# Environmental Standards in World Trade:

## A study of the Trade-Environment Nexus, Disadvantages of the Unilateral Imposition of Standards, and Mutual Recognition as an Alternative

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# SUMMARY

This thesis explores the trade related aspects of environmental standards. It assesses the potential for trade related conflict between Developed and Developing countries arising out of Unilateral Environmental Action (UEA). Furthermore it analyses the concept of Mutual Recognition (MR) and Mutual Recognition Agreements (MRAs) to understand how the inherent characteristics may potentially be utilized to reduce friction in international trade while implementing standards. The thesis also looks at the WTO compatibility of environmental standards, UEAs and MRAs. It uses a "Black Letter" methodology of doctrinal analysis, concentrating on doctrinal principles associated with the transnational governance of environmental standards and includes the analysis of statutes and cases of the WTO.

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# 1. INTRODUCTION

## 1.1 Introduction

The consequences of globalisation affect a number of public interest topics, such as human rights, sanitary and phytosanitary issues, and issues dealing with sovereignty. One such public interest topic allowing academic analysis is the relationship between globalized free trade and the environment[1]. An important discussion emanating from this intersection of trade and the environment is on the effects of environmental standards on trade.

This thesis explores the trade related aspects of environmental standards[2], including the need for WTO compliance, of 'environmental standard increasing' instruments which affect trade[3] (such as Unilateral Environmental Instrument and Mutual Recognition Agreements). The thesis assesses the potential for trade related conflict between developed and developing countries arising out of normative environmental processes implementing environmental standards such as Unilateral Environmental Action (UEA)[4]. The thesis examines Mutual Recognition Agreements (MRAs) as a trade instrument with the potential to increase environmental standards, while enquiring whether MRAs may reduce conflict arising out of trade related aspects of environmental standards[5].

Although the thesis does briefly discuss the reasons for such conflict, its primary aim is to analyse certain trade instruments that may alleviate the friction between developed and developing

[1] Brian R Copeland and M. Scott Taylor, 'Trade, Growth and the Environment' (2004) XLII Journal of Economic Literature 7; Please note that although the OSCOLA method of citations has been used in the thesis, for WTO Agreements and case law, and other international agreements the abbreviated name has been used. For a full citation of the case or agreement, see the first instance of the citation in the body of the text or the Bibliography. Please also note that the legal position of this thesis is that of September 2015 at which point it was submitted. Developments in International Environmental Law, Trade Law and Policy changes after this date will not be reflected in the discussions to follow.

[2] See Chapter 3 Trade and Environment

[3] See Chapter 2.3.3 The WTO and Standards; Chapter 3.4 Looking at the WTO; Chapter 4 Standards as General Exceptions to the GATT; Chapter 5.3.3 The Requirement of Necessity in WTO Jurisprudence; Chapter 7.3 MRAs: The WTO Perspective; and Chapter 8.4 The WTO and Environmental Standards

[4] See Chapter 5.3 The Legality of UEAs

[5] See Chapter 6 Mutual Recognition and Mutual Recognition Agreements and Chapter 7 Mutual Recognition and International Law

countries while propagating environmental standards. The thesis analyses MRAs to see whether it implements environmental standards while reducing inter country friction in international trade. Whether MRAs increase standards through their functioning has been discussed in available literature[6], but to a very small extent.

One piece of literature however, seems to have discussed MRAs further in their relationship with standards. Schrodder has looked at the harmonization, equivalence and mutual recognition of standards in WTO law. The difference between Schroder's analysis and this thesis is the broader scope of the term environmental standards[7]. This is also the novelty in the thesis. We do look at the WTO compatibility of standards as well as UEAs and MRAs, in this thesis and certainly there is an overlap with Schroder's area of analysis. However we look at the WTO only to the extent of the compatibility of WTO rules with standards, environmental standards, UEAs and eventually MRAs. We look at standards in a larger – Dworkinian – scope[8].

The second area where the thesis is different is in its analysis of the characteristics of UEAs and MRAs to gauge whether such characteristics are conducive to the implementation of environmental standards. To be very clear, this does not suggest that the characteristics of MRAs or UEAs have not been analysed. On the contrary, there is extensive literature analysing the characteristics of MRAs and UEAs, and we look at this literature throughout the thesis. Where this thesis is different is in attempting to understand how these characteristics may potentially be utilized to combine a reduction in friction in international trade with the implementation of standards.

Before analysing MRAs and UEAs, the backdrop i.e. the relationship between international trade and environmental issues needs to be understood. This chapter lays the premise behind considering international instruments found within the Trade-Environment nexus. This premise lies in the

[6] For example Nicolaidis and Shaffer differentiate between underlying standards and conformity assessment and also discuss home country and host country standards. Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 Law and Contemporary Problems 263

[7] Humberto Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards*, (Kluwer Law International 2011); See Chapter 2.3 Standards and Chapter 2.3.1 Environmental Standards

[8] See discussion on the Dworkinian definition of standards in Chapter 2.3 Standards

differences between Free Trade and Environmentalism and the conflict between the two schools of thought. The chapter also introduces the potential for conflict between developed and developing countries arising from the trade related aspects of environmental standards. The chapter then outlines the methodology and structure of the thesis.

## 1.2 An Introduction to the Trade-Environment Nexus and the Debate on Environmental Standards in International Trade

Free Trade and Environmentalism have often been considered as separate schools of thought and have as a consequence been addressed separately. Furthermore, recent attempts to reconcile the two schools of trade and environment, as a result of the effects of globalized trade on the environment, have given rise to a further set of issues due to the conflicting interests of developing and developed countries. We look at these aspects briefly in this section as the foundation to the enquiries in this thesis. We discuss the first aspect of differing schools of trade and environment in this chapter. We introduce the issue of developed and developing country conflict stemming from varying environmental standards in this section but look at them in greater detail in Chapter 3[9] and 5[10].

Part of the difficulty in addressing issues relating to trade and the environment, lies in the fact that until recently free traders and environmentalists had addressed such issues under two very separate regimes[11]. Esty attributes this difference between free traders and environmentalists as a "clash of culture", "a clash of paradigm" and "a clash of judgement"[12]. We expand on these three themes in the following paragraphs.

In terms of a "clash of cultures", Esty suggests that, as opposed to environmentalists who are "process-oriented", free traders, on the other hand, are "outcome-oriented" and give more

[9] See Chapter 3.4.2 The Differing Interests of Developed and Developing Countries
[10] See Chapter 5.4 The Legality of UEAs
[11] Daniel C Esty, *Greening the GATT* (Institute for International Economics 1994) 9
[12] Esty, *Greening the GATT* (n 11) 35

importance to the eventual goal of trade instruments[13]. This eventual goal for free traders is economic welfare, which can be achieved through the lowering of trade barriers[14].

This deep seated difference between the two schools of thought – Free Trade and Environmentalism – may perhaps be understood better through examining the two schools briefly. Dunkley defines Free Trade as, "the absence of artificial barriers to the free flow of goods and services between countries"[15]. This concept is deep rooted in the philosophy of free trade as is witnessed in the writing of Adam Smith:

> "*A trade which is forced by means of bounties and monopolies, may be, and commonly is disadvantageous to the country in whose favour it is meant to be established, […]. But that trade which, without force or constraint, is naturally and regularly carried on between any two places, is always advantageous, […]*"[16].

This strong belief of the advantage of free trade combined with the inter-war[17] experience of the disastrous consequences of protectionism was the predominant feeling that was precursor to the formation of the GATT[18]. The success of the Uruguay round sought to cement this belief regarding the benefits of free trade and cooperation among nations, prompting the former WTO Secretary General, Renato Ruggiero to state:

[13] Esty clarifies that this does not imply that environmentalists are uninterested in the outcome of trade instruments. Rather, according to him the difference lies in the process of trade negotiations where trade negotiators are "comfortable with the diplomatic practice of working in secret" with the foresight of diffused benefits through trade liberalization. In contrast, he says, environmentalists prefer openness and public participation to alleviate the danger of business interests dominating trade negotiations. Esty, *Greening the GATT* (n 11) 36

[14] Esty, *Greening the GATT* (n 11) 36

[15] Graham Dunkley, *Free Trade: Myth, Reality and Alternatives* (Zed 2004) 9

[16] Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, general editors R.H. Campbell and A.S. Skinner; textual editor W.B. Todd, OUP 1976) 489

[17] The inter-war period is the time period between the end of the First World War (1919-1920) and the Beginning of the Second World War (1945)

[18] Dunkley (n 15) 3

*"By lowering barriers among nations, economies and people, it helps create interdependence and solidarity. Trade Liberalization is not just a recipe for growth, but also for security and peace, as history has shown us."*[19]

Improved economic conditions in developing countries and successes of the Uruguay round have been portrayed by proponents of the WTO as a result of their integration into the multilateral system which Dunkley phrases as 'trade determinism' or the attribution "of all good things to free trade and globalisation"[20].

We contrast this school of thought with that of Environmentalism. Environmentalism is defined to be "[The] *concern with the preservation of the natural environment, esp. from damage caused by human influence; the politics or policies associated with this*"[21]. Therefore, by its very definition and as put forward by Esty, environmentalists are not only concerned with the eventual goal of the 'preservation of the natural environment' but also with the very processes that are the means to the eventual goal i.e. the 'politics and policies associated with [the preservation of the natural environment]', which Free Traders look to veil[22]. Moreover, the justification of economic growth as an end may not hold ground with environmentalists as it fails to recognise intermediary processes that are environmentally degrading[23]. This "clash of culture" is often reflected in the relationship between trade and environmental organisations. The UNEP, for example, reports that the WTO rules and DSB decisions may have a detrimental effect on the way Multilateral Environmental Agreements (MEAs) function[24].

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[19] Renato Ruggiero, Former Director General WTO, 'A New Partnership for a New Century: Sustainable Global Development in a Global Age' (Address to the Bellerive/Globe International Conference entitled "Policing the Global Economy", Geneva, 23 March 1998) < http://www.wto.org/english/news_e/sprr_e/global_e.htm> accessed 29 June 2015

[20] Dunkley (n 15) 3, 4

[21] 'environmentalism, n.', *OED Online*, OUP, December 2014 <www.oed.com/view/Entry/63091> accessed 29 June 2015

[22] Esty, *Greening the GATT* (n 11) 36; We consider these intermediary processes in relation to environmental standards, in later chapters.

[23] Esty, *Greening the GATT* (n 11) 36

[24] United Nations Environmental Programme (UNEP), 'Civil society consultations on international environmental governance: Summary report: Nairobi, 22-23 May 2001.' (2001) Nairobi: UNEP 5

Esty suggests that a further "clash of culture" between the two schools of free trade and environmentalism occurs due to the relative infancy of environmentalism compared to free trade[25]. Trade has been in existence since antiquity, and international trade for a few centuries. The GATT (including in its current form) is 66 years old. Contrastingly, environmentalism is a movement with no coherent international system and without an all embracing environmental regime[26]. Rather, an amalgam of parallel interests is found, often under the aegis of the United Nations, consisting of several multilateral and bilateral environmental treaties and environmental institutions, concentrating on specific subject areas[27].

As an illustration, consider the following diverse set of treaties and conventions pertaining to various environmental concerns (this is but a small un-exhausted list). While the United Nations Framework Convention on Climate Change (UNFCCC)[28], which includes the Kyoto Protocol[29], provides binding emission reduction targets for climate change and air pollution, the institutional structure which specifically addresses the depletion of the ozone layer and reduction targets for ozone depleting substances is the Vienna Convention for the Protection of the Ozone Layer[30] along with the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[31] . A separate convention addressing transboundary pollution is the Convention on Long-Range Transboundary Pollution[32]. Two major treaties which address species and habitat conservation are the Convention on

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[25] Esty, *Greening the GATT* (n 11) 37

[26] Esty, *Greening the GATT* (n 11) 37; Although the UNEP may be considered one such body, the lack of a dispute settlement body and enforcement procedures renders it comparatively less effective than the WTO. Evidence of this may be derived from the numerous environmentally inclined case-law heard at the Dispute Settlement Body (DSB) of the WTO. Also, by the UNEP's own admission, the environmental authority of the UNEP has progressively eroded, not least because of the multiple multilateral environmental agreements. See UNEP (2001) (n24) 1

[27] Alexander Ovodenko and Robert O. Keohane, 'Institutional Diffusion in International Environmental Affairs' (2012) 88 International Affairs 523, 525

[28] 'Background on the UNFCCC: The international response to climate change', (United Nations Framework Convention on Climate Change, 2014) <http://unfccc.int/essential_background/items/6031.php> accessed 29 June 2015

[29] 'Kyoto Protocol', (United Nations Framework Convention on Climate Change, 2014) <http://unfccc.int/kyoto_protocol/items/2830.php> accessed 29 June 2015

[30] United Nations Environmental Programme, *Handbook for the Vienna Convention for the Protection of the Ozone Layer*, (9th Edition, UNEP, 2012) <http://ozone.unep.org/Publications/VC_Handbook/VC-Handbook-2012.pdf> accessed 29 June 2015

[31] United Nations Environmental Programme, *The Montreal Protocol on Substances that Deplete the Ozone Layer*, (Ozone Secretariat 2010) <http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?sec_id=5> accessed 29 June 2015; Link to text of Protocol on webpage.

[32] 'The Convention: The 1979 Geneva Convention on Long-range Transboundary Air Pollution', (United Nations Economic Commission for Europe) <http://www.unece.org/env/lrtap/lrtap_h1.html> accessed 29 June 2015; Link to text of Convention on webpage.

International Trade in Endangered Species of Wild Fauna and Flora (CITES)[33] and the Convention on Biological Diversity (CBD)[34] while separate agreements such as the International Convention for the Regulation of Whaling (ICRW)[35] and the International Commission for the Conservation of Atlantic Tunas (ICCAT)[36] address specific marine species and habitats. Moreover, more general agreements such as the United Nations Convention on the Law of the Sea (UNCLOS)[37] contain provisions for the protection of the marine environment. Certain agreements such as the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[38] address specific aspects of environmental policy.

Although several such environmental agreements are negotiated under the United Nations (UN) structure, a concrete institution providing international regulations (such as the WTO for international trade) is as yet unavailable for international environmental concerns[39]. The reliability of the WTO is increased by the availability of a Dispute Settlement Body (DSB), which is perhaps why several environmentally important trade disputes, which may fall under other international agreements are preferred to be heard by the parties under WTO rules. There are of course environmental cases heard by the ICJ[40], yet disputes such as the Tuna/Dolphin cases[41] have been

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[33] 'Convention on International Trade in Endangered Species of Wild Fauna and Flora', (CITES) <http://www.cites.org/eng/disc/text.php> accessed 29 June 2015

[34] 'Text of the CBD', (Convention on Biological Diversity) <https://www.cbd.int/convention/text/default.shtml> accessed 13 June 2015

[35] 'Key Documents: The Convention', (International Whaling Commission) <https://iwc.int/convention> accessed 29 June 2015; Link to text of Convention on webpage.

[36] 'ICCAT: Home' (The International Commission for the Conservation of Atlantic Tunas) <https://www.iccat.int/en/> accessed 29 June 2015; Link to the Basic Texts on webpage or go directly to 'Basic Texts', (The International Commission for the Conservation of Atlantic Tunas) <https://www.iccat.int/Documents/Commission/BasicTexts.pdf> accessed 29 June 2015

[37] 'United Nations Convention on the Law of the Sea of 10 December 1982: Overview and full text', (United Nations; Oceans & Law of the Sea, 2013) <http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm> accessed 29 June 2015; Link to text of Convention on webpage.

