414F, Supp 297 (DDC).

[37] Ibid at 309.

[38] See N.26 above at 202-204. Mayer & Hoch highlight the position taken by the US Fishing Industry that a zero kill rate was not realistic.

Mexico, was a major contributor to continued dolphin mortality rates. Its vessels still "set on" dolphins using purse-seine nets, without applying the dolphin rescue techniques.

In 1988 Congress passed the Marine Mammals Protection Act Amendments.[39] Among other things the amendments sought to impose conditions on tuna importations.

Previously the MMPA allowed for imports to be excluded at the discretion of US authorities. The 1988 amendment made exclusion mandatory where the incidental kill rate of dolphins by the vessels of the exporting nation was more than two times greater than that of the US fleet. This has been lowered to 1.25 times the US rate since the beginning of the decade.[40]

H THE IMPORT EMBARGO - EARTH ISLAND INSTITUTE V MOSBACHER (EARTH ISLAND 1)[41]

Under the Amendment Act the Secretary of Commerce is required to provide information on US kill rates for comparison with those of foreign fleets. Without these statistics as a guide-line the statutory power for banning non "eco-friendly" tuna could not be properly exercised.

In Mosbacher an injunction was obtained against the Secretary of Commerce for his failure to produce the required statistical data and to "make a positive finding as required by the Act, that Mexico had met the applicable

---

[39]Marine Mammals Protection Act Amendments of 1988 Pub L No 100-711 102 Stat 4755 (1988).

[40]Ibid S1373 (a)(2)(b)(ii)(II) 1988.

[41]141 Earth Island Institute v Mosbacher 746 F. Supp 964 (N.D. Cal. 1990).

standards regarding the incidental killing of dolphins".[42] The result was the ordering of an embargo on imports of Mexican yellowfin tuna and tuna products.

I THE ALLEGED BREACH - REFERRAL TO THE GATT PANEL

Mexico referred the matter to a GATT dispute settlement panel under Article XXIII(2) of the agreement.

The arguments raised by Mexico, included:

1. The imposition of the ban was in breach of Article XI prohibiting quantitative restrictions.

2. The ban was contrary to Article III which requires that imported products receive "no less favourable" treatment than the same domestically produced products.

3. The general obligations of both Article I and IX were breached by the ban ie, discrimination against only one trading partner and "unreasonable" labelling requirements.[43]

4. The exceptions in Articles XX(b) and (g) did not apply to the circumstances of the Mexican case.

In response, the US argued that article XI was not applicable.

---

[42]Ibid 929 F. 2d at 1449.

[43]Mexico had also been penalised by a US requirement that eco-friendly tuna cans be labelled "Dolphin Safe" under the Dolphin Protection Consumer Information Act (DPCIA) 16 USC S1371, 1385 (Supp 1991).

It relied on the wording of Article III referred to earlier in this paper.[44] The US sought a direction from the panel that:

1. the measures were internal regulations imposed at the point of import of the goods and therefore consistent with Article III:1, and;

2. even if not consistent, the measures were permissible by virtue of the exceptions in Article XX(b) and XX(g).[45]

Further, the US argued that, consistent with requirements in Article III:4 imported tuna from Mexico was not being given less favourable treatment than the US domestic product. In fact, at the time, foreign caught tuna was at an advantage to the local catch. This was because, it was argued, the foreign vessels were allowed 2.0 times more incidental dolphin deaths than the US fleet, before any ban could be applied.[46]

J THE PANEL DECISION AND REASONS

The GATT panel upheld the Mexican Complaint and found that the embargo by the US was a breach of GATT.

They dismissed the US argument under Article III:4 stating that the Article:[47]

> "Refers solely to laws, regulations and requirements affecting the internal sale, etc.

---

[44]See text at page 16 above.

[45]GATT Dispute Settlement Panel Report on United States Restrictions on imports of Tuna, 30 ILM at page 1594 (1991).

[46]Above N.26 at 209.

[47]Above N.45 at page 1601.

of products ... that are of the same nature as those applied to the domestic products".

The MMPA was a law principally designed to protect marine mammals and in this case the dolphins. It was not designed to regulate or impose conditions relating to the internal sale of tuna as a product. It was therefore not within Note Ad Article III[48] wording.

With respect to the Article XX(b) exception the panel did not accept that the embargo under the MMPA was "necessary to protect human, animal or plant life or health". This was because the US had not "exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement".[49] Such other options included co-operative arrangements to protect the mammal, with other concerned nations.

The panel also decided that the US could not use Article XX(b) as a means by which to impose measures outside its jurisdiction. It could not unilaterally determine the environmental policies of other contracting parties.

The panel similarly decided that the Article XX(g) exception must be read as being limited to conservation of natural resources within the nation adopting the measures.

The decision amounted to a total rejection of the idea that one contracting party might impose its own environmental standards extra-territorially by imposing trade penalties. A fuller discussion and analysis of the ramifications of the decision of the panel appears later in this paper.

---

[48]See Appendix III for copy of Note Ad Article III.

[49]Above N.45 para 5.28.

That analysis will be made in the context of the recent changes made to the GATT agreements.

IX GATT - POST URUGUAY ROUND

A FORMATION OF THE WORLD TRADE ORGANISATION

The concept of free trade received perhaps its greatest impetus with the conclusion of the Uruguay round negotiations in December 1993.

The negotiations were a success for a number of reasons. Firstly, 95 nations made contractual commitments regarding trade access and secondly a number of previously unresolved trade problems (including fair trading conditions for Agriculture) were settled.