[38] 'Introduction to ESPOO Convention', (United Nations Economic Commission for Europe) <http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf> accessed 29 June 2015; Link to text of Convention on webpage.

[39] The UNEP as mentioned in (n 26) lacks a dispute settlement body and an implementation structure. See also UNEP (2001) (n 24)

[40] See for example *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgement) [2014] ICJ; or Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgement) [1997] ICJ

[41] The three Tuna Dolphin cases are United States – Restrictions on Imports of Tuna (Report of the Panel) (3 September 1991) GATT DS21/R-39S/155 (US – Tuna (Mexico)); **United States — Restrictions on Imports of Tuna** (Report of the Panel)

tried under WTO rules (GATT Article XX) even when agreements such as the ICCAT[42] (a non-WTO agreement) was functional. One reason why the DSB is preferred to the ICJ may perhaps be because several ICJ awards are often un-complied with[43].

The Trade - Environment debate is also classified by Esty as a "clash of paradigms". According to him, the Environmentalists views are essentially law based whereas the Free Traders hold an economic perspective.[44] Environmentalists have traditionally been suspicious of incentive based policy and regulation[45]. According to environmentalists, this places a price-tag on the environment and the ability to substitute environmental obligations with money[46]. Furthermore, Environmentalists are also suspicious of the adherents of economic prosperity not giving sufficient regard to the needs of future generations and principles of sustainable development[47].

On the other hand, free traders are of the opinion that stringent environmental standards could lead to a competitive disadvantage against goods in markets with less stringent environmental standards[48]. Compliance cost has been correlated to less productivity in several industries where environmental standards are higher[49]. Free traders see such environmental practices as coercive and accuse environmentalists of being indifferent to the actual effects of such practices and more preoccupied with their implementation. The resulting international chaos is perceived as a threat to

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(16 June 1994) GATT DS29/R (US – Tuna (EEC)); and United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Report of the Appellate Body) (16 May 2012) WTO WT/DS381/AB/R (US – Tuna II (Mexico))

[42] ICCAT (n 36)

[43] Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 The European Journal of International Law 819

[44] Esty, *Greening the GATT* (n 11) 38

[45] Steven J. Kelman, *What Price Incentives? Economists and the Environment* (Praeger 1981) 109; see also Esty, *Greening the GATT* (n 11) 38

[46] Kelman (n 45) 110

[47] Richard A. Johnson, 'Commentary: Trade Sanctions and Environmental Objectives in the NAFTA', (1993) 5 Georgetown International Environmental Law Review 577, 581

[48] Richard B. Stewart, Environmental Regulation and International Competitiveness [1993] The Yale Law Journal 2039, 2043; Kelman (n 45), however, notes that there will be a competitive advantage in the domestic market, against foreign products of lower environmental standards. Furthermore, there may be a competitive advantage in the global market, if a market for "green" products of technology emerges.

[49] Wayne B. Gray and Ronald J. Shadbegian, 'Environmental Regulation and Manufacturing Productivity at the Plant Level' (1993) US Department of Commerce, Centre for Economic Studies, NBER Working Paper No. 4321, 16 <http://www.nber.org/papers/w4321.pdf> accessed 29 June 2015

the trading system Free Traders promote and thus a threat to international harmony[50]. This divide is concerning as it has prompted scholars wary of excessive environmentalism to accuse environmentalists of being blindly opposed to all human endeavours of progress. As Gibson states:

> "*Environmentalism […] would treat problems, real or alleged, as an opportunity to attack progress. As part of a broader political agenda, the truthfulness of the claims made is secondary to their propaganda value. The presentation of facts would be highly selective, sweeping generalizations would be used, along with inflammatory rhetoric. Human needs and desires would be portrayed as problems in themselves. Progress, science and technology would all in general be disparaged. This 'ism' would promote pessimism and anti-human elitism. Environmental problems, real or not, would be focused on to support the broader political agenda*"[51].

Another effect of disparities in environmental standards is that it may lead to a "race to the bottom". With the advent of globalisation, countries have had to engage in "regulatory competition" in order to restrict an outflow of investment and corporations, or to attract new investment. To prevent corporation from moving to lower environmentally regulated jurisdictions countries may lower their own as an incentive to global commerce[52].

Lastly, we look at Esty's suggestion of a "clash of judgements" causing a difference between propagators of free trade and environmentalism. Such a clash derives primarily from the uncertainty in quantifying environmental harm and the value of environmental standards[53]. Even when economic theory is applied with environmental variables being considered, often assumptions are made due to the excessive scientific uncertainty involved in future projections[54]. However, in terms

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[50] Esty, *Greening the GATT* (n 11) 39

[51] Donald Gibson, *Environmentalism: Ideology and Power* (Nova Science Publishers, 2002) 8

[52] David Vogel and Robert A Kagan, 'Introduction: National Regulations in A Global Economy', in David Vogel and Robert A Kagan (eds.), *Dynamics of Regulatory Change: How Globalisation Affects National Regulatory Policies* (University of California Press, 2004) 3

[53] Esty, *Greening the GATT* (n 11) 40

[54] Clement Allan Tisdell (ed), *Economics of Environmental Conservation* (2nd Ed, Edward Elgar, 2006) 21

of environmental policy affecting trade, certain allowances have been made for such scientific uncertainty through policy tools such as the precautionary principle, allowing for measures preventing environmental degradation in the face of serious or irreversible damage[55].

Another possible way to negate scientific uncertainty when formulating environmental policy is through a life cycle analysis of a manufactured product. In trade parlance this would be the issue surrounding Process and Production Methods (PPMs)[56]. Although regulated production methods at every step of a product's life cycle provides for a detailed and intensive environmental supervision, such regulations may fall foul of WTO rules if 'like products', without any distinctions in the final products, are compared through their PPMs[57].

The issues arising out of the confluence of trade and the environment is not limited merely to the differences in the two schools of thought. Globalisation and a consequent economic integration have a marked and direct effect on an increase in friction between countries (especially between developed and developing countries) resulting from environmental concerns[58]. Part of the reason for such friction arises from the fact that countries may be apprehensive of varying environmental goals and standards of other nations[59].

Varying environmental standards of different countries lead to several issues. One of the issues with trade related aspects of environmental standards is that, host countries accepting imported goods and services are purported to ignore environmental standards in the home country. This leads from the 'pollution haven' hypothesis where manufacturing is shifted to countries with less stringent environmental standards[60].

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[55] The Rio Declaration on Environment and Development (1992) (Rio Declaration) (U.N. Doc A/Conf.151/5/Rev.1) Principle 15, See Chapter 2 Concepts and Definitions for a discussion on the Precautionary Principle.

[56] See Section 2.3.3.2.1 PPMs

[57] US – Tuna (Mexico) para 5.11-5.15

[58] Daniel C Esty, 'Bridging the Trade Environment Divide' (2001) 15 Journal of Economic Perspectives 113, 114

[59] Robert Z. Lawrence, Albert Bressand and Takatoshi Ito, *A Vision for the World Economy: Openness, Diversity and Cohesion* (Brookings Institution Press 1996) 101; Trade-Environment friction arising between Developed and Developing countries is discussed in detail in Chapter 3.4.2 The Differing Interests of Developed and Developing Countries

[60] Nick Mabey and Richard McNally, Foreign Direct Investment and the Environment (WWF-UK Report 1999) 3

In countries with higher environmental standards, objections include having to compete with economies which have a 'lower burden' than themselves due to the presence of lower standards. This in turn also breeds the fear of "a race to the bottom" that may eventually lower the standards of the countries with existent high standards, in order to stay in competition[61].

Furthermore, even if countries with higher standards pursued their agenda for altruistic reasons, such an agenda may quite often be perceived as protectionist. This issue is further exacerbated for environmentalists because WTO rules allow countries with lower standards to object to such high standards.[62]

The potential conflict of the environmental interests of one nation with the trade interests of another are discussed in later chapters[63], including with regard to the various disputes that have appeared at the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO)[64]. It is however, pertinent to note that this conflict between Developed and Developing countries and the seeming friction arising from environmental standards in trade is the central theme which this thesis wishes to address.

Even proponents of free trade such as Bhagwati have suggested that social agendas (such as environmental standards) "cannot be advanced without economic prosperity"[65]. As Esty declares, the connection between trade policy and its effect on the environment cannot be denied[66]. As a result the two legal regimes of trade and environment are inherently interconnected and must be considered in tandem when formulating policy. Renato Ruggiero, in the earlier mentioned address to the Globe International Conference highlighted this interconnectivity, stating that:

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[61] Jagdish N. Bhagwati and T. N. Srinivasan, 'Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?' (1995) Columbia University Discussion Papers Series No. 718, 6 <http://academiccommons.columbia.edu/catalog/ac%3A100101> accessed 29 June 2015; see also Vogel and Kagan (n 49) 3

[62] Bhagwati and Srinivasan (n 61) 7

[63] See Section 3.4.2 The Differing Interests of Developed and Developing Countries and Section 5.3 the Legalities of UEAs

[64] See Chapter 4 Standards as General Exceptions to the GATT

[65] Jagdish Bhagwati, 'Moral Obligations and Trade', presentation at Senator Bob Kerrey's BACKPAK Conference on International Trade (Omaha, Nebraska 12 December 1998)

[66] Esty, *Bridging the Trade Environment Divide* (n 58) 114.

*"Today the trading system is called on from one side or another to take account of environmental policy, financial instability, labour standards, ethical issues, development policy, competition law, culture, technology, investment, marginalization, security, health - an ever-lengthening list of issues which can be associated in one way or another with trade.*

*This underlines the degree of interdependence we have reached in our world. Clearly, the implications of trade liberalization go much beyond trade and economics.*

*[...]*

*The reality of globalisation is the reality of interdependence, an interdependence that, as I said at the outset, extends far beyond trade or strictly economic criteria. But trade remains a key element in sustaining and spreading the benefits of interdependence."*[67]

It is therefore with this premise in mind that the thesis analyses environmental standards in light of the possibility for conflict between trade interests and environmental standards amongst developed and developing countries. The thesis assesses this possibility for trade related conflict between developed and developing countries in instruments implementing environmental standards in trade, such as Unilateral Environmental Action (UEA)[68]. The thesis thereafter examines the concept of Mutual Recognition (MR) and Mutual Recognition Agreements (MRAs) as a trade instrument with the potential to increase environmental standards while simultaneously reducing conflict arising out of trade related aspects of environmental standards[69]. The next section provides an analysis of the methodology used in the thesis and the key research themes and points of departures which will be found in the rest of the thesis.

[67] Ruggiero (n 19)
[68] See Section 5.3 The Legality of UEAs
[69] See Chapter 6 Mutual recognition and Mutual Recognition Agreements and Chapter 7 Mutual Recognition and International Law

## 1.3 Methodology and Research Themes

The thesis uses a "Black Letter" methodology of doctrinal analysis, concentrating on doctrinal principles associated with the transnational governance of environmental standards. Important instances and examples of doctrinal analysis in the thesis include discussions on Sustainable Development[70], the concept of Necessity in International Law and especially within the jurisprudence of the WTO[71], the Kantian theory of Cosmopolitan Law[72], the Environmental Kuznets curve[73] and associated doctrines such as Inglehart's concept of Post-materialism[74], the various discussions of sovereignty arising out of instruments increasing environmental standards in international trade[75] etc. The thesis also includes the analysis of statutes and cases of the WTO[76].

This thesis is a qualitative analysis of existing paradigms and instruments in the intersection of trade and environment and of agreements[77] which help illustrate such paradigms. However, although individual MRAs have been analysed, the thesis is not a case study approach. Rather, it is a comparative approach looking at different instruments which have the potential to increase environmental standards. To clarify, such instruments are not seen as isolated topics used for treaty or agreement analysis. Instead the comparative approach is used to look at a conflict of laws arising from such instruments.

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[70] See Section 3.4 Sustainable Development and the Trade-Environment Relationship

[71] See Section 4.3.2 Article XX(b): Necessity; Section 5.3.3 The Requirement of Necessity in WTO Jurisprudence; The term "WTO Jurisprudence" refers to the various case-law adjudicated under the DSB whether the Panel or the Appellate Body. Whether WTO case-law may be considered 'jurisprudence' is a contested notion for specific reasons. Firstly, adjudication at the WTO is often argued to be a question of political might and leaning and less of legality. Secondly, others argue that principle and precedent is unavailable within WTO adjudication. This is often seen as a strong reasoning behind not considering WTO case-law to be jurisprudential. However, arguing whether WTO case-law may be considered 'jurisprudence' is beyond the purview of this thesis. The term 'jurisprudence' has been used in various WTO related literature to identify WTO case-law, and is therefore used in the same context in this thesis.

[72] See Section 7.2.3 Kantian Middle Path: Cosmopolitan Law; Kant's Cosmopolitan Law is analysed in light of the concept proposed by Nicolaidis and Shaffer. According to Nicolaidis and Shaffer, MR is the "legal incarnation" of Kant's cosmopolitan law as it is a transnational form of governance falling between domestic and international law and consisting of the legality concerning the obligation of one state towards the citizens of another state. Nicolaidis and Shaffer (n 6) 266

[73] See Section 3.2 The Environmental Kuznets Curve

[74] See Section 3.2.1 Post-Materialism

[75] See Section 5.3.1 Permanent Sovereignty; Section 7.2 Mutual Recognition and the Transfer of Sovereignty; Section 7.2.1 Mutual Recognition and Interdependent Sovereignty; Section 7.2.2 The Delegation and Transfer of Sovereign Powers

[76] See Section 2.3.3 The WTO and Standards; Section 3.5 Looking at the WTO; Chapter 4 Standards as General Exceptions to the GATT; Section 5.3.3 The Requirement of Necessity in WTO Jurisprudence; Section 7.3 MRAs: The WTO Perspective

[77] Mutual Recognition Agreements and Agreements with elements of Mutual Recognition

Such a comparative approach is used in the thesis at different levels of analysis. The analysis of MRAs as a trade instrument with the potential to increase environmental standards, and their similarity, analogy and differentiation in relation to instruments such as Unilateral Environmental Instruments, form the basis of one level of this comparative approach[78].

As the thesis delves deeper into an analysis of one particular instrument – Mutual Recognition – we find the comparative approach is used to analyse different forms of Mutual Recognition[79]. At this level the comparative analysis illustrates the differences between forms of MR such as Judicial[80], Regulatory[81] and Managed[82] MR. This comparative approach also illustrates an evolution of MR from its inception in European Jurisprudence[83], to the form it achieves in international agreements[84], to a form investigated by this thesis for the potential to decrease conflict in trade while propagating environmental standards[85].

MR and MRAs has been the subject of substantial academic analysis since the inception of the concept in Europe. Various aspects of MR have been extensively scrutinized with academic vigour. Several commentators have discussed MR as an instrument of transnational governance[86]. Other discussions have elaborated on the economic perspective of MR regimes and MRAs[87]. Yet others have highlighted the advantages and disadvantages of such MR regimes[88]. Importantly, some

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[78] These instruments are grouped together as they lie within the Trade-Environment Nexus whereby they have the potential to affect trade through environmental standards. The analysis of UEIs may be found in Chapter 5 Unilateral Environmental Action. Characteristics derived through this analysis (benefits/drawbacks) are then used to compare with characteristics of MRAs

[79] An introduction to these forms of MR may be found in Section 6.3 Forms of Mutual Recognition

[80] See Section 6.3 Forms of Mutual Recognition

[81] See Section 6.3.1 The New Approach

[82] See Section 6.3.2 Managed Mutual Recognition

[83] Such as the form found in the "Origin Principle" in the *Cassis* judgement; See Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements; and Section 6.3 Forms of Mutual Recognition

[84] Such as the 'Managed' form as suggested by Nicolaidis and Shaffer (n 6). See also Section 6.3.2 Managed MRAs.

[85] See Chapter 8 Conclusions

[86] See Nicolaidis and Shaffer (n 6); Susanne K. Schmidt, 'Mutual Recognition as a new mode of Governance' (2007) 14(5) Journal of European Public Policy 667

[87] See Jacques Pelkmans, 'Mutual Recognition in Goods and Services: An Economic Perspective' in Fiorella Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005), 92; Jacques Pelkmans, 'Mutual Recognition: Economic and Regulatory logic in Goods and Services' (2012) Bruges European Economic Research Papers 24/2012 <http://aei.pitt.edu/58617/> accessed 13 June 2015

[88] See Kalypso Nicolaidis, 'A World of Difference: Exploring the Dilemma of Mutual Recognition', Paper presented at Princeton University, 17-19 February 2005); Jacques Pelkmans, 'Mutual Recognition in goods: On Promises and Disillusions'

literature focuses on the relationship between the EU and Mutual Recognition regimes[89] and other literature even extends the analysis of EU Mutual Recognition to WTO compatibility[90]. Certain literature even has themes in close proximity to the research theme of this thesis, often being comparative studies on harmonization, equivalence and MR in terms of WTO law[91].

The question therefore may be asked, given this vast repertoire of scholarship on MR and MRAs, how the thesis furthers the research on the subject. A response to this would be the linking of environmental standards to MR, to investigate whether the instrument may have the potential to increase environmental standards particularly. Moreover, the thesis will also analyse the characteristics of MR which may provide the opportunity to decrease friction among trading nations. The thesis also looks at a broader remit of the definition of 'standards' than as considered by the WTO. Thus, instead of looking at only those standards defined by the WTO, the thesis looks at the WTO compatibility of instruments incorporating a much broader definition of the term 'environmental standards'. However, unlike Schroeder, the thesis limits the discussion to a definition of environmental standards exclusively, and not standards in general[92].

### 1.3.1 Limitations

As a matter of convenience we provide a set of limitations and assumptions to this thesis in the form of a list:

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(2007) 14(5) Journal of European Public Policy 699; Miguel P. Maduro, 'So close yet so far: The Paradoxes of Mutual Recognition' (2007) 14(5) Journal of European Public Policy 814

[89] See Kalypso Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14(5) Journal of European Public Policy 682; Adrienne Heritier, 'Mutual Recognition: Comparing Policy Areas' (2007) 14(5) Journal of European Public Policy 800

[90] See Lorand Bartels, 'The Legality of the EC Mutual Recognition Clause under WTO Law' (2005) 8(3) Journal of International Economic Law 691

[91] See Schroder (n 7); Frode Veggeland and Christel Elvestad, 'Equivalence and Mutual Recognition in Trade Arrangements: Relevance for the WTO and the Codex Alimentarius Commission' (2004) Norwegian Agricultural Economics Research Institute Report 2004-9 <https://www.regjeringen.no/globalassets/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_s.pdf> accessed 29 June 2013; Christel Elvestad, 'Equivalence and Mutual Recognition Agreements in Relation to Technical Measures' (2002) Norwegian Agricultural Economics Research Institute Report 2002-36 < http://www.nilf.no/publikasjoner/Notater/2002/Equivalence_and_Mutual_Recognition_Agreements_in_Relation_to_Technical_Measures-Contents> accessed 29 June 2015

[92] Schroder (n 7)

(1) The thesis does not compare the effectiveness of the discussed instruments in increasing environmental standards. In other words, the thesis is not a comparative of whether UEIs or MRAs are more effective at increasing environmental standards. Rather, it is attempted to first establish whether MRAs do increase environmental standards, before analysing the consequences of the instruments used on the relationship between developed and developing countries. As mentioned earlier in the introduction, although the thesis does briefly discuss the reasons for such conflict, its primary aim is to analyse certain trade instruments that may alleviate the friction between developed and developing countries while propagating environmental standards.

(2) The thesis does not discuss the possibility of an overhaul of the international trade regime. Several authors have argued for a radical overhaul of the trade regime in order to effectively address other socio-economic issues such as the effect of international trade on the environment. Although there is certainly an argument to be made for this theory of entirely overhauling the trade regime[93], addressing the theory would be outside the purview of the thesis. Rather, the thesis concentrates on instruments already prevalent within the International trade system. Specifically, the thesis looks at trade instruments with the potential of increasing environmental standards, and more specifically at such potential of increasing environmental standards in MRAs.

(3) The thesis assumes that conflict between states arising from the environmental standards and trade is detrimental to the effectiveness of environmental standards. To be simple, the thesis assumes that international friction leads to a drop in the quality of environmental standards. To make this assumption based on previous literature, the thesis may then concentrate on analysing how the characteristics of MRAs may aid in reducing inter country friction.

[93] See for example, Naomi Klein, *This Changes Everything: Capitalism vs Climate Change* (Simon and Schitzer, 2014); Janet Dine, 'Democratization: The Contribution of Fair Trade and the Ethical Trading Movement' (2008) 15(1) Indiana Journal of Global Legal Studies 177

(4) The thesis discusses international trade at the macroscopic level only. We define this macroscopic level to include international trade rules, regulations and trade statistics between nation states. Therefore the thesis does not involve a discussion on private standards.

(5) The thesis discusses MRAs implementing standards and their effect on the trade in goods only. This limitation has two parts. Firstly, by discussing underlying standards only, the mutual recognition of conformity assessment programmes is not discussed in the thesis[94]. This is because conformity assessments are a topic of discussion on their own right and deviate from central theme of discussing environmental standards in international trade.

Secondly, by discussing the effect of MRAs associated with trading in goods we leave services out of this thesis. Again, the discussion surrounding services is a separate and extensive topic on its own and merits an individual study. This also means that a discussion on GATS rules is limited in this thesis[95].

(6) The thesis generally assumes a demand for higher environmental standards to flow from Developed (standard makers) to Developing (standard takers) countries. Although Section 3.2 The Environmental Kuznets curve is discussed in an attempt to justify this assumption of Developed countries demanding higher environmental standards of Developing countries, the general trend of the thesis is to assume the dynamic from the outset.

(7) The US-Japan Mutual Recognition Agreement on Organic Products analysed in the thesis was selected due to the availability of data. MRAs are often negotiated with very little public access and associated data is difficult to obtain. The data obtained for the US-Japan MRA was through email correspondence with the United States Department of Agriculture (USDA). The MRA itself was negotiated through correspondence. This set of correspondence has been attached to the thesis as Annex I.

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[94] For a discussion on MRAs regarding conformity assessment see Nicolaidis and Shaffer (n 6)

[95] For a discussion on MRAs and GATS see Kalypso Nicolaidis and Joel P. Trachtman, ‘From Policed Regulation to Managed Recognition in GATS’ in Pierre Sauvé and Robert Mitchell Stern (eds.) *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000)

(8) The thesis does not discuss the effect of Regional Trade Agreements on the WTO system.

The proliferation of several Regional Trade Agreements (RTAs) has had an effect on the trade regime. While RTAs can complement the WTO system, they are essentially instruments of preferential treatment[96]. Many commentators have discussed the various effects of RTAs on the WTO. Such a discussion, however, is outside the purview of this thesis. Instead, the thesis looks at the relationship between the WTO and bilateral and plurilateral treaties, i.e. the MRAs analysed, only to the extent of the WTO compatibility of such treaties. However, we briefly list some of the arguments put forward in terms of the adverse effects RTAs and bilateral treaties have on the multilateral trade system.

One such argument is that RTAs may be used to influence multilateral negotiations[97]. Secondly, regional trade negotiations may divert valuable resources from Developing and poorer countries, which would otherwise be used for multilateral negotiations[98]. Furthermore, RTAs arguably invite costly trade diversions away from the multilateral system[99]. Importantly, RTAs create parallel legal frameworks[100] and often have their own dispute settlement mechanisms which may be incompatible to WTO laws and the jurisprudence of the DSB[101].

There are however, academics who argue in favour of RTAs, disagreeing that RTAs have an adverse affect on the multilateral trade system. In terms of trade diversion academics argue that trade blocs are already prevalent in the multilateral system, and thus a concrete bilateral or plurilateral treaty among them would increase and strengthen trade rather than

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[96] Regional Trade Agreements: Scope of RTAs, ( The World Trade Organisation), <https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm> accessed 12 June 2016

[97] See for example the US strategy during the Uruguay round of talks at the WTO, to use the threat of regional and bi-lateral negotiations as a way to influence multilateral partners; John Whalley, 'Why Do Countries Seek Regional Trade Agreements?" in Jeffrey A. Frankel (ed.), *The Regionalization of the World Economy*, (University of Chicago Press 1998) 74

[98] The World Bank, 'Global Economic Prospects: Trade, Regionalism, and Development' (The World Bank: Washington D.C. 2005) 133

[99] Jagadish N. Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press 2008)

[100] Edward Best, and Thomas Christiansen, 'Regionalism in International Affairs' in Baylis, J., Smith, S. and Owens, P. (eds.) *The Globalisation of World Politics* (4th ed. New York: Oxford University Press 2008) 436-439

[101] The World Bank, 'Global Economic Prospects: Trade, Regionalism, and Development' (The World Bank: Washington D.C. 2005) 133

divert it[102]. Furthermore, regional trade is often seen as a stepping stone, or an integrating factor, towards stronger multilateral ties[103]. In that vein, this thesis looks at the WTO compatibility of UEIs and MRAs in general, and the specific MRAs analysed.

(9) The thesis does not look at the concept of power in international relations. Power is extremely influential in determining international relations. Unequal power amongst countries may have an influence in the formulation of international policies and have a similar influence in the adjudication and implementation of international judgements[104]. Moreover, unequal power between nations may also influence the decision in bringing a case to an international adjudicating forum against a powerful country[105].

However, the enormity of such a concept prevents its discussion in the thesis. The very definition of the word 'Power' used in this context merits a nuanced and extensive discussion. Payne defines power as "The ability to get others–individuals, groups, or nations–to behave in ways that they ordinarily would not"[106]. Viotti & Kauppi define power as "the means by which a state or other actor wields or can assert actual or potential influence or coercion relative to other states and non state actors because of the political, geographic, economic and financial, technological, military, social, cultural, or other capabilities it possesses"[107]. However, Barnett and Duvall sum up the complexity in defining power by stating that, "no single concept can capture the forms of power in international politics"[108].

To delve into the dynamics of power underpinning international relations would be to detract from the main objective of the thesis to understand and analyse the legal

[102] Lawrence H. Summers, 'Regionalism and the World Trading System' in *Policy Implications of Trade and Currency Zones: A Symposium* (sponsored by the Federal Reserve Bank of Kansas City, Kansas City, Mo.: Federal Reserve Bank) 295, 297
[103] Pascal Lamy, 'Stepping Stones or Stumbling Blocks? The EU's Approach Towards the Problem of Multilateralism vs Regionalism in Trade Policy' (2002) 25(10) The World Economy 1407
[104] Michael N. Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59(1) International Organisation 39
[105] See Christiane Schuchhardt 'Consultations' in Patrick F.J. Macrory *et al* (eds.) *The World Trade Organisation: Legal, Economic and Political Analysis* (Springer, 2005) 1202
[106] Richard J. Payne, *Global Issues; Politics, Economics and Culture* (5th Edition, Pearson, 2013)
[107] Paul R. Viotti, and Mark V. Kauppi, *International Relations and World Politics* (5th Edition, Pearson, 2013)
[108] Michael N. Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59(1) International Organisation 39, 66

relationship between states in terms of environmental standards. Although power may have a determinant role in such a relationship, the thesis assumes its neutrality and therefore, avoids the discussion of power while analysing the law underpinning international relationships.

(10) The thesis does not discuss the implementation of the regulations and the judgements influencing international trade and environmental law and policy – Similar to the concept of power, and as mentioned in the previous point, connected to it, is the concept of the implementation of judgements. Often dissimilar power amongst countries would mean that judgements are not equitably implemented. International judgements have often presumed implementation and have refused to discuss the eventuality of non-implementation[109]. In other cases, when the non-implementation of a judgement was inevitable, the courts, through strict interpretation, absolved themselves of any jurisdiction[110]. This is also true for the enforcement of treaties and MEAs. Implementation is also dependant on factors such as corruption, national interests and vote bank politics. Thus the factors influencing implementation is the realm of a separate discussion and the constraints of space prevents its discussion here.

(11) The analysis of the NAFTA Agreement is limited to the sections on Agriculture and Sanitary and Phytosanitary sections and the provisions of mutual recognition within them. These two sections of the NAFTA were chosen due to their association with environmental standards.

(12) The thesis does not analyse harmonization as an instrument. We explore this limitation in further detail immediately below.

[109] See for example in the Case of the S.S. "Wimbledon", the ICJ (at the time, the PCIJ) refused to consider punitive interest in case of a delay in the implementation of their judgement. According to the ICJ, "The Court does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency."; Case of the S.S. "Wimbledon", (Judgement), Series A, No. 1 at 32 (1923) P.C.I.J

[110] See for example The Anglo-Iranian Oil Co. Case (Preliminary Objections), [1952] I.C.J. Rep. 93; See also the Case Concerning the Aerial Incident of 27 July 1955 (Preliminary Objections), [1959] I.C.J. Rep. 127

One further instrument related to environmental standards affecting trade, that could potentially be analysed, would be Harmonization. There is in fact already available literature on the comparison of the two instruments[111]. Therefore, it is necessary to explain why harmonization is not considered in greater detail within the thesis. Rather it is used as a comparative tool to highlight characteristics of MR only.

The argument for avoiding an analysis of harmonization in this thesis is two-fold. The first contention to explain the lack of an analysis of harmonization of international environmental standards stems from the diversity of such standards. These diverse set of standards are often seen as non-tariff barriers to trade as they may be used disproportionately as a means for protectionism[112] thereby leading to "unfair trade and competition", and there is certainly a prevalent academic argument to harmonize environmental standards to reduce trade barriers[113]. Free Traders feel that to eliminate such diversity in standards, harmonization – or in other words the "adoption of uniform standards" – is necessary[114].

There is however a counter-argument to the necessity for harmonization of standards. Diversity of environmental standards may occur for several reasons including differences in technology and considerations to national environmental circumstances such as weather, demography, geography etc[115]. A country may choose to address environmental issues differently from another country (and give more importance to one over another) if it feels this would be beneficial to its citizens[116]. In fact

[111] Linda Horton, 'Mutual Recognition Agreements and Harmonization' (1998) 29 Seton Hall Law Review 692; Schroder (n 6)
[112] Richard J. King, 'Regional Trade and the Environment: European Lessons for North America' (1996) 14(2) UCLA Journal of Environmental Law and Policy 209, 213
[113] Alexander M. Donahue, 'Equivalence: Not Quite Close Enough for the International Harmonization of Environmental Standards' (2000) 30 Envtl. L. 363
[114] Alberto Bemabe-Riefkohl, 'To Dream the Impossible Dream: Globalisation and Harmonization of Environmental Laws', (1995)20 North Carolina Journal of International Law and Commercial Regulation 205, 212
[115] Bhagwati and Srinivasan (n 61) 16
[116] Bhagwati and Srinivasan (n 61) 17

WTO jurisprudence says as much by allowing countries to choose their own level of environmental protection[117].