Also significant was the wide participation and commitment of developing nations and the Asian trading powers. In addition, the round was more successful than its predecessors, because agreement was reached with respect to almost all sectors of trade.[50]

A significant feature of the new GATT is the creation of the World Trade Organisation (WTO). The Final Act embodying the results of the Uruguay Round of Trade Negotiations consists of two parts. The first is the Final Act itself and the second is the Agreement which establishes the WTO.[51]

---

[50]For example, Agreement was reached for the first time on new areas of trade including trade in services and intellectual property.

[51]The Text of the Uruguay Round Agreements has been reproduced by the Ministry of Foreign Affairs and Trade in a publication entitled "The GATT Uruguay Round Final Act and Agreement Establishing The World Trade Organisation". Hon. P R Buron Minister for Trade Negotiations July 1994.

The preamble to the Agreement which establishes the WTO defines succinctly the intended purpose of the WTO as "the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the annexes to this Agreement."[52]

Signatories to the Uruguay Round Agreements will become members of the WTO. The day to day functions of the WTO will be performed by the permanent staff of the General Council. In addition a trade ministers conference will be held every two years to enable member countries to, if necessary, conduct business by majority vote, where consensus over a particular issue cannot be reached.

The final format of the Agreement makes the WTO of pivotal importance to the successful application of GATT principles. Included among WTO responsibilities are administrative and oversight roles in relation to all the agreements negotiated with respect to trade in goods, services and intellectual property.

It will also act as a discussion forum in respect of new trade issues. It is submitted, in view of the increasing impact of trade on the environment, that the WTO will become an important forum for focusing international attention on the environmental impact of reduction in world trade barriers.

However, as shall be illustrated later in this paper, issues of an environmental nature would be more effectively dealt with in a neutral forum. The WTO has as its primary function the fostering of world trade, not international environmental protection.

---

[52]Ibid at 9. Article II, Para 1. For a copy of the preamble refer to Annex IV.

Notwithstanding this primary function however, a further important step forward in recognition of environmental concerns with regard to trade has been taken by the Ministers negotiating GATT. At the Ministerial meeting at Marrakesh, Morocco (at which the Final Act was signed) a written decision was adopted entitled "Trade and Environment" pursuant to which it was decided that a Committee on trade and environment be established at the first meeting of the WTO. One of the stated issues to be addressed by the committee is:

> "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements."[53]

B WTO AND DISPUTE SETTLEMENT

It is of particular significance for the purposes of this paper, that the Uruguay Round provides for the settling of international trade disputes under the umbrella of the WTO. It is of even greater significance that the dispute resolution procedures appear to have been improved and strengthened.

The Tuna/Dolphin dispute illustrates perfectly the often complex nature of trade disputes under GATT. For GATT to work effectively such disputes require swift resolution. Signatories should be able to refer instances of restrictive trade practices to a disputes resolution tribunal with confidence. If it can be proven that a nation has breached its commitment, effective action should be able to be taken against that nation.

---

[53]Ibid at 428-429.

Annex 2 of the Uruguay Round GATT[54] sets out the revised rules and procedures governing the settlement of disputes.

The Annex, under Article 2, provides that the Dispute Settlement Body (DSB) established pursuant to the Agreement establishing the WTO shall administer the rules and procedures for dispute resolution set out in the Annex.

The DSB can make a decision on a dispute by consensus of its members and the general provisions to the Annex recognise and provide among other things that:

1. The dispute settlement system of the WTO is a central element in providing security and predictability to the Multilateral trading system.[55]

2. Prompt settlement of disputes is essential to the effective functioning of the WTO.[56]

3. In the absence of a mutually agreed solution (which is the preferred result), the first objective is to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of GATT.[57]

4. Where there is an infringement of obligations assumed under a covered agreement it is up to the member complained against to rebut the charge. That is, as opposed to the complainant having to prove its case.[58]

---

[54]Ibid at 353.

[55]Ibid para 3.2.

[56]Ibid para 3.3.

[57]Ibid para 3.7.

[58]Ibid Article 3 Para 7.

5. Consultation between members is encouraged first, before resorting to further action under the dispute procedure. In addition, mediation is available on request.[59]

6. Where consultation and or mediation fails, the complaining party may request the DSB to establish a panel to examine the matter and make its recommendations to the DSB.[60]

7. Paragraph 8 of Article 12 requires the panel to receive and consider the written submissions of the parties and report back to those parties within a maximum nine month time frame, taken from the date of establishment of the panel. As a general rule the clause makes it clear that the process should take only six months or three months in urgent cases, for example, where the dispute relates to perishable goods.

8. The parties may make written comments on the interim panel report and further meetings may be held to deal with those matters. The panel must then make a final report incorporating further amendments if any to the members of the DSB.[61]

9. At the stage the final report is submitted to the DSB there is opportunity for DSB members to object to the report. The parties to the dispute may also participate in the consideration process undertaken by the DSB. However, the DSB must meet and adopt the

---

[59]Ibid paras 4 and 5.

[60]Ibid paras 6 and 7. Paragraph 8 requires independence and trade related experience in the panel membership whom may only be representatives from member nations and may not be parties to the dispute unless agreed otherwise.

[61]Ibid Article 15.

report within 60 days of issuance, unless the parties notify it of their decision to appeal. Alternatively the DSB has the power by consensus to refuse to adopt the report.[62]

10. Under Uruguay Round GATT rules there is now provision to appeal to a Appellate Body established by the DSB. Appeals must be limited to issues of law arising the panel report, and may only be brought by the parties to the dispute and not third parties. Appeal proceedings may not exceed 90 days.[63]

11. It is notable that Article 17 Paragraph 10 requires that appellate proceedings be conducted in confidence and it reports be drafted in the absence of the parties to the dispute. The Appellate Body may uphold, modify or reverse the legal findings of the panel.[64]

12. The DSB may by consensus decide not to adopt the appellate report. A consensus decision not to adopt must be made within 30 days following circulation of the report to members. Otherwise, the report must be adopted and accepted unconditionally by the parties to the dispute.[65]

13. If either the panel or the Appellate Body decides that a trade measure or other matter has resulted in a breach of GATT then it is required to recommend that the Member in breach conforms with the Agreement.[66]

---

[62]Ibid Article 16.

[63]Ibid Article 17.

[64]Ibid Article 17 Paragraph 13.

[65]Ibid Article 17 Paragraph 14.

[66]Ibid Article 19.

14. The DSB has responsibility to ensure that a Member implements panel recommendations and or implements the rulings of the panel.[67] There is provision for a time frame for compliance to be agreed through Arbitration.[68]

15. Ultimately, where a member does not implement the rulings within a reasonable time, it may be requested to agree to payment of compensation to the complainant. Alternatively the DSB may allow members to suspend trade concessions to the recalcitrant party.[69]

C DISPUTE SETTLEMENT PROCEDURE AND ENVIRONMENTAL PROTECTION

In comparison to the dispute procedures in place under the pre-Uruguay GATT (PUG) the above mentioned articles are extensive. The Tuna/Dolphin dispute was initiated by Mexico pursuant to Article XXIII of the PUG. As outlined earlier in this paper[70] Article XXIII consists of two comparatively short clauses allowing a contracting party to refer disputes for resolution to the Contracting Parties.

The article does not provide for a specific dispute settlement body, nor does it allow for appeals to be made. If a contracting party does not agree with a decision given under the article it has the option of withdrawing from the GATT where concessions have been suspended.

---

[67]Ibid Article 21.

[68]Ibid Article 21 Paragraph 3(c).

[69]Ibid Article 22.

[70]See text above at page 20.

It is submitted that the new and more extensive procedures for dispute settlement could well prove to be a positive for the global environment and members seeking to protect environmental interests.

Firstly, and in the writer's opinion, most importantly, the new procedures allows for Third Parties[71] to make submission to the DSB panel. This, would allow for additional written submissions and evidence to be placed before the panel, by other member nations effected by a trade related environmental problem.

For example if Nation A complained to the DSB about the actions of Nation B in banning or restricting importation of product X, Nation B may be able to elicit the support of other member nations. The other member nations would need to be able to demonstrate to the panel that they have a substantial interest in the matter.

If product X was proven to be harmful to the global environment (eg some form of transboundary pollutant) then third party submissions in support would certainly strengthen the claims of Nation B. It would be difficult for the panel to ignore submissions from a majority of GATT members that the trade restraint imposed by Nation B was permissable within the GATT environmental exceptions.

Secondly, Article 13 of Annex 2, specifically allows the panel to seek expert scientific or technical opinion to assist in its consideration of issues raised by parties to a dispute. If in the example above, Nation B had to make complex scientific submissions to support its position, the panel could appoint the necessary experts to evaluate and advise on the validity of the submissions. From the view point of environmental protection this ability to have

---

[71]Above N.51 Article 10.

scientific assessment of the harmful effects of product X could be crucial to the panels ultimate decision.

Article 8 of the Annex allows for the composition of the panel to include governmental and non-governmental appointees with knowledge of international trade and the subject matter of the covered agreements.[72] However, the panel will usually consist of three and at most five members. It is likely that on a three person panel the majority of the panellists would have a trade background rather than scientific or environmental expertise. Accordingly the importance of expert co-opted advice in the making of correct and informed dispute rulings is increased.

Thirdly, the ability to appeal on a point of law which did not previously exist under the PUG dispute provisions, will give members the opportunity to have the legal reasoning of the panel reviewed. Concerns relating to interpretation and application of GATT provisions by a DSB panel can now be agreed before an appellate body. The appointees to the Appellate Body must have a demonstrated expertise in law as well as international trade.

It is submitted that the existence of an Appellate Body with legal expertise introduces a quasi-judicial body that did not exist at the time the Tuna/Dolphin dispute was decided. The presence of a Body of lawyers deciding on issues of law only, should in some measure avoid the possibility of a trade bias in the decision making of the DSB. This should advance the interests of members seeking to protect the environment from harm arising out of trade concessions.

---

[72]Ibid Article 8 Paragraph 4.

D ENVIRONMENTAL EXCEPTIONS REVISITED

The dispute procedures referred to above have been expanded comprehensively and, it is submitted, have been placed on a much sounder institutional and legal basis than that which applied at the time of the Tuna/Dolphin dispute. However, the same cannot be claimed in respect of the environmental exceptions previously contained in Article XX of the original GATT.

It should be noted here that many of the original agreements contained in the GATT as concluded in 1947 have been carried through with amplification and amendment to the new WTO Agreement.

Also, of note is that the preamble to the Agreement establishing the WTO expands the original GATT preamble and embraces the concept of sustainable development, "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[73]

This new statement in the preamble suggests a concern for matters environmental. However in the writer's opinion this is not fully reflected in the re-written exceptions which do not extend the PUG wording with sufficient conviction to allow for protection and preservation of the environment to be enhanced. Rather, the status quo remains. That is unless the narrow interpretation of the exceptions adopted by the panel in the Tuna/Dolphin dispute is not followed by future DSB panels.

The exceptions are now contained in two separate agreements, the Agreement on the Applicant of Sanitary and

---

[73]For the full preamble refer to Annex IV.

Phytosanitary Measure (ASP) and the Agreement on Technical Barriers to Trade (ATB).

The recitals to both Agreements reaffirm that no member should be prevented from adopting measures necessary to protect human, animal or plant life or health. As previously, such measures may not be applied in an arbitrary or unjustifiably discriminatory manner between members where the same conditions prevail. Nor may they constitute a disguised restriction on international trade.[74]

However the recital to the ATB does go further. It recognises that no country should be prevented from taking measures necessary for the protection of the environment.[75]

The ASP allows necessary measures provided they are not inconsistent with the provisions of the ASP Agreement. A measure must have a proven scientific basis to be maintained.[76]

Annex A to the ASP defines the terms "sanitary" and "phytosanitary measures" to include measures that relate principally to the exclusion of pests, disease carrying organisms and animals, contaminants, toxins and food additives.