Furthermore, such differing circumstances from which diverse environmental standards arise, also provide "differential advantages of production and trade competitiveness", a fact common to every trading nation, whatever the level of standard prevalent within them[118]. Bhagwati and Srinivasan therefore state that the notion that the diversity in environmental standards "is illegitimate and constitutes 'unfair trade' or 'unfair competition' is itself illegitimate", as is the consequent demand for harmonization[119]. Harmonization would lead to a country with lower environmental standards 'distorting their standards up' and could potentially lead to an economic and welfare loss as a result[120].

Another argument in favour of harmonization is its preference over equivalence[121]. Donahue differentiates harmonization as the case where parties "adjust their differing standards until they are the same" while under equivalence parties "agree to treat their differing standards as if they were the same"[122]. According to Donahue, the two instruments are not interchangeable and while harmonization in an upward direction increases environmental protection, equivalence "allows the weaker standard to serve as a bypass route around the stronger one, thereby invalidating the stronger and reducing the level of protection"[123].

There are several strands to counter the above argument. Firstly, while accepting that the nature of harmonization is to create the same standard and that of equivalence is to agree to differing standards, it is pointed out that the argument does not consider the reasons for these differing

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[117] Australia – Measures Affecting Importation of Salmon (Report of the Appellate Body) (20 October 1998) WT/DS18/AB/R (Australia – Salmon) (AB) Para 205; See also EC – Trade Description of Sardines (Report of the Panel) (28 May 2002) WT/DS231/R (EC – Sardines) (Panel) Para 7.120

[118] Bhagwati and Srinivasan (n 61) 18

[119] Bhagwati and Srinivasan (n 61) 17

[120] Bhagwati and Srinivasan (n 61) 18

[121] Equivalence is considered a front runner to MRAs as the mutual recognition of equivalent standards is the basis of MRAs. For a discussion on this concept see Chapter 6 Mutual Recognition and Mutual Recognition Agreements

[122] Donahue (n 113) 365

[123] Donahue (n 113) 365 – 366

international environmental standards, as has been discussed above[124]. Moreover, although it is generally true that equivalence is treating differing standards "as if they were the same", the objective of the standard is important towards achieving equivalence in some forms of mutual recognition (MR) of equivalence[125]. Even WTO Agreements encourage Members to accept "as equivalent technical regulations of other Members, even if these regulations differ from their own, *provided* they are satisfied that these regulations adequately fulfil the objectives of their own regulations"[126] [emphasis added].

Secondly, the contention that equivalence and harmonization is not interchangeable may not be true in its entirety. Rather, Nicolaidis states that mutual recognition can be seen as the "residual of harmonization". At times, 'left-over' regulations are mutually recognised once harmonization has been assessed[127]. Nicolaidis also adds that "some degree of harmonization or autonomous convergence of underlying standards" may result from MRAs[128].

Lastly, we address Donohue's contention that equivalence reduces the level of environmental protection by allowing weaker standards. Although it is certainly plausible that the negotiation of a high harmonized standard would increase the level of environmental protection compared to the recognition of an equivalent standard which is lower, Donahue does not account for two factors. The first factor is that the consideration of similar objectives when recognizing standards (as has been discussed above) keeps the environmental objectives equivalent if not the standard, and affords a certain amount of flexibility in considering domestic environmental circumstances.

The second factor that may be considered is that, demanding harmonizing standards may in fact be environmentally detrimental if we consider the resulting international friction of such an insistence

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[124] See text to (n 99)

[125] Pelkmans, *Mutual Recognition in Goods: On Promises and Disillusions* (n 88) 702; This form of mutual recognition is termed by Pelkmans as 'Judicial MR' and is discussed with other forms of MR in Chapter 6 Mutual Recognition and Mutual Recognition Agreements

[126] Agreement on Technical Barriers to Trade (1 January 1980) BISD 26S/8 (TBT Agreement) Article 2.7

[127] Kalypso Nicolaidis, 'Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects' in *Regulatory Reform and International Market Openness* (OECD Publications 1997)

[128] Nicolaidis 1997 (n 127) Section IV.1

for the imposition of standards. Consider for example the situation surrounding US – Tuna (Mexico) and the embargo which led to the case[129]. The US' insistence on the banning of Purse Seine nets for Tuna fishing in the Eastern Tropical Pacific region (this could be regarded as the harmonization of fishing standards), led to three international cases[130]. Furthermore, pressure from the Inter American Tropical Tuna Convention (IATTC)[131], led eventually to the Clinton Administration passing a much diluted International Dolphin Conservation Protection Act 1997 (IDCPA)[132], thereby compromising prevalent Dolphin Safety regulations[133]. The Act included Purse Seine fishing by countries that were members of the International Dolphin Conservation Program, as "dolphin safe"[134], in the prevalent eco labelling program mandated by the Dolphin Protection Consumer Information Act, 1990[135]. This reduction of standards may be seen as a direct result for the harmonization of environmental standards[136]. On the other hand, as Nicolaidis and Shaffer postulate, the necessary public and private engagement arising out of mutual recognition agreements breeds a familiarity which leaves room for 'regulatory convergence' as opposed to 'ex-ante harmonization'[137].

Given these above considerations, we leave Harmonization out of the purview of this thesis and concentrate on MRAs as a trade instrument with the potential to decrease international friction arising out of environmental standards, while having the potential to increase such standards. Furthermore, the consideration that mutual recognition may tend towards harmonization creates the opportunity for further research beyond the subject area of this thesis.

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[129] US – Tuna (Mexico)
[130] See US – Tuna cases (n 41)
[131] 'Home' (Inter-American Tropical Tuna Commission) <http://www.iattc.org> accessed on 14 June 2015
[132] 'H.R. 408 (105th): International Dolphin Conservation Program Act', (Govtrack.us) http://www.govtrack.us/congress/bills/105/hr408> accessed on 14 June 2015
[133] 'Dolphin Alert' (Greenpeace Foundation, 1996) <http://www.greenpeacefoundation.org/dolphinfalse.html> accessed on 14 June 2015
[134] International Dolphin Conservation Protection Act (1997), Section 2 (a) Purpose and Findings
[135] International Dolphin Conservation Protection Act (1997), Section 5 Amendments to Dolphin Protection Consumer Information Act
[136] The circumstances surrounding the US tuna embargo and the US – Tuna cases are discussed in details in Chapter 6.3.1 The New Approach
[137] Nicolaidis and Shaffer (n 6) 274

One further aspect must be clarified before moving on to the next section of this chapter. As the thesis analyses the concept of environmental standards in international and world trade, it is integral to the thesis that the compatibility of environmental standards, UEIs and MRAs, with WTO law be analysed as well. The thesis therefore discusses such compatibility at every opportunity[138].

The next section looks at the structure of the thesis to illustrate the continuity within the several themes prevalent in the thesis.

## 1.4 Structure of the Thesis

This thesis consists of nine substantive chapters followed by a concluding chapter. The following chapter, Chapter 2 elaborated on two necessary seminal concepts central to this thesis – the definition of Developed and Developing countries and the concept of environmental standards. Chapter 2 is dedicated to the elaboration of concepts and definitions[139].

Chapter 2 starts by defining Developed and Developing countries[140]. The friction between Developed and Developing countries stemming out of the effects of environmental standards on trade, is mentioned throughout the thesis, and the nature of the parties to such friction must be defined in order to truly understand the issues discussed. The chapter looks at the various categorizations found in international organisations such as the World Bank, International Monetary Fund (IMF), the United Nations Statistics Division (UNSD), the United Nations Development Program and the WTO, before stating the definition used in the thesis.

Chapter 2 next looks at the basic definition of standards[141]. The chapter finds the definition of standards to create a level of "quality or attainment" which is "required, aimed at, or possible"[142]. It

[138] For a discussion on the compatibility of environmental standards with WTO Law see Chapter 3.4 Looking at the WTO and Chapter 4 Standards as General Exceptions to the GATT; For a discussion on the compatibility of UEIs with WTO Law see Chapter 5.3.3 The Requirement of Necessity in WTO Jurisprudence; For a discussion on the compatibility of MRAs with WTO Law see Chapter 7.3 MRAs: The WTO Perspective
[139] See Chapter 2 Concepts and Definitions
[140] See Chapter 2 Section 2.2 The Categorization of Developed and Developing Countries
[141] See Chapter 2 Section 2.3 Standards

also looks at the definition provided by the International Organisation for Standardization (ISO)[143]. However, it may be argued that standards in certain international agreements such as the Rio Declaration environmental protection standard set for development processes[144] may not fall within such a definition. Furthermore International environmental norms may not fall under standards under these definitions. The chapter therefore looks towards a Dworkinian sense of standards in order to assess whether rules, principles and policies fall under the definition of standards. Dworkin's categorisation is convenient to the thesis as it expands the scope of the definition of standards to include those principles of environmental law which are often considered to be 'soft law'[145]. Chapter 2 then turns its attention to environmental standards specifically[146]. It discusses the definition provided by the Royal Commission on Environmental Pollution[147] before elaborating on the different forms of environmental standards[148].

Chapter 2 next looks at the WTO compatibility of Environmental Standards[149]. The chapter discusses the definition of international environmental standards under the WTO followed by the WTO compatibility of standards and standard setting agreements. It considers the standards which are perceived as technical barriers according to WTO rules and the provisions in the TBT Agreement which address this. The chapter also looks at WTO *plus* agreements containing standards of a higher level than those provided or accepted by the WTO.

Lastly, Chapter 2 looks at various principles of International Environmental Law[150], which are not only principles central to the thesis but often found in the form of standards themselves. An

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[142] See Chamber's Twentieth Century Dictionary 2000 pg 1611; See also The Concise Oxford English Dictionary 10th Edition, pg 1399

[143] 'Standards', (ISO) <http://www.iso.org/iso/home/standards.htm> accessed 29 June 2014

[144] Rio Declaration Principle 4

[145] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Ed, Oxford University Press, 2009) 25

[146] See Section 2.3.1 Environmental Standards

[147] Royal Commission on Environmental Pollution, 21st Report: Setting Environmental Standards (Royal Commission on Environmental Pollution, 1998) Para 1.16 <http://webarchive.nationalarchives.gov.uk/20110322143804/http://www.rcep.org.uk/reports/21-standards/documents/standards-full.pdf> accessed 29 June 2015

[148] See Chapter 2 Section 2.3.2 Forms of Standards

[149] See Chapter 2 Section 2.3.3 The WTO and Standards

[150] See Chapter 2 Section 2.4 International Principles of Environmental Law

example of this would be the concept of Sustainable Development often found as a standard in international environmental agreements, such as the Convention on Biological Diversity (CBD).

Having introduced the key concept of standards the thesis then turns its attention to the relationship between trade and the environment in Chapter 3[151]. It attempts to draw a relationship between the economic growth of a nation and its effect on environmental standards, initially using the Kuznets curve hypothesis as a starting point to the discussion[152]. The curve suggests that after a point in the economic growth of a nation (calculated using its GDP), termed as the "Tipping Point Income", environmental degradation decreases indirectly proportional to the income of a country[153]. This phenomenon could possibly be explained through Inglehart's theory of Post-materialism[154] which is discussed in Chapter 3[155]. The EKC and Inglehart's theory of post-materialism suggests that the demand for environmental standards may naturally flow from developed countries towards developing countries. Thus Developing countries tend to be 'standard takers'[156] i.e. exporting countries.

Chapter 3 next looks at the concept of Sustainable Development as an essential theory within the trade-environment nexus[157]. The discussion projects the two parameters of 'environmental capacity' and 'social sustainability' as essential to analysing trade instruments with the potential of increasing environmental standards while avoiding international friction between trading nations. However, the discussion also notices the differing levels of socially acceptable environmental harm in different countries, which could essentially lead to environment related international trade disputes.

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[151] See Chapter 3 Trade and Environment

[152] See Chapter 3 Section 3.2 The Environmental Kuznets Curve

[153] Nemat Shafik, 'Economic Development and Environmental Quality: An Econometric Analysis', (1994) 46 Oxford Economic Papers 757, 765

[154] Ronald F Inglehart, 'Changing Values among Western Publics from 1970 to 2006' (2008) 31 Western European Politics 130

[155] See Chapter 3 Section 3.2.1 Post-materialism

[156] Certain developing countries however, have participated in developing international standards within the ISO, by providing secretariats to technical committees of particular manufacturing industries. However, the general trend is for Developing Countries to be standard takers. See Khalid Nadvi, 'Global standards, global governance and the organisation of global value chains' (2008) 8 Journal of Economic Geography 323, 329-330

[157] See Chapter 3 Section 3.4 Sustainable Development and the Trade-Environment Relationship

Such disputes are often heard at the DSB of the WTO. Chapter 3 therefore looks at the WTO as an intermediary to trade-environment disputes[158]. It discusses the environmental drawbacks of banking on a trade organisation for settling environmentally inclined disputes and introduces Article XX of the GATT as the recourse taken by parties towards justifying environmental policies under the WTO[159] as these set of Articles form the General Exceptions to the GATT. Chapter 3 thereafter looks at the differing interests of Developed and Developing countries within the WTO[160] and interplay between such interests and international environmental treaty obligation[161].

As the General Exceptions to the GATT are so important to the admissibility of environmental policy and standards in international trade Chapter 4 is dedicated to the analysis of Article XX of the GATT[162]. As environmental standards may infringe general GATT principles, such as those in Articles I[163], II[164], III[165] and XI[166] the recourse for justifying environmental standards falls towards Article XX (b), (g) of the GATT and the Chapeau of Article XX. The jurisprudence surrounding Article XX is complex and continuously evolving (not least because of the organisational change of the multilateral trading platform from the GATT to the WTO). The thesis therefore analyses the various available GATT and WTO case-law, related to the environmental provisions of Article XX. This is done to derive the principles which shape the characteristics of environmental standards, which might stand the test of WTO law scrutiny.

Chapter 5 scrutinizes UEIs to highlight the characteristics of unilateral action in order to assess the points at which such instruments may lead to international dispute[167]. The chapter attempts to assess the UEIs to understand the importance of – (1) a more negotiated approach, in order to

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[158] See Chapter 3 Section 3.5 Looking at the WTO
[159] See Chapter 3 Section 3.5.1 Drawbacks of the WTO
[160] See Chapter 3 Section 3.5.2 The Differing Interests of Developed and Developing Countries
[161] See Chapter 3 Section 3.5.3 Global Linkages
[162] See Chapter 4 Standards as General Exceptions to the GATT
[163] General Agreement on Tariffs And Trade (May 1952) BISD I/14-15 (GATT) Article I: General Most-Favoured-Nation Treatment
[164] GATT Article II Schedules of Concessions
[165] GATT Article III: National Treatment on Internal Taxation and Regulation
[166] GATT Article XI: General Elimination of Quantitative Restrictions
[167] See Chapter 5 Unilateral Environmental Action

reduce international friction and diplomatic mistrust and (2) continued and optimal market access, in order to fulfil international trade obligations (such as those of the WTO) – and to understand their effect on the implementation of environmental standards in a globalized world economy[168].

Chapter 5 first categorizes UEAs according to the point of causation and where the effect is felt, thereby covering all transboundary circumstances[169]. The chapter explores the legality of unilateral action in International Law[170]. It highlights the question of permanent sovereignty of a State[171], the State's obligation towards other nations for environmental damage caused within its borders and the right to unilateral action for the non-fulfilment of such obligation[172], and the WTO compatibility of unilateral action[173]. If unilateral action, when taken by one State has an effect outside the jurisdiction of the implementing state, it may have international ramifications and become cause for dispute[174].

Having identified these characteristics the thesis then recommends MRAs for analysis in order to discuss whether the characteristics that lead to international dispute in the case of UEIs may be circumvented through certain characteristics prevalent in MRAs. MR is based on the principle of unencumbered sale of a product or service in one jurisdiction without having to comply with its regulations if such sale is lawfully permitted in another jurisdiction, subject to the existence of an agreement (an MRA). MRAs being reciprocal, negotiated agreements that are voluntarily discussed by parties intending to form such an agreement, the potential for politico-economic friction may be considerably reduced as compared to unilateralist trade distorting international instruments.

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[168] For a discussion on the requirement of these two factors to effectively implement environmental standards in world trade see Chapter 3 Trade and Environment ; For a discussion on the relationship of these two factors with UEIs see Chapter 5 Unilateral Environmental Action

[169] See Chapter 5 Section 5.2 Classifying Unilateral Environmental Action; by transboundary circumstances we mean environmental issues arising out of either internal or external causes and leading to external global (e.g. climate change) or, external or internal (e.g. transboundary water pollution) threat.

[170] See Chapter 5 Section 5.3 The Legality of UEAs

[171] See Chapter 5 Section 5.3.1 Permanent Sovereignty

[172] See Chapter 5 Section 5.3.2 Obligation towards other States for Internal Causation and UEAs arising out of Inaction

[173] See Chapter 5 Section 5.3.3 The Requirement of Necessity in WTO Jurisprudence

[174] Daniel Bodansky, 'Rules Versus Standards in International Environmental Law' 98 Am. Soc'y Int'l. L. Proc. 275 (2004) 276, 341

Chapter 6[175] discusses the concept of mutual recognition[176] before looking at the various forms of MR available and that most conducive to international trade[177]. The chapter seeks to analyse whether MRAs may indeed hold an advantage over UEIs, in international trade, in the context of reduced international friction regarding environmental standards. Finally, the chapter looks at two specific MRAs - The US-Japan MRA on organic products[178] and certain features of the NAFTA containing elements of MR which specifically concerning trade between the US and Mexico[179] in order to understand whether negotiations and market access is available in MRAs and whether that may affect international environmental standards in world trade.

Finally, Chapter 7[180] addresses two major issues that require discussion when examining MR and MRAs. Firstly, the horizontal transfer of power to another jurisdiction raises issues of sovereignty which the chapter attempts to address[181]. Secondly, the chapter looks at the WTO compatibility of MRAs[182]. MRAs are in effect agreements of preferential treatment where parties to the agreement exclusively recognize the standard of the other for products and services that then may be marketed within their jurisdiction. MRAs therefore must be seen in light of and in comparison to the most favoured nation (MFN) principle of the WTO[183]. The thesis discusses MRAs in the WTO context, especially regarding regional agreements *viz-à-viz* the MFN principle. It also analyses the potential of a conflict between a GATT provision allowing mutual agreement and other WTO provisions agreements preventing discrimination within Member States.

Chapter 8 finally concludes the discussion of the previous chapters by analysing and recapping the concept of environmental standards in International trade and comparing the two instruments of

[175] See Chapter 6 Mutual Recognition and Mutual Recognition Agreements
[176] See Chapter 6 Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements
[177] See Chapter 6 Section 6.3 Forms of Mutual Recognition
[178] See Chapter 6 Section 6.5.1 The US-Japan Mutual Recognition Agreement on Organic Products
[179] See Chapter 6 Section 6.5.2 Certain Features of the NAFTA Concerning Trade between the US and Mexico
[180] See Chapter 7 Mutual Recognition and International Law
[181] See Chapter 7 Section 7.2 Mutual Recognition and the Transfer of Sovereignty
[182] See Chapter 7 Section 7.3 MRAs: The WTO Perspective
[183] The MFN principle found in Article I GATT states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Preferential treatment of a specific country's products may potentially therefore be in conflict with this principle.

UEIs and MRAs to understand whether there is an advantage in a negotiated instrument over a unilateral instrument in reducing friction between developed and developing countries with regards to environmental standards.

## 1.5 Conclusion

This chapter lays the premise behind considering trade instruments which may have the potential to increase environmental standards. It discusses the differences between Free Trade and Environmentalism and the conflict between the two schools of thought. It also introduces the potential for conflict between developed and developing countries arising from the trade related aspects of environmental standards. This provides the basic theme for the thesis as the conflict arising out of the Trade-Environment nexus would be the backdrop for the discussion on instruments which implement environmental standards in trade.

The chapter then provides the methodology and research themes prevalent within the thesis. It also illustrates previous literature available on the subject as well as the point of departure from such literature leading to the novelty within this research. The chapter also attempt to justify the instruments chosen for analysis – UEIs and MRAs – while also justifying why Harmonization is an instrument used in the thesis exclusively as a tool of comparison to MRAs and not for individual detailed analysis of its own.

Finally, the chapter provides a skeletal structure of the thesis in the form of brief descriptions of the substantive chapters to follow. In that light, and as already revealed above, the next chapter looks at certain concepts and definitions important to the continuation of this thesis.

# 2. CONCEPTS AND DEFINITIONS

## 2.1 Introduction

The purpose of this chapter is to define one of the central concepts of this thesis – environmental standards. However, before the chapter does so, it takes the opportunity to clarify the relatively ambiguous distinction between developed and developing countries in International Law.

The preceding introductory chapter discussed the aims of the thesis and the intention to compare the performance of mutual recognition agreements (as a mode of transnational governance of environmental standards) with unilateral environmental instruments, in order to address environmental issues and their effectiveness in increasing environmental standards. Also, it briefly discussed the issue of developed and developing country friction, emanating from the imposition of standards in international trade.

To truly understand the issues related to the interplay of trade and environment we must understand the nature of the parties involved and their differing environmental and economic requirements and capacities, resulting from a different economic growth history. Such differences allow the categorization of countries into Developed, Developing and Least Developed (LDC) countries. Section 2.2 discusses the taxonomy used by different international institutions and organisations for the categorization of developed and developing countries before choosing one that is pertinent to the thesis.

The chapter then turns its attention to the concept of environmental standards. This concept is central to the thesis, which looks at certain instruments which implement environmental standards in international trade. In order to compare mutual recognition (MR) and Mutual Recognition Agreements (MRAs) with Unilateral Environmental Instruments (UEIs), in the context of environmental standards, it is necessary to first define what this thesis considers to be standards,

looking at the various kinds environmental standards available and the provisions governing them. Section 2.3 attempts to define the term ‘standards’ in general, in which the body of provisions considered to be environmental standards, lie. Section 2.3.1 then looks at environmental standards in detail, through a breakdown of the concept of standards eventually culminating to a definition of international environmental standards. .

Finally in section 2.4, we look at various principles of International Environmental Law which are required to be explained in order to further the discussions in this thesis such as the Precautionary Principle and the principle of Sustainable Development. This chapter has several overlaps with the following Chapter 3 on trade and environmental issues. The combination of these two chapters foreshadows a discussion on the two instruments of environmental standards discussed in this thesis – UEIs and MRAs.

## 2.2 The Categorization of Developed and Developing Countries

The lines between what consists of a Developing country and what would be considered a Developed country are significantly blurred. International institutions have differing criteria for making the distinction. Furthermore, certain institutions, the WTO included, provide certain benefits to developing countries and the identification of Developing countries are therefore an important exercise. In this section we look at some of the categorizations available to us in international law before selecting one conducive to this thesis.

The World Bank method of income group division categorizes countries according to their Gross National Income (GNI) per capita[184]. In basing a categorization of states through their economic status, by using a comparative single currency (the US Dollar in the case of the World Bank), necessary adjustments are required for exchange rate fluctuations. The World Bank makes such

[184] ‘How we Classify Countries’, (The World Bank) <http://data.worldbank.org/about/country-classifications> accessed on 29 June 2015

adjustments through a process known as the 'World Bank Atlas Method'[185]. This allows them to categorize countries into low income ($1,045 GNI or less), lower middle income (more than $1,045 to $4,125 GNI), upper middle income (more than $4,125 to less than $12,746 GNI), and high income ($12,746 GNI or more)[186]. The World Bank brackets lower and upper middle income countries as Developing countries[187].

The International Monetary Fund (IMF) categorizes the economic status of countries through a larger number of criterions. These criteria are based on (1) the per capita income level, (2) the export diversification and (3) the degree of integration into the global financial system[188]. The IMF categorizes countries as Advanced and, Emerging and Developing economies. The definition of Developing countries was initially decided by the IMFs Executive Board in 1975. Most members of the IMF (104 out of a total of 107) insisted on being categorized as Developing countries, as such a status would allow the use of special funds within the IMF[189]. Countries such as Singapore were also aware of the influence of such a categorization on the GATT system and the benefits thereof for being designated a Developing country rather than a developed one[190].

As of 2012 the IMF World Economic Outlook categorizes Advanced Economies into the sub-categories of Euro Area, Major Advanced Economies (G7), Newly Industrialized Asian Economies, Other Advanced Economies (Advanced Economies excluding G7 and Euro Area), and the European Union and Emerging and Developing Economies into Central and Eastern Europe, Commonwealth of

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[185] 'World Bank Atlas Method', (The World Bank) <http://data.worldbank.org/about/country-classifications/world-bank-atlas-method> accessed on 29 June 2015

[186] The 2015 index is based on the estimate of GNI per capita of categorized countries for the previous calendar year. The World Bank reviews its index on an annual basis. See 'How does the World Bank classify countries?', (The World Bank), <https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries> accessed 29 June 2015

[187] The World Bank, *How we Classify Countries* (n 184)

[188] 'How does the WEO categorize advanced versus emerging and developing economies?', (International Monetary Fund), World Economic Outlook (WEO), <http://www.imf.org/external/pubs/ft/weo/faq.htm#q4b> accessed on 29 June 2015

[189] Lynge Nielsen, 'Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done' (2011) International Monetary Fund Working Paper No 11/31, 15 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755448> accessed 29 June 2015

[190] Nielsen (n 189) 16

Independent States, Developing Asia, ASEAN-5, Latin America and the Caribbean, Middle East and North Africa, and finally Sub-Saharan Africa[191].

It is interesting to note the discrepancies between these two systems to illustrate the difficulty of choosing a benchmark for this thesis. The discrepancies come to light when comparing the position of developing countries in both, the IMF and the World Bank system of categorization. Let us consider the BRIC[192] nations as an example. Under the IMF categorization all four BRIC nations are categorized under 'Emerging Markets and Developing Economies'[193] while under the World Bank system Russia is categorized as a 'High Income Economy', Brazil and China as 'Upper Middle Income Economies' and India is categorized as a 'Lower Middle Income Economy'[194]. A more distinctive categorization and perhaps a more simplistic one may be required for the purpose of this thesis.

One such categorization may be found through the UN Statistics Division (UNSD). The UNSD classifies North America, Europe, Japan, Australia and New Zealand as the developed regions of the world. Developing regions include all other regions except an exhaustive list of LDCs[195]. However this is noted by the UN Statistics Department to be merely for statistical purposes and that "there is no established convention for the designation of "Developed" and "Developing" countries or areas in the United Nations system"[196].

The United Nations Development Program has an even simpler categorization of developed and developing countries without any LDC exceptions. This was first developed by the 2009 Human

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[191] 'Country Composition of WEO Groups', (International Monetary Fund), World Economic Outlook (WEO), <http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/groups.htm#wa> accessed on 29 June 2015

[192] The term BRIC refers to the "larger emerging market economies" of Brazil, Russia, India and China. The term was first coined by Jim O'Neill for the paper entitled 'Building Better Global Economic BRICs'; Jim O'Neill, 'Building Better Global Economic BRICs' (2001) Goldman Sachs Global Economics Paper No. 66 <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf> accessed 29 June 2015

[193] 'World Economic and Financial Surveys: World Economic Outlook Database', (International Monetary Fund) <http://www.imf.org/external/pubs/ft/weo/2014/01/weodata/index.aspx> accessed 29 June 2015

[194] 'Country and Lending Groups', (The World Bank) <http://data.worldbank.org/about/country-and-lending-groups> accessed 29 June 2015

[195] 'Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings' (United Nations Statistics Division) <http://unstats.un.org/unsd/methods/m49/m49regin.htm#developed> accessed on 29 June 2015

[196] See 'footnote c/' on webpage in (n 191)

Development Report[197]. Before the 2009 report, countries under the UNDP were categorized either as 'Industrial countries' or 'Developing countries'. The categorization of 'Industrial countries' was later replaced by: (1) member countries of the OECD and (2) countries in Central or Eastern Europe or members of the Commonwealth of Independent states[198].

Finally we look at the categorization prevalent within the WTO. Often in literature associated with the WTO, Developed countries are referred to as 'North' while Developing countries are referred to as 'South'. This still necessitates a look into how member states are categorized within the WTO. Primarily, Member States considering themselves to be Developing countries may declare this to the WTO[199]. Such a 'self-categorization' system allows Developing countries special benefits under the special and differential treatment provisions (S&D provisions)[200].

The basis for allowing such differential treatment may be found in the Agreement Establishing the World Trade Organisation (The WTO Agreement) which recognizes the "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"[201]. Another significant set of S&D provisions are found in Part IV (Trade and Development) of the GATT[202] – such as the principle of non-reciprocity in Article XXXVI:8[203]. As a result of non-reciprocity developing countries would not be expected to make trade commitments

[197] 'Human Development Report 2009 Overcoming barriers: Human mobility and development' (The United Nations Development Program), 21 <http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf> accessed 29 June 2015

[198] Nielsen (n 189) 8

[199] 'Who are the developing countries in the WTO?', (The World Trade Organisation), <http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 29 June 2015

[200] 'Special and differential treatment provisions', (The World Trade Organisation), http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions accessed 29 June 2015

[201] Agreement Establishing the World Trade Organisation (15 April 1994) 1867 U.N.T.S. 154, 33 I.L.M. 1144 (The WTO Agreement); Paragraph 2 of Chapeau

[202] General Agreement on Tariffs and Trade (May 1952) BISD I/14-15 (GATT); Part IV trade and Development

[203] GATT Article XXXVI.8

which were detrimental to their development, trade and financial requirements, notwithstanding the reciprocal commitments made by developed countries[204].[205]

However, the lack of obligations in Part IV meant that these provisions were persuasive at best[206]. It was only through the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause)[207], that a legal basis was provided for the Generalized System of Preferences and S&D provisions under GATT agreements[208].