The ATB is designed to develop international standards and conformity in such technical matters as packaging, labelling, product characteristics, their related processes and production methods.

---

[74]See N.51 above at pages 69 to 83.

[75]See N.51 above at 118 Article 2 Paragraph 2.2. For a copy of this Article refer to Annex V.

[76]See N.51 above at 70 Article 2 Paragraphs 1 and 2.

Although the Agreements that include the re-written exceptions are much more extensive and detailed in terms of compliance requirements, the basic premise which underpinned the Article XX exceptions remains. That is, there is a presumption that measures taken should not create unnecessary obstacles to international trade.

The key word is "necessary". The key issue remains it is submitted, the same as one of the key issues in the Tuna/Dolphin dispute. That is, whether the measure is "necessary to protect". If the nation seeking to impose the measure is unable to substantiate on scientific grounds that it is necessary to impose the same for protection purposes, then it is likely (if the measure were to be referred to a DSB panel) that it would be ruled in breach of GATT.

It is the opinion of the writer that the narrow interpretation of the word "necessary" taken by the panel in the Tuna/Dolphin dispute will be followed by DSB panels. Accordingly, if Nation A seeks to ban imports from Nation B of Product X it will need to be confident that it can prove that there is irrefutable scientific evidence to show that Product X has or will harm human, animal or plant lift or health (or under the ASB, the environment generally).

Furthermore, if the reason Nation A is seeking to ban or restrict import of Product X, is based on the damage caused to the global environment from the production process, Nation A will need to prove two things, should Nation B dispute the ban. The first is to produce scientific evidence, the second to show that all other avenues including a bilateral co-operative arrangement with Nation B, to encourage adoption of an environmentally friendly production process, has been pursued.

In summary, it appears to the writer that the rules have not changed sufficiently, to afford greater opportunities to protect the environment. In addition to scientific proof and (in the case of production process issues) the need for an initial attempt at resolution by agreement, the same trade bias remains. GATT is after all a trade agreement of which the ASP and ATB agreements are constituent parts.

Its primary purpose is to break down the barriers preventing or restricting the freedom of international trade. It is not realistic to expect that the trade ministers that negotiated GATT would have an environmental focus that would reflect in the final document.

X ANTICIPATED OUTCOMES OF URUGUAY ROUND

A *ECONOMIC OUTCOMES*

Without doubt, the effects of having a commonly accepted set of trade rules will be felt on the economic front. The greater certainty within which producers and exporters will operate will result in increased trade, income and investment.

MOFAT state that:[77]

> "Conservative estimates suggest that world income over the next 10 years will increase by about one percent as a result of the Uruguay Round. These forecasts predict additional growth by 2005 of US $200 - $300 billion per year in 1992 dollars. To put these figures into perspective, growth increases of this scale

[77]Above N.6 at 6.

> would be equivalent to adding a new Switzerland, India or South Korea to the world economy in the next decade.

For a world economy that has been shrinking or virtually static for many years even the conservative estimates are good news. In theory, the agreed reductions in tariffs on imported goods and the phasing out of government subsidies to local producers should produce a more level playing field. Both developed and developing nations should benefit, the latter especially from the phased removal of quantitative restrictions on textile and clothing exports to industrialised economies.[78]

For the New Zealand agriculture sector in particular MOFAT predicts revenue gains of $1.0 - $1.5 billion by the year 2005. In addition up to 30,000 more jobs will, it is estimated, be created by an over national GDP growth of $1.5 - $2.3 billion by that year.[79]

B ENVIRONMENTAL OUTCOMES

The expected surge in global economic activity will surely have an environmental cost to the world. The GATT ministers have recognised this in making their decision to establish a Committee on Trade and Environment, which as discussed above,[80] is to be formed at the first meeting of the General Council of the WTO.

Among the matters that the Committee will be examining as part of its terms of reference is "to identify the relationships between trade measures and environmental

---

[78]Ibid at 4.

[79]Ibid at 16.

[80]See text above at page 32.

measures, in order to promote sustainable development".[81] The Committee will also examine the relationship between GATT and trade measures made pursuant to multilateral environmental agreements.

Clearly, the potential for harm to the environment from the anticipated worldwide increase in production resulting from GATT is on the agenda. MOFAT states that New Zealand's approach to this issue is that trade and the environment can be mutually supportive.[82] The GATT ministers state also that there should not be any policy contradiction between a multilateral free trading system and protection of the environment.[83] The catch phrase used both by the GATT and echoed by MOFAT is "sustainable development". The question is can GATT in its current form allow for sustainable development?

XI FREE TRADE AND SUSTAINABLE DEVELOPMENT - IS IT ACHIEVABLE?

The Tuna/Dolphin dispute illustrates what the writer submits are the two major problems with GATT as it relates to issues of environmental protection.

The first problem is that notwithstanding changes made to GATT a government seeking to exclude a product on the basis of the harmful effects caused to the environment through its production process will be in breach of GATT. It would leave itself open to a complaint that could ultimately lead to withdrawal of its own concessions under the Agreement.

The narrow and restrictive interpretation given to the Article XX exceptions in that case made it clear that

---

[81]Above N.51 at 429.

[82]Above N.6 at 90.

[83]Above N.51 at 428.

governments may not impose regulations to protect the environment as it exists outside its own territory. The reason for the panels decision was, in part, that Nation A should not be able to impose its own environmental standards unilaterally on Nation B.