However, such a pronouncement may be challenged by other Member States[209]. Furthermore, a declaration of developing status by a member state does not guarantee preference by developed member states under the Generalized System of Preference (GSP). A GSP agreement is the prerogative of the developed member state giving such preference and it is up to such a country to choose who they consider to be a developing country in need of such a benefit[210]. The WTO relies on the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) for a list of LDCs[211].

Considering the WTO links to the thesis, it would be prudent to use a simplistic North-South categorization similar to the terminology used in other WTO related literature. However, given the 'self-selection' basis of the WTO categorization, we use the UNDP formulation for developed and developing countries, when using the North-South terminology.

Having considered the taxonomy of the North-South categorization, the chapter now considers the second concept that necessarily needs to be defined – that of environmental standards. The section

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[204] Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?', (2004) Staff Working Paper ERSD-2004-03, World Trade Organisation Economic Research and Statistics Division, 4 <https://www.wto.org/ENGLISH/res_e/reser_e/ersd200403_e.htm> accessed 29 June 2015

[205] A WTO updated list of S&D Provisions may be found in: Committee on Trade and Development, 'Special and Differential Treatment Provisions in WTO Agreements and Decision' (2013) WT/COMTD/W/196

[206] Keck and Low (n 204) 4

[207] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (28 November 1979) L/4903

[208] Keck and Low (n 204) 5

[209] World Trade Organisation, *Who are the developing countries in the WTO?* (n 199)

[210] World Trade Organisation, *Who are the developing countries in the WTO?* (n 199)

[211] 'Least Developed Countries', (The World Trade Organisation), <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm >accessed 29 June 2015

starts with a discussion on standards in general before specifically discussing environmental standards.

## 2.3 Standards

This section starts with some basic dictionary definitions of the term standards. The Chamber's Twentieth Century Dictionary defines standards to be, "an established or accepted model; a degree or level of excellence, value, quality."[212] Similarly the Concise Oxford English Dictionary defines standards as a "level of quality or attainment; a required or agreed level of quality or attainment"[213]. In both these definitions, we find the creation of a level, one that is required or aimed at and thereby agreed to.

However, these definitions do not satisfy several potential points of enquiry. In the context of this thesis an important question pertains to standards as part of international agreements. Do these agreements create binding rules or are they policies with the further intention of creating binding rules? What of the principles of environmental law that are encapsulated in international agreements that clearly aim at required levels of environmental safeguards[214]? Would such principles be considered standards as well? Are they merely goals set for policy makers to reach? Do they have a larger, more binding nature where it is necessary to observe them in the interest of equity, fairness or justice? The above dictionary definitions also do not reveal the methods of achieving such a level.

Let us contrast these definitions with a more functional definition of a standard setting body – the International Organisation for Standardization (ISO). According to the ISO, a standard is "a document that provides requirements, specifications, guidelines or characteristics that can be used consistently

[212] 'standard', Chamber's 21st Century Dictionary (Chamber's Online, 2015) <http://www.chambers.co.uk/search.php?query=standard&title=21st> accessed 29 June 2015
[213] 'standard', The Concise Oxford English Dictionary (12th Edition, OUP 2011), 1407
[214] See Section 2.4 International Principles of Environmental Law

to ensure that materials, products, processes and services are fit for their purpose."[215] The ISO definition brings in the added dimension of documentation. According to this definition, a standard is no more an abstract level of quality or attainment but rather a tangible one.

However, it is fairly difficult to reconcile this requirement of a standard with the various standards mentioned in international agreements. Certain provisions clearly point at less tangible concepts and principles of environmental law as standards to be achieved. For example, Principle 4 of the Rio Declaration states that, "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[216] Clearly the Declaration places a level of sustainability related environmental protection on governmental development processes. Such a requirement would conform to the ordinary definition of standards but would be outside the purview of the ISO definition.

Similarly Article 4(b) of the 1992 UN Framework Convention on Climate Change requires members to 'Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change."[217] It does not however provide any specifications or guidelines to do so.

The ISO definition may therefore be seen as a definition for only certain forms of standard convenient to the requirements and workings of this standard setting body. As will be seen later in this chapter there are several other forms of standards available (we discuss this in the case of environmental standards exclusively) which include requirements beyond usual product and process

[215] 'Standards', (ISO) <http://www.iso.org/iso/home/standards.htm> accessed 29 June 2014
[216] The Rio Declaration on Environment and Development (1992) (Rio Declaration) (U.N. Doc A/Conf.151/5/Rev.1); Principle 4
[217] United Nations Framework Convention on Climate Change (1992) (UNFCCC) U.N. Doc. A/AC.237/18 (Part II)/Add.1 Article 4(b)

requirements[218]. In order to find a definition of standards conducive to the thesis we must look beyond the specific definitions related to different forms of standards (we come back to them in the next section) and look for a definition larger in scope.

A necessary clarification at this point is that the term 'standard' and the term 'norm' are often used interchangeably in discussions of this nature. For example, Beyerlin in his analysis of norms in international environmental law clarifies that his concept of norms is different only in terminology to Dworkin's concept of standards[219]. Bodansky provides a slightly different categorization. He uses the term standards for identifying 'less precise' norms distinct from 'precise' rules[220].

A broader definition of standards may be found within Dworkin's arguments on *Legal Positivism*[221]. This thesis uses Dworkin's arguments related to positivism[222] only to the extent of his definition of standards, in order to build a definition of the term 'standards' for the thesis itself. Due to the requirements of clarity and space, the thesis does not go any further into Dworkin's arguments on positivism.

According to Dworkin, standards consist of rules, principles and policies[223]. Dworkin categorizes standards in his general discussion on rules, and essentially through a counterargument to Hart's positivism structure[224]. The wide scope provided by Dworkin may be favourable to the concept of standards depended upon in this thesis. It would allow for a broader scope to interpret standards as interchangeable with norms in this thesis, allowing a broader set of instruments to be analysed in the context of international trade and environment.

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[218] See Section 2.3.2 Forms of Standards

[219] Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law' in Bodansky et. al (eds.), *The Oxford Handbook of International Environmental Law* (OUP 2007) 427

[220] Daniel Bodansky, 'Rules Versus Standards in International Environmental Law' (2004) 98 American Society of International Law Proceedings 275, 276

[221] Legal Positivism is "[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law"; 'legal positivism, *n.*' Black's Law Dictionary (9th Ed, Thomson Reuters 2009) 978

[222] Dworkin uses his categorization of standards in aid of a criticism of positivism, especially with regards to the arguments put forward by Hart. Ronald Dworkin, *Taking Rights Seriously* (9th Impression, Duckworth 2005) 22

[223] Dworkin, (n 222) 22

[224] Dworkin, (n 222) 27

To Dworkin, the term 'principle' represented 'the whole set of standards other than rules'[225]. However, Dworkin did make a distinction between principles and policies (policies were of course not rules but rather within the category of principles when used in the general sense of 'standards other than rules'). 'Policies' were those standards that 'set out a goal to be reached' – goals that lead to any economic, political or social improvement[226]. 'Principles' in this specific context therefore became standards that needed to be observed not because, unlike a policy, it led to any form of economic, political or social improvement, but rather as a requirement of justice or fairness or, as Dworkin puts it – some other dimension of morality[227].

This leads to the question of what a 'rule' is. Dworkin does deliberate the difference between a legal rule and a legal principle. According to him, "[b]oth sets of standards point to a particular decision about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer must be accepted, or it is not, in which case it contributes nothing to the decision"[228]. In comparison a legal principle will not set out legal consequences that follow automatically when the conditions provided are met.[229] Altogether, to Dworkin, the term standards encompassed his concept of principles, policies and of course rules.

However, Dworkin is also quick to acknowledge that at times it may not be clear from the form of the standard, whether it is a rule or a principle. Sometimes a rule and a principle can play much the same role and the difference between them is almost a matter of form alone[230]. This concept has been agreed with by academics such as MacCormick. According to MacCormick a rule's appearance as a principle is dependent on the coherence of the rule itself. Therefore, if a set of rules, consistent with a standard (MacCormick prefers the term 'norms'), is considered to be a 'specific or concrete

[225] Dworkin, (n 222) 22
[226] Dworkin, (n 222) 22
[227] Dworkin, (n 222) 22
[228] Dworkin, (n 222) 24
[229] Dworkin, (n 222) 25
[230] Dworkin, (n 222) 27

manifestation' of it and one that appears to be a sensible then such a standard may be considered a 'principle' thereby justifying all or any of the specific rules encompassed by it[231].

Similarly, Raz acknowledges the interchangeability of rules and principles, only distinguishing 'principles' as norms of 'greater generality and greater importance' than rules. Such distinctions, in his opinion are devoid of philosophical importance[232]. As Aarnio puts it, principles and rules have a similar or analogical role in legal discretion. He concurs with Raz on the greater generality of principles over rules and that the value content of principles is more apparent, but recognizes no other characteristics to distinguish them[233]. Therefore MacCormick, Raz and Arnio are in agreement with Dworkin with the claim that rules and principles show only a difference in degree as both are forms of standards.

In essence therefore, it is possible to define standards through the context of the above discussion. We find standards to be a general assortment of rules, principles and policies. Dworkin's categorisation is convenient to the thesis as it creates an increased scope for the definition of standards, that do not merely limit environmental standards to legally enforceable limits alone but extends the definition to certain principles found in environmental law which, due to the character of international environmental law, are often relegated to 'soft law'. Soft law is often considered to be 'the articulation of norms in written form'[234].

Also, by adopting this broad approach to the definition of standards in general, we may not be required to analyse the discrepancies within the approaches of positivism and indeed Dworkin's criticism of them. Therefore, nuances between principles, policies and rules are of less concern to us than are the other forms of categorization that environmental standards are subject to. For example, it is outside the scope of this thesis to consider whether sustainable development is a political goal

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[231] Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP, 2003) 152
[232] Joseph Raz, *Practical Reason and Norms* (OUP 1999) 49
[233] Aulis Aarnio, 'Taking Rules Seriously', in Werner Maihofer and Gerhard Sprenger (eds.), *Law and the States in Modern Times: Proceedings of the Fourteenth IVR World Congress in Edinburgh, August 1989* (Franz Steiner Verlag Stuttgart, 1990) 181
[234] Patricia Birnie, Alan Boyle and Catherine Redgwell, International Law and the Environment (3rd Ed, Oxford University Press, 2009) 25

or has ‘matured’ into a legal principle, as has been considered by Beyerlin[235]. Rather, we may consider the inclusion of sustainable development goals within a treaty or an agreement to be a standard and therefore look to its analysis through the lens of implementation.

To do this we must first dwell briefly on the different forms of environmental standards available to us. An exact definition of international environmental standards is hard to come by, but what consists of a standard is possible to determine, through the subject areas addressed by standard setting documents (such as international treaties). A definition of specific forms of standards (such as environmental quality standards) is more easily available, but to look at specific standards before discussing a broader definition of environmental standards leaves us with a problem similar to the one looked at in the previous section (compare the ISO definition provided, to the broader picture of the Dworkin discussion). We must first seek a more general definition before venturing towards the specific distinctions of different forms of standards.

### 2.3.1 Environmental Standards

To understand and define environmental standards we do look at the different forms of standards available. This we do in the following section. Environmental concern itself has changed significantly as a result of globalisation. Traditional concern was regarding more immediate effects to human health by local environmental factors such as water and air pollution. However, with the simultaneous globalisation of environmental realization and environmental problems to and accruing from a globalisation of trade, environmental concern shifted to more long term and less obvious forms of environmental degradation such as climate change and extinction of species due to habitat loss as a result of global trade chains, which require international and coordinated action[236].

[235] Beyerlin, (n 219) 436

[236] Royal Commission on Environmental Pollution, Environmental Standards and Public Values: A Summary of the Twenty First Report of the Royal Commission on Environmental Pollution (Royal Commission on Environmental Pollution, 1998) 11

A convenient point to start a discussion of Environmental standards is the 21st Report of the Royal Commission on Environmental Pollution[237]. In this section we look at the definition as well as the categorization of such standards. We provide this categorization along with examples of such standards in international trade.

The 21st Report of the Royal Commission on Environmental Pollution defines environmental standards as "any judgement about the acceptability of environmental modifications resulting from human activities which fulfil both the following conditions: (1) It is formally stated after some consideration and intended to apply generally to a defined class of cases and; (2) because of its relationship to certain sanctions, rewards or values, it can be expected to assert an influence, direct or indirect, on activities that affect the environment"[238]

One may observe an almost Dworkinian scope in the Report's definition of Environmental Standards. The use of the word judgement, rather than specifying a document, illustrates the intention of the Commission to broaden the scope of the definition of environmental standards. The Commission admits in its Report that the term environmental standards was used, 'broadly to include standards which are not mandatory but contained in guidelines, codes of practice or sets of criteria for deciding individual cases; standards not set by governments which carry authority for other reasons, especially the scientific eminence or market power of those who set them; and some standards which are not numerical.'[239] This is clearly in line with the intention of the thesis and the discussion in the previous section.

The definition also reveals two other characteristics of environmental standards. First, it is formally stated after some consideration. This might imply pre-agreement negotiations in the case of International Environmental Standards or the methodology in arriving at them. The standard is also

[237] Royal Commission on Environmental Pollution, 21st Report: Setting Environmental Standards (Royal Commission on Environmental Pollution, 1998) <http://webarchive.nationalarchives.gov.uk/20110322143804/http://www.rcep.org.uk/reports/21-standards/documents/standards-full.pdf> accessed 29 June 2015

[238] 21st Report of the Royal Commission on Environmental Pollution (n 237) Para 1.16

[239] 21st Report of the Royal Commission on Environmental Pollution (n 237) Para 1.15

said to be applicable to a defined class of cases, indicating the variability in the kinds of standards available and which will be discussed in following paragraphs.

Secondly, the definition connects standards to sanctions, rewards and values and thereby naturally infers the influence such a condition may have to activities affecting the environment. If such activities are trade related, then such influence may lead to consequences for international trade negotiations and the general friction arising from the North-South concerns regarding the influence of standards.

Sanctions, rewards and values may be more prevalent in national legislations as they are often looked upon as technical barriers to trade in international agreements. However certain international agreements have such sanctions prevalent and agreed upon by parties to such agreement. An example would be the economic sanctions associated with environmental issues attached to the NAFTA through the North American Agreement on Environmental Cooperation (a side agreement to the NAFTA). Through Article 36 of the side agreement, Parties may suspend benefits if a Party fails to pay a monetary enforcement assessment imposed by a panel[240]. Such monetary enforcement arises out of a series of procedures[241] due to 'a persistent pattern of failure' by a Party to effectively enforce its environmental law[242].

As mentioned earlier, the definition of environmental standards in the Report is broad in scope. The ambiguities that arose from the various definitions of standards in the previous section may be reconciled by this fact. According to the Report environmental standards may be statutory standards such as emission limits and Environmental Quality Standards as well as non-statutory protocols,

[240] North American Agreement on Environmental Cooperation (1993) 32 ILM 1482 (NAAEC); Article 36
[241] NAAEC (n 240); Part 5
[242] NAAEC (n 240); Article 22

guidelines and targets[243]. However, neither of these categories includes principles of International Environmental Law, and therefore, we look at these principles separately in a later section[244].

The Report primarily divides standards using the criterion of direct and indirect effect on environmental modification. It first categorizes standards to those related to 'pathway points' of a substance and their effect on contact with an 'entity susceptible to damage' at that point[245]. The second category contains standards indirectly related to environmental modification.[246] Later chapters in this thesis notice (and discuss) a higher degree of international disagreement in relation to the second category of standards when they affect trade. This discussion is most relevant to the North-South disagreements on PPMs and nprPPMs[247]. The following section discusses some of the relevant forms included in each along with suitable examples of international standards.

### 2.3.2 Forms of Standards

Pathway point standards are some of the more recognizable and prevalent standards, especially in the context of national regulations. These include the various air water, soil and biota related standards available. Examples of national regulations are abundant in these forms. However, considering that the thesis primarily concerns international standards, we also provide examples from international agreements. This section looks at three types of pathway point standards – quality, emission and product standards. The section then looks at process and life cycle analysis standards, which are often an important point of contention in international North-South trade discussions.

Note also that wherever possible, the section substantiates the discussion with definitions from the UN Glossary. This is not only because of the significance of the UN as an international organisation,

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[243] Summary of 21st report (n 236) 10
[244] See Section 2.4 International Principles of Environmental Law
[245] 21st Report of the Royal Commission on Environmental Pollution (n 237) Para 1.18
[246] 21st Report of the Royal Commission on Environmental Pollution (n 237) Para 1.18
[247] Process and Production Method (PPMs) and Non-Product Related Process and Production Methods (nprPPMs); PPMs and the controversy surrounding nprPPMs have been discussed below in Section 2.3.3.2.1 PPMs.

but also of the WTO recognition of such definitions. For example, Article 1.1 of the Agreement on Technical Barriers to Trade provides that, "[g]eneral terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement."[248]

Environmental quality standards are defined by the UN to be "a limit for environmental disturbances; in particular, from ambient concentration of pollutants and wastes that determines the maximum allowable degradation of environmental media."[249] This is also a definition relied on by the OECD[250]. This definition of standards, however, is not explicit about the environmental entities it covers. It allows the determination of a limiting level to environmental degradation but fails to specify the 'environmental media' it refers to.

The EU regards environmental quality standards to be, "the concentration of a particular pollutant or group of pollutants in water, sediment (any material transported by water and settled to the bottom) or biota (all living organisms of an area) which should not be exceeded in order to protect human health and the environment".[251] This definition is more specific regarding the environmental entities it refers to. It noticeably omits air pollution from its definition. It also adds an anthropocentric dimension to the eco-centric purpose of a quality standard. This is reflective of the types of environmental concern that instigates environmental action and is discussed later in the thesis[252].

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[248] Agreement on Technical Barriers to Trade (1 January 1980) BISD 26S/8 (TBT Agreement); Article 1.1 General Provisions
[249] 'Glossary of Environment Statistics', Department for Economic and Social Information and Policy Analysis (1997) ST/ESE/STAT/SER.F/67, 30
[250] 'Environmental Quality Standard', (Glossary of Statistical Terms, OECD) <https://stats.oecd.org/glossary/detail.asp?ID=838> accessed 29 June 2015
[251] 'Environmental Quality Standards' (European Commission) <http://ihcp.jrc.ec.europa.eu/our_activities/public-health/eqs> accessed 29 June 2015
[252] See Chapter 3 Section 3.3 Sustainable Development and the Trade – Environment Relationship

The ISO set of standards for soil quality are an example of international environmental quality standards[253]. These contain standards for particle density in the soil[254] and determination of water retention characteristics[255], and sampling requirements including guidance[256] and quality control and assurance[257]. The ISO also has a separate set of standards for soil contamination providing various investigation and technique standards[258].

Another international set of guidelines, and one related to controlling pollutants effecting biota, are the JAMP Guidelines for Monitoring Contaminants in Biota[259] formulated under the OSPAR Convention[260]. The guidelines contain provisions for sampling and analysis of contaminants in fish, shellfish and seabird eggs[261]. The guidelines provide a species specific pollutant level analysis[262] with sampling guidelines.

Examples of national standards include EC quality standards for bathing waters in the 2006 Bathing Water Directive[263]. The Directive creates obligations for Member States to assess bathing water setting out levels of assessment[264] and procedures for calculating such levels[265].

The subject of air pollution could possibly be argued to fall under UN definition of Quality standards, had in not been for a separate categorization of emission standards within the UN glossary of terms. Emission standards, as defined by the UN, are "the maximum amount of polluting discharge legally allowed from a single source, mobile or stationary"[266], which appears to be a general definition

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[253] Soil Quality [ISO/TC 190]
[254] Soil Quality – Determination of particle density [ISO 11508:1998]
[255] Soil quality – Determination of the water-retention characteristic – Laboratory methods [ISO 11274:1998]
[256] Soil quality – Sampling – Part 2: Guidance on sampling techniques [ISO 10381-2:2002]
[257] Soil quality – Sampling – Part 106: Quality control and quality assurance [ISO/CD 18400-106]
[258] Geotechnics [ISO/TC 182]
[259] 'CEMP Monitoring Manual' (Ospar Commission) <http://www.ospar.org/content/content.asp?menu=00900301400135_000000_000000> accessed 29 June 2015
[260] The OSPAR Convention is an international agreement for the protection of the marine environment of the North-East Atlantic. 'OSPAR Convention' (OSPAR Commission) <http://www.ospar.org/content/content.asp?menu=00340108070000_000000_000000> accessed 29 June 2015
[261] JAMP Guidelines (Agreement 1999-2); Section 1 Introduction
[262] JAMP Guidelines (n 261) Section 4.2 Sampling Strategy for Temporal Trend Monitoring
[263] Directive of the European Parliament and of the Council 2006/7/EC concerning the Management of bathing water quality and repealing Directive 76/160/EEC [2006] OJ L64/37 (Bath Water Directive)
[264] Bath Water Directive (n 263) Article 4 Bathing Water Quality Assessment
[265] Bath Water Directive (n 263) Annex II Bathing Water Assessment and Classification
[266] Glossary of Environment Statistics (n 249) 27

similar to that of quality standards were it not for the definition of 'Emissions' within the same document. The term 'emissions' is defined to be the "discharge of pollutants into the atmosphere from stationary […] and mobile sources"[267].

The United Nations Framework Convention on Climate Change (UNFCCC) is an important example of an international agreement suggesting emission standards. Article 2 of the convention states its 'ultimate objective' is to stabilize greenhouse gas concentrations in the atmosphere. The level the UNFCCC aims to achieve is one that would 'prevent dangerous anthropogenic interference with the climate system'[268]. The UNFCC aims to achieve these objectives through several agreements; the most important and widest in terms of parties is the Kyoto protocol. The protocol aims at reducing a listed set of greenhouse gasses (GHGs)[269] through binding emission limits[270] on Annex I countries of the UNFCCC[271].

The United Nations Economic Commission for Europe is another UNFCCC supervised international organisation containing eight protocols to date, related to emission standards[272]. Another example of an international set of guidelines for emission standards is the 2005 World Health Organisation (WHO) Guideline for Particulate matter, Ozone, Nitrogen dioxide and Sulphur dioxide. The guidelines provide recommended levels of each substance as well as target levels[273].

Product standards according to the 21st Report are those that 'specifying the composition of a product'[274]. The TBT Agreement definition of both technical regulations[275] and standards[276] are concerned with product standards as well. Both definitions elaborate on the meaning of product

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[267] Glossary of Environment Statistics (n 249) 27
[268] UNFCCC Article 2.
[269] Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) UN Doc FCCC/CP/1997/7/Add. (Kyoto Protocol) Annex A
[270] Kyoto Protocol Annex B.
[271] 'List of Annex I Countries' (UNFCCC) <https://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php> accessed 29 June 2015
[272] 'Protocols' (UNECE) <http://www.unece.org/env/lrtap/status/lrtap_s.html> accessed 29 June 2015
[273] 'Guideline for Particulate matter, Ozone, Nitrogen dioxide and Sulphur dioxide' (WHO) <http://whqlibdoc.who.int/hq/2006/WHO_SDE_PHE_OEH_06.02_eng.pdf?ua=1> accessed 29 June 2015
[274] 21st Report of the Royal Commission on Environmental Pollution (n 216) 4
[275] TBT Agreement Annex 1.1
[276] TBT Agreement Annex 1.2

composition by stating that such standards are “document[s] which lays down product characteristics or their related processes and production methods”.[277] Such standards aim to protect the environment and the consumer from potential damage from either the product itself or a substance in the product[278]. Such standards are distinguished from process and life cycle standards as they are related to the end product and are detectable at that point[279]. Regulations controlling substance levels in products for human consumption (such as food products and drinking water) are common examples of such standards.

The EU Drinking Water Directive[280] is an example of a legislation providing such product quality standards which sets various levels of microbial and chemical substances in drinking water. A similar example from a developing country would be the Indian Standards for Drinking Water which includes tolerance limits of substances in drinking water[281].

Process standards identify a set or sets of techniques for a specified industrial process[282]. They are often related to Life cycle-based standards which set certain criteria that the life cycle of a product should satisfy[283]. These may influence the end product just as in product standards, however, the standard applied at a point in the processing or life cycle of the product may not be detectable in the end product itself[284].

Various eco labelling schemes fall under this category, as labels are designed to indicate a processing or life cycle standard that may not be otherwise visible to the consumer. An example of such eco labels is the Nordic Swan[285] eco label, governed by the Nordic Council[286], an inter-parliamentary

[277] We look at the TBT Agreement in detail in Section 2.3.3.2 Standards and Technical Barriers to Trade
[278] Nathalie Bernasconi-Osterwalder et.al. (eds.), *Environment and Trade: A Guide to WTO Jurisprudence* (Earthscan 2005) 204
[279] Bernasconi-Osterwalder et.al. (n 278) 204.
[280] Council Directive 98/83/EC on the quality of water intended for human consumption [1998] OJ L 330/32
[281] Indian Standard: Drinking Water – Specifications, Bureau of Indian Standards [IS: 10500: 2012]
[282] 21st Report of the Royal Commission on Environmental Pollution (n 237) 5
[283] 21st Report of the Royal Commission on Environmental Pollution (n 237) 5
[284] Bernasconi-Osterwalder et.al. (n 278) 205
[285] ‘Home’ (Nordic Ecolabelling) <http://www.nordic-ecolabel.org/> accessed on 29 June 2015
[286] ‘Norden (Nordic Council)’, (Official Co-operation in the Nordic Region) <http://www.norden.org/en> accessed on 29 June 2015

forum of elected members of Nordic countries. The Nordic Eco label evaluates the environmental impact of a product through its entire life cycle, providing criterion to ensure that climate requirements are taken into account, and that CO2 emissions (and other harmful gasses) are limited[287].

Discriminating products through life cycle analysis and thereby their process and production methods (PPMs) are a contentious issue within the WTO. There are two distinguishable forms of PPMs. The distinguishing factor is dependent on whether such PPM requirements affect the characteristic of the end product only (PPM) or whether it affects a part of the production system and is not dependant on the characteristics of the end product (nprPPM). WTO Members generally agree that if end products (that are otherwise 'like products') can be distinguished because of their PPMs then criterion may be placed on the method of production and processing under WTO rules[288]. However, measures, based on nprPPMs that leave no apparent distinguishable feature on the end product are subject to vigorous debate between Member States. WTO rules explicitly prohibit the discrimination of like products and WTO jurisprudence has often deliberated on this matter. Section 2.3.3.2.1 of this chapter further examines the issue of standards with regards to PPMs and 'like products'.

### 2.3.3 The WTO and Standards

The chapter now turns its attention to the WTO compatibility of environmental standards and their interpretation in different WTO agreements. We first look at the definition of international environmental standards under the WTO. This is followed by a discussion on the WTO compatibility of standards and standard setting agreements. The discussion then looks at the standards perceived as technical barriers to trade followed by the provisions in the TBT Agreement that address this.

[287] 'Product Groups' (Nordic Ecolabelling) <http://www.nordic-ecolabel.org/criteria/product-groups/> accessed 29 June 2015

[288] 'Labelling', (The World Trade Organisation) <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> accessed on 29 June 2015

The WTO is not a standard setting body but a legal regime supervising their effects on trade[289]. The WTO acknowledges the standards of specific international standard setting bodies and organisations and looks towards such organisation to define the term 'international standards'. In *US — Tuna II (Mexico)* the Panel deliberated thus:

> "The term 'international standard' is not defined in Annex 1 of the TBT Agreement, but is defined in the ISO/IEC Guide 2. In accordance with the terms of Annex 1, in the absence of a specific definition of this term in Annex 1, the term 'international standard' should be understood to have the same meaning in the TBT Agreement as in the ISO/IEC Guide 2, which defines it as a 'standard that is adopted by an international standardizing/standards organisation and made available to the public"[290].

This necessitates an identification of relevant international standards organisations. To list the organisations relevant to environmental standards requires a reading of certain WTO agreements and documents. We first look at the WTO Agreements with provisions relating to international standards and the corresponding WTO jurisprudence. Specifically we look at Article 3.1 and Annex A of the SPS Agreement, and Annex 1.1 and Annex 1.2 of the TBT Agreement. Thereafter, we look at the certain GATT/WTO documents which list such international standards and standardization organisations.

We start with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement provides that Member States must attempt to harmonize their sanitary and phytosanitary measures as widely as possible. To facilitate this, Member States are advised to source their sanitary or phytosanitary measures from international standards, guidelines

[289] Humberto Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards*, (Kluwer Law International 2011) 18

[290] United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Report of the Appellate Body) (16 May 2012) WTO WT/DS381/AB/R (US – Tuna II (Mexico)) Para 7.663

or recommendations[291]. The Appellate Body in *Canada — Continued Suspension* noted that the relevant "international standards, guidelines or recommendations" that are referred to, are those set by the international organisations listed in Annex A paragraph 3 of the SPS Agreement[292].

Annex A Paragraph 3 is as follows:

> "Annex A Definitions
>
> 3. International standards, guidelines and recommendations
>
> (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
>
> (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
>
> (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organisations operating within the framework of the International Plant Protection Convention; and
>
> (d) for matters not covered by the above organisations, appropriate standards, guidelines and recommendations promulgated by other relevant international organisations open for membership to all Members, as identified by the Committee."[293]

[291] The Agreement on the Application of Sanitary and Phytosanitary Measures (April 1994) LT/UR/A-1A/12 (SPS Agreement) Article 3.1
[292] Canada — Continued Suspension of Obligations in the EC — Hormones Dispute (16 October 2008) (Appellate Body) WT/DS321/AB/R (Canada – Continued Suspension) Para 532
[293] SPS Agreement Annex A.3

It is worth noting that the WTO has not identified any 'other' relevant international organisation under 3(d). According to Schroder, this may be because there is "little regulatory space not covered" by the three organisations mentioned in the Annex[294].

The concept of standards may also be determined by the definition of technical regulations and standards found in the TBT Agreement. The TBT Agreement covers both mandatory as well as voluntary standards. However, the terminology used in the TBT Agreement is slightly different. A mandatory standard within the TBT Agreement is referred to as a 'Technical regulation' while voluntary standard are referred to as a 'Standard'. The Explanatory note to Article Annex 1.2 explains this terminology:

"The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents."[295] This connection has later been endorsed by the AB in *EC – Sardines*[296].