The second problem is the restrictive interpretation of the word "necessary" which word has been retained in the new GATT Agreements as discussed earlier in this paper.[84]

Most environmentalists would agree, it is submitted, that any risk of damage to health and the environment is unacceptable. However the wording of GATT as interpreted by the panel makes it clear that to be sure a measure is "necessary" there will need to be clear scientific evidence of the hazard, and the risk may need to be more than just a small one.

In the writers view any environmental risk no matter how small, should be able to legislated against without a government feeling pressurised by trade concerns. In New Zealand it is clear that a trade off has already been made with regard to CFC's. For example the Minister for the Environment made the following response to a question on whether the Government would ban the importation of refrigerators using CFC refrigerant and insulating foam from the end of 1994:[85]

> "The Government has considered the issues involved and decided that, given that it would produce a small environmental benefit, and that it had broad implications for trade policy in other areas, it was not appropriate to implement

[84]See text above at pages 40 - 41.

[85]Hon. Simon Upton (Minister for the Environment) oral answer Hansard 13/7/1994 as reported in The Capital Letter Vol 17 No.32 (784) at page 2.

a ban at this time."

If each of the signatories to GATT makes a similar trade off based on the extent of the harm or benefit of a measure to protect the environment, the potential for global relaxation of standards to the detriment of all, is clear.

The problems identified above show that the suggestion that increased and virtually unrestricted trade can co-exist with and compliment sustainable development is a difficult argument to support. In the view of the writer the differing objectives of GATT and that of international environmental law remain divergent. The divergency is to such an extent that the concepts of sustainable development and sustainable management of resources may not be achieved without compromise by the members of GATT and further amendment to its terms.

XII GATT CONFLICT WITH INTERNATIONAL ENVIRONMENTAL AGREEMENTS

When GATT was first drafted some 45 years ago, the world economy rather than its environment was the focus of concern. Many of the environmental problems that exist now were not evident then.

The environmental problems described in part III of this paper (those which existed) were much less of an issue than the restrictive trade strategies (listed in part VI above) and seen as a threat by GATT negotiators to economic growth. Accordingly trade rules developed largely unfettered by environmental concerns.

However in the last 15 to 20 years a number of multilateral international environmental agreements (IEA's) have been drawn up to combat environmental problems. A number of

these IEA's contain trade measures to achieve their objectives.

For example the Basle Convention on the control of Transboundary Movement of Hazardous Wastes (which came into force in May 1992) requires signatories to prohibit the export of hazardous wastes if they have reason to believe that the wastes will not be managed in an environmentally sound manner.[86] Other examples are the Convention on International Trade in Endangered Species (CITES) which imposes export and import controls on certain species and the Montreal Protocol on Substances that Deplete the Ozone layer which requires parties to ban imports of CFC's from non parties.

In part these IEA's seek to impose environmental values on signatories and non-signatories alike. The signatories recognise the importance of protection of the global environment, not just ones own back yard.

However, GATT provisions as interpreted do not recognise the need to protect against transboundary pollution and undesirable process and production methods. Furthermore, it gives potential protection to polluters by allowing them to continue to contaminate their own environment (and therefore in some instances the global environment) without fear of penalty from their international trading partners. If a trading partner does seek to impose unilateral trade restrictions against a product for this reason then the offending nation may invoke the GATT dispute procedure. The polluter can hide behind complaints of unjustified trade barriers and discrimination allegations.

Proponents of the GATT trade policy push the view point that some nations are economically better able to limit

[86]Basle Convention Article 4(2) (e).

process pollution. Those nations which by circumstances may only remain competitive using such processes should not be penalised and thereby lose their position of equality with their trading partners.[87]

There is another agreement that suggests that the widespread economic growth and wealth that free trade can generate will benefit the environment. Nations, especially developing ones will become financially better able to put in place environmental measures and to change manufacturing processes by introducing "eco-friendly" methods. However, there are no guarantees that increased wealth will equate with increased spending on the environment.[88]

Clearly, there remains a conflict of law between GATT and the objectives of a number of IEA's and the concept of environmental protection generally.

XIII MAKING THE POLLUTER PAY - A DESIRABLE OUTCOME

In the course of this paper the tensions between freer international trade and protection of the environment have been examined in some detail. The analysis has established that GATT in its present form will continue to contribute to these tensions with resultant harm to the environment.

Before setting out some possible amendments to the GATT in an attempt to resolve these tensions it is important to identify the type and level of environmental protection the world should be looking to achieve.

---

[87]See for example the comments of R. Hage on International Trade and Environmental Policy reprinted in ASIL Proceedings April 1992 at 227.

[88]See for example comments by N. Roht-Arriaza on Trade and Environment: An Environmentalist View reproduced in ASIL Proceedings April 1992 at 241.

It is apparent to the writer from an analysis of the Tuna/Dolphin dispute that GATT can be used as a weapon to discourage the imposition of penalties against nations that pollute the environment through damaging production processes (DPP's). Furthermore it is clear from the list of major environmental problems set out in part III of this paper that the majority of them are caused by DPP's. Acid Rain, Global Warming, Ozone depletion, Destruction of Habitat and Deforestation all fall into this category. These problems also have global impact, causing direct transboundary pollution in some instances and generally contributing to degradation of the earths environment.

Consequently, although they may occur on the other side of the world, there is a cost to all mankind inherent in the processes that cause them. It is therefore important that the people who are responsible for continuing to use DPP's should be discouraged from doing so. The creator of the pollution should have to pay the cost of control or clean up measures.

The concept of requiring the polluter to pay is a well established one. The Polluter-Pays Principle (PPP) is recognised by the Organisation for Economic Cooperation and Development (OECD) as a useful strategy in achieving sustainable economic growth. The principle has been defined by the OECD as:[89]

> "The principle to be used for allocating costs of pollution prevention and control measures to encourage national use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called Polluter-Pays Principle. The

[89]OECD "Guiding Principles Concerning International Economic Aspects of Environmental Policies". Reprinted in 11 I.L.M. 1172 (1972).

> Principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state."

A manufacturer that is required to meet the cost of pollution control and cleanup will for economic reasons seek alternative and environmentally friendly production methods, where available. If such alternatives are not available, then control or cleanup techniques to limit the detrimental impacts will still lead to a general improvement in the state of the environment.

It is submitted that global application of the PPP would see major progress on many of the worlds environmental problems. Passing on the cost to those directly responsible would potentially be an effective pollution abatement and control device.

The reality is that global harmonisation and application of environmental principles is difficult, if not impossible to achieve. International Cooperation in trade through GATT took more them 40 years to achieve to a satisfactory level, with now, some 125 countries making a commitment. The penal nature of the PPP would make it less than palatable for many governments, and it is difficult to envisage that it could be incorporated in a separate IEA.

However it is submitted that it could be incorporated under the umbrella of GATT so that in certain defined cases trade sanctions and or restrictions could be used to give the PPP efficacy. If 125 countries can agree on sanitary and phyto-sanitary measures as well as the technical barriers to trade outlined in part IX of this paper then they could agree to take GATT environmental protections one step further, by adopting the PPP approach.

XIV AMENDMENTS TO GATT - SOME PROPOSALS

It is submitted therefore, that an ability to make the polluter accountable is desirable. At present, the terms of the Final Agreement with its limited exceptions does not facilitate such an outcome.

The issue therefore becomes one of what amendments can be made to the GATT so that the PPP can be incorporated as part of its terms? Furthermore can such amendments be incorporated without significantly reducing GATT's effectiveness in achieving the goal of a more liberalised world trading system?

The following are some proposals for changes that might be made to specific GATT agreements that could allow for the accommodation of the PPP and in addition, provide for greater protection of the environment generally.

A AMENDMENT TO ARTICLE XX GENERAL EXCEPTIONS

As noted earlier in this paper previous GATT accords have been subsumed into the final Uruguay Round agreements, including the environmental exceptions in Article XX.

Article XX has been augmented by the ASP and ATB agreements. However, it is arguable that the augmentation has actually narrowed the potential application of the environmental exceptions XX (b) and (g) by imposing a high level of scientific proof[90] to support measures and also risk assessment procedures.[91]

The wording of Article XX was discussed in part VII of this paper. In the writers opinion the Article XX (b) exception

---

[90]Above N.51, Article 2 ASP at 70.

[91]Ibid Article 5 ASP at 72.

could be amended by deleting the word "necessary" and substituting the words "relating to" at the beginning of the paragraph, and by the addition of the words "or the environment" at the end of the paragraph.

The article would therefore read as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) relating to the protection of human, animal or plant life or health or of the environment."

This would avoid a continuation of the narrow and restrictive interpretation placed on the word "necessary" by the panel in the Tuna/Dolphin dispute. It also introduces the word "environment" to the equation.

It is notable that the words "relating to" are used in the Article XX (g)[92] environmental exception and also notable that the word environment is missing from these so-called environmental exceptions.

With the above changes the US would not have had to show that the tuna ban was "necessary". The panel found that necessity could not be shown as the US had not explored

---

[92]For a discussion of Article XX (g) see Text Part VIII E above the first line of this paragraph (g) reads: "relating to the conservation of exhaustible natural resources ..."

other options including a co-operative protection agreement with the Mexicans to reduce the dolphin kill rate.[93]

Moreover, the addition of wording permitting measures relating to protection of the environment considerably widens the scope and application of the exception. The additional scope of the wording would have allowed the US to pursue an argument that they were seeking to protect the international marine environment from indiscriminate dolphin destruction. Mexico, being the polluter, by its use of a damaging production process, (purse-seine nets) should be required to meet the cost of controlling the damage or introducing new and safer harvesting methods.

Notwithstanding the rewording of the exception, the article could still be interpreted under the new dispute procedures in such a way that would not being the GATT free trade goals into conflict with protection of the environment.

It is likely, in light of the panels decision in the Tuna/Dolphin dispute that the US ban on Mexican Tuna would still be held in breach of GATT under the proposed new wording. That is because a total product ban, would likely be considered (in light of the free trade principles that underpin GATT) as discriminatory. It is still the process not the actual product that is harming the environment.

However, suppose that the facts of the case were changed. Instead of imposing a total ban the US levied a tax on each can of tuna sold. The proceeds of the tax were then utilised in providing technical assistance to the Mexican fishing fleet in changing its fishing methods to comply with those standards observed by the US fleet.

---

[93]See Text at page 29 above.

Under the new wording, it is submitted, that the tax would meet the three stage test established by Article XX as amended. That is:

1. The tax is a measure relating to protection of the marine mammal environment pursuant to paragraph (b).

2. The tax would not constitute arbitrary or unjustifiable discrimination since the US fleet already uses the environmentally friendly fishing techniques that it is seeking to have Mexico comply with.

3. The tax is a genuine environmental measure as the proceeds are being used to assist Mexico to improve fishing techniques and thereby protect the dolphin and the marine environment generally. The tax is not therefore a disguised restraint on trade.

Finally, in the above scenario, Mexico as the polluter is paying a cost for its activities, but it is still able to gain access to the US market for its tuna. Although a tax would make its tuna prices more expensive, until a tax is imposed Mexico maintains a competitive advantage over its US competitors. The US fishing fleet in the Tuna/Dolphin case were in part meeting the cost of purse seine fishing by expending funds on dolphin rescue techniques that the Mexican fleet were choosing to ignore.

B *AMENDMENT TO AGREEMENTS ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES AND TECHNICAL BARRIERS TO TRADE*

It is not proposed to attempt to re-write these agreements in their entirety, nor is it possible to do so within the wording constraints of this paper.

However, the amendments made to the wording of Article XX would need to be carried through to these Agreements which seek to augment and amplify those exceptions.

Accordingly the word "necessary" would be replaced with the words "relating to" in Article 2 of the ASP and the words "or the environment" added. Paragraph 1 of Article 2 would read:

> "Members have the right to take sanitary and phytosanitary measures relating to the protection of human, animal or plant life or health or of the environment, provided that such measures are not inconsistent with the provisions of this agreement."

For consistency these changes would need to be made wherever this formula of wording is used in both the ASP and ATB agreements.

These proposed changes, should be sufficient to introduce greater scope for member nations to implement environmental protection measures within the framework of the ASP and ATB agreements.

C AMENDMENT TO DISPUTE SETTLEMENT PROCEDURES

Even if these wording changes were acceptable to member nations, they would not represent an unfettered opportunity for unilateral measures to be put in place to penalise other members for their production process pollution. Such measures would still be challenged through the DSB procedures, particularly where the complainant faces serious damage to its economy from such measures.

As discussed earlier the Annex 2 Understanding Significantly amplifies the previous dispute procedures

under Article XXIII.[94] However, as with the US in the Tuna/Dolphin dispute it is still the member complained against that is required to rebut the allegation that measures taken are in breach of GATT provisions.

Where a member puts in place measures (pursuant to Article XXIII as augmented by Annex 2) that relate to protection of the environment then it should be the member against whom the measure has been applied, that should have to prove that its activities or products are not detrimental to the environment.

The following clause could be inserted into Annex 2 as a General Provision under Article 3:

> "In cases where the complaining party is disputing the legality of a measure taken against it by a member that relates to protection of human, animal or plant life or health or of the environment, then in such cases, it shall be up to the complaining party to prove that the product and or the process used to manufacture or produce the product against which the measure has been applied does not cause damage to the environment or put at risk human, animal or plant life or health or alternatively that the measure complained of is arbitrary or unjustifiably discriminatory or has been applied in a manner which would constitute a disguised restriction on international trade."

Such a clause would transfer the burden on proof onto the polluter. The member applying the measure would still need to produce sufficient scientific evidence to show

[94]See Text above Part IX C.

environmental degradation of sufficient magnitude to justify the measure.

As discussed in part IX of this paper the revised dispute procedure allows for input by interested third party members. This should allow for contributions from environmental advocates of third party members, in support of the party seeking to apply the environmental measure.

It should be noted here that Article X of the Agreement Establishing the WTO sets out the procedures to be followed to amend the provisions of GATT.

Any members of the WTO can initiate amendment procedures by submitting its proposal to the Ministerial Conference[95]. Amendments to the Multilateral Trade Agreements may only take place with unanimous consent of all members of the WTO.[96] However, certain amendments which do not "alter" the rights and obligations of members, can take effect for all members upon acceptance by two thirds of the members.[97]

D EXCEPTION BY WAIVER FOR INTERNATIONAL ENVIRONMENTAL AGREEMENTS (IEA's)

Finally, and perhaps most significantly, GATT could use its waiver provisions to allow for accommodation of Multilateral IEA's with trade provisions that prima facie breach GATT terms.

Article IX of the Agreement Establishing the WTO is entitled Decision Making. It affirms that the general principle of decision making by consensus set up under GATT 1947 will continue to be practised by the WTO.

---

[95]Above N.51 Article X, paragraph 1 at 14.

[96]Ibid Article X, paragraph 2 at 15.

[97]Ibid Article X, paragraph 4 at 15.

Paragraph 3 of the Article provides that "in exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements."

The procedure requires a member requesting a waiver to submit the request to the Ministerial Conference for consideration and if possible, granting by consensus. If consensus cannot be reached within a maximum allowable period of 90 days then a decision to grant the waiver can be taken by three fourths of the members.

A decision to grant a waiver must state the exceptional circumstances that apply and will be reviewed annually to ensure those conditions continue to apply.

It is submitted that this waiver procedure, could be used by GATT members to give recognition to the value and importance of Multilateral IEA's. Where GATT members already make up a majority of signatories to an IEA, consensus, or a three fourths majority decision to grant a waiver in respect of the IEA's trade provisions, would not seem an unrealistic expectation.

For example, a general waiver could be applied for by the signatories to the Montreal Protocol on Substances that Deplete the ozone layer (the Protocol) most of whom are also signatories to GATT and will be members of the WTO.

The application for the waiver would require 75% majority support. The applicant members would need to gain the support of the non-protocol signatories by persuading them that exceptional circumstances existed warranting the waiver. That is, that the potential for global environmental disaster from continued trade in substances that deplete the ozone layer warrant trade restrictions.

If successful, the terms of the waiver would need to be worded so as to exempt Protocol signatories (and other members not committed to the Protocol should they choose) from the trade access obligations of the GATT, in relation to ozone depleting substances.

For example, Article 4 of the Protocol provides under paragraph 1 that "Within one year of the entry into force of this Protocol, each party shall ban the import of controlled substances from any state not party to this Protocol." New Zealand, as a signatory, has passed the Ozone Layer Protection Act 1990 to implement the import ban through domestic legislation. Section 5 of that Act prohibits the import of bulk controlled substances[98] from non-parties.

At present a member of GATT seeking to export controlled substances as a non-signatory into New Zealand could use the threat of GATT as a weapon to pressurise the New Zealand Government for access. This is clearly demonstrated by the statement of the Minister for the Environment (referred to above)[99] that trade policy implications made it inappropriate to ban importation of refrigerators that use CFC refrigerants.

A GATT waiver, exempting Protocol signatories from their multilateral trade agreement obligations in respect of Protocol controlled substances, would remove the threat of dispute and concession withdrawal. A protocol signatory could pursue its obligations pursuant to the IEA without concerns about the trade implications of a product ban.

---

[98]Controlled substances are defined in the Act by reference to an extensive list of Carbon, Nitrogen, Chlorine and Bromine substances recorded in the First Schedule to the Act.

[99]See Text page above at 45.

Furthermore, as the Protocol extends to limitation and reduction in the levels of production of ozone depleting substances, a waiver could assist in the application of measures designed to curb damaging production processes.

Without doubt, the prospect of successfully obtaining a waiver to enable obligations to be met under an IEA without breaching GATT, would improve with numerical support. The more WTO members that are already signatories to an IEA, the better the chances of gaining the required 75% support.

XV CONCLUSION

The legal issues relating to the conflict between trade liberalisation and environmental protection are complex.

The extension of GATT has not simplified the issues, nor has it brought a satisfactory resolution of the problem closer to hand. The GATT is first and foremost an agreement relating to international trade. Trade, not the environment is its primary focus.

Notwithstanding their primary focus, the GATT negotiators have recognised the important and sometimes damaging impact trade can have on the environment. This recognition is illustrated firstly, by the extension of the Article XX environmental exceptions and secondly by the decision to establish a Committee on Trade and the Environment.

As demonstrated in this paper, there is still a long way to go before environmental interests and concerns receive equal consideration alongside trade and economic considerations.

For this to occur amendments will need to be made to the GATT along the lines proposed by the writer. Those

amendments coupled with a more concerted international approach to environmental issues can redress the balance.

Without amendments, and further recognition by GATT members of the significant threats to the global environment, trade liberalisation will increase environmental degradation. It is therefore important that GATT members take responsibility for minimising the impact of the effects of the Agreement on the environment.

The Committee on Trade and Environment should be used by members to lobby for amendments where appropriate. Environmental protection mechanisms in GATT need to be strengthened where they exist and added to where they do not exist.

This papers demonstrates that additional environmental safeguards could be built into GATT. These safeguards need not be a threat to the concept of free trade as promoted by the GATT.

International trade and international environmental policies can be mutually supportive provided there is a recognition of the validity and benefits of both. That recognition then needs to be translated into negotiated agreements, legislation and dispute resolution procedures, that work to both enhance world trade and protect and preserve the environment.

APPENDIX I

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM, the UNITED STATES OF BRAZIL, BURMA, CANADA, CEYLON, the REPUBLIC OF CHILE, the REPUBLIC OF CHINA, the REPUBLIC OF CUBA, the CZECHOSLOVAK REPUBLIC, the FRENCH REPUBLIC, INDIA, LEBANON, the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS, NEW ZEALAND, the KINGDOM OF NORWAY, PAKISTAN, SOUTHERN RHODESIA, SYRIA, the UNION OF SOUTH AFRICA, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and the UNITED STATES OF AMERICA:

Recognizing 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, developing the full use of the resources of the world and expanding the production and exchange of goods,

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

Have through their Representatives agreed as follows:

APPENDIX II

Article XX

General Exceptions

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

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importation or exportation of gold or silver;

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

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

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

(*h*) 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 submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

APPENDIX III

Ad *Article III*

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term " reasonable measures " in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term " reasonable measures " would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence

[1] This Protocol entered into force on 14 December 1948.

APPENDIX IV

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

The *Parties* to this Agreement,

Recognizing 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 for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

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

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have

APPENDIX V

TECHNICAL REGULATIONS AND STANDARDS

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Members 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 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.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an 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.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

BIBLIOGRAPHY

1. Jackson J.H. — World Trade Rules and Environmental Policies: Congruence or Conflict? Washington and Lee Law Review Volume 49 Number 4 Page 1219

2. Kettlewell U. — GATT - Will liberalised Trade Aid Global Environmental Protection? Denver Journal of International Law & Policy Volume 21, Page 55

3. Mayer D. & Hoch D. — International Environmental Protection and The Gatt: The Tuna/Dolphin Controversy. American Business Law Journal Volume 31 Page 187

4. Goldman P.A. — Resolving The Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principals. Washington and Lee Law Review Volume 49, Page 1279

5. GATT Secretariat — The Text of The General Agreement on Tariffs and Trade. Geneva, July 1986

6. Pope S. Appleton M. and Wheal E.A. — The Green Book. Hodder and Stoughton

7. A.S.I.L. Proceedings April 1992 — Trade and Environment: An Environmentalist View. N. Roht-Arriaza.

8. A.S.I.L Proceedings April 1992 — International Trade and Environmental Policy. R. Hage

9. British Institute of International and Comparative Law — Bulletin of Legal Developments January 1994 (Issue No. 1). Ed J. Kingston and C. Wickremasinghe

BIBLIOGRAPHY (continued)

10. 33 International Legal Materials (1994) — The Final Acts of the Multilateral Trade Negotiations (The Uruguay Round) and Introductory Note

11. Ministry of Foreign Affairs and Trade April 1994 — Trading Ahead The GATT Uruguay Round: Results for New Zealand

12. Hon P. R. Burdon Minister for Trade Negotiations July 1994 — The GATT Uruguay Round Final Act and Agreement Establishing The World Trade Organisation

13. 11 International Legal Materials 1972 — OECD, Guiding Principles Concerning International Economic Aspects of Environmental Policies

14. F. L. Kirgis, Jnr — Environment and Trade Measures After the Tuna/Dolphin Decision. Washington and Lee Law Review Volume 49, Page 1221.

15. 30 International Legal Materials 1991 — GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna. Page 1594.

VICTORIA UNIVERSITY OF WELLINGTON

LIBRARY

A Fine According to Library Regulations is charged on Overdue Books

LAW LIBRARY

r Folder Sh
Shannon, Philip John
GATT and the environment