Technical regulations under the TBT Agreement are, "Document[s] which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory."[297] TBT standards are similarly documents but in this case are approved by a "recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory."[298]

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[294] Schroder (n 289) 64
[295] TBT Agreement Explanatory note Annex 1.2
[296] European Communities – Trade Description of Sardines (Report of the Panel) (28 May 2002) WT/DS231/R (EC – Sardines) Para 224
[297] TBT Agreement Annex 1.1
[298] TBT Agreement Annex 1.2

Noticeably, the TBT Annexes, and indeed the TBT Agreement itself, do not specify any standard setting organisations. However, as mentioned above there are other GATT/WTO documents that may provide a connection with international standard setting bodies/organisations. Schroder lists a total of four such documents[299]. These are the 'Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade'[300], the 'List of International Standardizing Bodies for purposes of Articles 10.4 and 13.3 of the [Tokyo Round Standards] Agreement'[301], the 'Information provided by bodies involved in the preparation of international standards'[302] and the 'Second TBT Triennial Review'[303]. The organisations most relevant to a discussion on environmental standards found in these four lists are the Food and Agriculture Organisation (FAO), ISO, the International Civil Aviation Organisation (ICAO), the International Maritime Organisation (IMO), the Codex Alimentarius Commission[304], the OECD, the World Organisation of Animal Health (OIE), the World Health Organisation (WHO) and the United Nations Economic Commission for Europe (UNECE)[305].

Recounting the *US — Tuna II (Mexico)* judgement, standards set by these bodies would be considered international standards in terms of the WTO regime. This determines the interpretation of international environmental standards within the WTO. However, it does not provide for a discussion on the governance and compatibility of standards created by members in bilateral and plurilateral agreements[306]. The following sections look at the WTO provisions that may be problematic to the formation of trade affecting environmental standards and the provisions that may allow a digression from relevant WTO obligations.

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[299] Schroder (n 289) 65-67

[300] 'Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade', Drafting Group on Standards (30 December 1971) GATT Doc. Spec (71) 143

[301] 'List of International Standardizing Bodies for purposes of Articles 10.4 and 13.3 of the Agreement', Note by the Secretariat (5 June 1980) GATT Doc. TBT/W/8

[302] 'Information provided by Bodies involved in the preparation of International Standards', Committee on Technical Barriers to Trade (26 March 1999) WTO Doc. G/TBT/W/106, Para 1

[303] 'The Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade', Committee on Technical Barriers to Trade (13 November 2000) WTO Doc. G/TBT/9

[304] The FAO and WHO jointly administer the Codex Alimentarius

[305] The above discussion therefore lists the various organisations considered to be standard setting bodies and organisations under the WTO regime. Those listed in this section are the ones relevant to environmental standards. Several of the organisations such as the Codex Alimentarius and the WHO overlap amongst the four documents mentioned in (n 284-287)

[306] See for example the standards created within the NAFTA; Chapter 6 Section 6.5.2 Certain Features of the NAFTA Concerning Trade between the US and Mexico

## 2.3.3.1 The Compatibility of Standards with the WTO

The problem of compatibility arises due to the fact that standards in bilateral/plurilateral agreements may be regarded as quantitative restrictions. The GATT generally eliminates quantitative restrictions of any kind in the trade of goods. GATT Article XI.1 (The General Elimination of Quantitative Restrictions) states that:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."[307]

The reason behind this intention to eliminate quantitative restrictions is recognized by the Panel in *Turkey — Textiles*[308]. The Panel acknowledges that it is tariffs rather than quantitative restrictions that are GATT's border protection 'of choice'[309]. According to them, "Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade-distorting effect, their allocation can be problematic and their administration may not be transparent."[310]

The question therefore arises, whether 'standards' would fall within the meaning of the term 'prohibitions or restriction' as stated in Article XI.1 GATT. According to the Panel in *Japan — Trade in Semiconductors*, the wording of Article XI:1 is comprehensive and applies "to all measures instituted

[307] General Agreement on Tariffs and Trade (May 1952) BISD I/14-15 (GATT); Article XI.1
[308] Turkey – Restrictions on Imports of Textile and Clothing Products (Panel Report) (31 My 1999) WT/DS34/R (Turkey – Textiles)
[309] Turkey – Textiles Para 9.63
[310] Turkey – Textiles Para 9.63

or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges”.[311]

The Panel in *India – Quantitative Restrictions* concurred with this view admitting that “the text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions ‘other than duties, taxes or other charges’. […] The scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation’”.[312]

The Panel in India — Autos deliberates that,

> “whether [a] measure can appropriately be described as a restriction on importation turns on the issue of whether Article XI can be considered to cover situations where products are technically allowed into the market without an express formal quantitative restriction, but are only allowed under certain conditions which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import.
>
> On a plain reading, it is clear that a ‘restriction’ need not be a blanket prohibition or a precise numerical limit. Indeed, the term ‘restriction’ cannot mean merely ‘prohibitions’ on importation, since Article XI:1 expressly covers both ‘prohibition and restriction’. Furthermore, the Panel considers that the expression ‘limiting condition’ used by the *India — Quantitative Restrictions* panel to define the term ‘restriction’ and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is

[311] Japan – Trade in Semi-conductors (Report of the Panel) (24 March 1988) L/6309 - 35S/116 (Japan – Semi Conductors) Para 104

[312] India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Report of the Panel) (06 April 1999) WT/DS90/R (India – Quantitative restrictions) Para 5.129

limiting i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself."[313]

Could this concept of 'limiting effect' also be extended to environmental standards? The facts in the *US — Shrimp* case is a useful example at this juncture. The US imposed an import ban on shrimp and shrimp products harvested by vessels of foreign nations where such exporting country had not been certified by United States' authorities as using methods not leading to the incidental killing of sea turtles above certain levels[314]. Bearing in mind the discussions earlier in this chapter, the US provision could qualify as an environmental standard.

Considering the provisions, the Panel regarded that, "[the US provision in question] expressly requires the imposition of an import ban on imports from non-certified countries. […] The United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be 'prohibitions or restrictions' within the meaning of Article XI."[315] The Panel found that the United States violated Article XI[316]

As the Panel noted in *Brazil — Re-treaded Tyres*, "[t]here is no ambiguity as to what 'prohibitions' on importation means: Members shall not forbid the importation of any product of any other Member into their markets."[317] However, Article XI does make an exception for standards. According to Article XI.2(b) the provisions of Article XI.1 do not extend to the "Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;"[318] The subject matter of these standards may be

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[313] India — Measures Affecting the Automotive Sector (Report of the Panel) (21 December 2001) WT/DS146/R, WT/DS175/R (India – Automotive Sector) Para 7.269–7.270

[314] United States — Import Prohibition of Certain Shrimp and Shrimp Products (Report of the Panel) (15 May 1998) WT/DS58/R (US – Shrimp) Para 2.11

[315] US – Shrimp Para 2.16

[316] US – Shrimp Para 7.17

[317] Brazil – Measures Affecting Imports of Retreaded Tyres (Report of the Appellate Body) (03 December 2007) WT/DS332/R (Brazil Retreaded Tyres) Para 7.11

[318] GATT Article XI.2

those formulated by international organisations (as discussed above) or they could be argued to be those formulated within the ambit of the General exception clauses in GATT Article XX[319].

The level of standard, of course, may be determined by the Member State itself. This was recognized by the AB in *Australia — Salmon*, where they stated that "the *SPS Agreement* does not contain an *explicit* provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the SPS Agreement."[320] The Panel also held a similar view in *EC – Sardines* noting that Article 2.2 of the TBT Agreement "affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[321]

However once such a level has been determined, Article 4 of the SPS Agreement provides that "Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection."[322] Similarly, the TBT Agreement also stipulates that "Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations."[323]

#### 2.3.3.2 Standards and Technical Barriers to Trade

A further issue with standards, even ones that are *prima facie* compatible with WTO provisions, is their use as technical barriers to trade (TBTs). We discuss the North-South issues emanating from

[319] The General Exception Clauses have been discussed in the following Chapter
[320] Australia – Measures Affecting Importation of Salmon (Report of the Appellate Body) (20 October 1998) WT/DS18/AB/R (Australia – Salmon) Para 205
[321] EC –Sardines Para 7.120
[322] SPS Agreement Article 4.1
[323] TBT Agreement Article 2.7

this use of standards in detail in the following chapters. In fact, one of the intentions of discussing MRAs later in this thesis[324] is to find a solution to the friction arising from the imposition of standards on developing countries.

However, in this chapter the discussion on TBTs is restricted to an analysis of the available provisions addressing the potential of standards being used as technical barriers, within the Agreement on Technical Barriers to Trade (TBT Agreement). We discuss the relevant provisions – Article 2.1 and 2.1, and the jurisprudence surrounding these provisions – in the following paragraphs. The relationship between these provisions and Article XX of the General Exceptions of GATT is discussed in Chapter 4[325].

TBT Article 2.1 stipulates that,

> "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."[326]

Article 2.1 TBT clearly seeks to uphold the MFN (Article I GATT)[327] and National Treatment (Article III.4 GATT)[328] principles of the GATT. The Panel in *EC — Trademarks and Geographical Indications (Australia)* notes this similarity between Article 2.1 of the TBT Agreement and Article III.4 of GATT. The Panel states that:

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[324] See Chapter 6 Mutual Recognition and Mutual Recognition Agreements; and Chapter 7 Mutual Recognition and International Law

[325] Standards which would otherwise fall foul of WTO provisions may be justified under Article XX of the GATT. See Chapter 4 Standards as General Exceptions to the GATT.

[326] TBT Agreement Article 2.1

[327] The MFN principle found in Article I GATT states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Preferential treatment of a specific country's products may potentially therefore be in conflict with this principle.

[328] The National Treatment principle found in Article III.4 GATT states that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

"Article 2.1 of the TBT Agreement refers to 'treatment no less favourable'. An essential element of a claim under Article 2.1 is that, in respect of technical regulations, the treatment accorded to imported products is 'less favourable' than that accorded to like products of national origin. The Panel notes the similarity in the terms used in Article 2.1 of the TBT Agreement and Article III of GATT 1994, which also refers to 'treatment no less favourable'. The preamble to the TBT Agreement expressly sets out the desire 'to further the objectives of GATT 1994'."[329]

WTO Panels in cases such as *EC — Trademarks and Geographical Indications (Australia)*[330], *US – Clove Cigarettes*[331]and *US – Tuna II (Mexico)*[332]have utilized this principle of the unfavourable treatment of 'like products' to assess the claim of national regulations being incompatible with the TBT obligations of corresponding Member States. The question here of course is whether a standard may yet be allowed under the General Exceptions in GATT Article XX if found incompatible with Article 2.1 TBT[333].

Members are also required to ensure that standards do not create 'unnecessary obstacles to international trade'.[334] For this purpose Article 2.2 stipulates that, standards cannot be "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".[335]

The protection of human health or safety, animal or plant life or health, or the environment is listed in the TBT as one such 'legitimate objective'.[336] In the Panel Decision of *US – Clove Cigarettes* it was

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[329] European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Report of the Panel) (15 March 2005) WT/DS290/R (EC — Trademarks and Geographical Indications) Para 7.464
[330] EC — Trademarks and Geographical Indications (Australia)
[331] United States — Measures Affecting the Production and Sale of Clove Cigarettes (Report of the Panel) (02 September 2011) WT/DS406/R (US – Clove Cigarettes)
[332] United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Report of the Appellate Body) (15 September 2011) WTO WT/DS381/AB/R (US – Tuna II (Mexico))
[333] For discussions related to WTO provisions and their relationship to GATT Article XX General Exceptions see Chapter 3 Section 3.4 Looking at the WTO
[334] TBT Agreement Article 2.2
[335] TBT Agreement Article 2.2
[336] TBT Agreement Article 2.2

held that reducing youth smoking was a 'legitimate objective' of the disputed legislation and was also not 'more trade restrictive than necessary'.[337] The Panel further asserts that, "[i]n *EC — Asbestos*, the Appellate Body stated that 'the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.' In addition, we recall that in *Brazil — Retreaded Tyres*, the Appellate Body agreed with the panel that 'few interests are more "vital" and "important" than protecting human beings from health risks'."[338]One might argue that this importance extends to environmental standards.

The Panel in both *US – Clove Cigarettes*[339] and *US – Tuna II (Mexico)*[340] states that the analysis of a provision under Article 2.2 is in two parts. The standard must firstly, fulfil a 'legitimate objective' and must also show not to be 'more trade restrictive than necessary'.

Through *EC — Sardines,* the Panel determined that Article 2.2 provides an inherent right for a Member State to choose its level of standards (this has been mentioned above). However, as the Panel in *EC – Sardines* also noted that Article 2.2 "impose[s] some limits on the regulatory autonomy of Members that decide to adopt technical regulations: Members cannot create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thus, the TBT Agreement, like the GATT 1994, whose objective it is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals."[341] The relationship between the provisions of Article

[337] US – Clove Cigarettes Para 7.349
[338] US – Clove Cigarettes Para 7.347
[339] US – Clove Cigarettes Para 7.333
[340] US – Tuna II (Mexico) Para 7.385 – 7.386
[341] EC – Sardines Para 7.120

2.2 TBT and Article XX of the GATT was also noticed by the Panel in *US – Clove Cigarettes*[342] and *US – Tuna II (Mexico)*[343].

The TBT Agreement further recommends that, if in the formation of standards if relevant international standards exist "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."[344]

If a standard is 'prepared, adopted or applied' for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, that standard may be presumed not to create an unnecessary obstacle to international trade.[345]

The Panel in *US – Tuna II (Mexico)* agreed with the Appellate Body in *EC – Sardines* that Article 2.4 provides three elements to examine a claim of its violation: (1) The existence of a relevant international standard, (2) whether that international standard has been used as a basis for the disputed provision and (3) whether the international standard is an ineffective or inappropriate means for the fulfilment of the legitimate objectives of the disputed standard[346]. It may be argued that the test of effectiveness and appropriateness would allow a member to formulate their own standards if the 'legitimate objective' is at a higher level than that of the international standard.

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[342] The Panel deliberated that "the jurisprudence developed under Article XX [GATT] is relevant to the interpretation of Article 2.2 [TBT]", especially in determining whether a product was "more trade-restrictive than necessary". The Panel also clarified that while "some aspects of Article XX [GATT] jurisprudence […] may be taken into account in the context of interpreting Article 2.2 [TBT]", Article XX [GATT] jurisprudence cannot be "transposed in its entirety" when interpreting Article 2.2 [TBT]. US – Clove Cigarettes (n 310) Para 7.368 – 7.369

[343] The Panel noticed the similarities between Article XX [GATT] and Article 2.2 [TBT] "when assessing the degree of trade-restrictiveness of a measure in relation to what is "necessary" for the fulfilment of the legitimate objective being pursued". However, similar to US – Clove Cigarettes, the Panel in US – Tuna II (Mexico) also noticed the 'differences in wording'. US – Tuna II (Mexico) Paras 7.458 – 7.460

[344] TBT Agreement Article 2.4

[345] TBT Agreement Article 2.5

[346] US – Tuna II (Mexico) Paras 7.627

## 2.3.3.2.1 PPMs

The next important question in terms of environmental standards (especially Product, Process and Life-cycle related standards) is regarding Process and Production Methods (PPMs). We have seen above that both, the definition of technical regulations and standards include PPMs[347]. However, the inclusion of the word 'related', has initiated the debate on whether non product related PPMs (nprPPMs) are excluded[348].

There are two distinguishable forms of PPMs. The distinguishing factor is dependent on whether such PPM requirements affect the characteristic of the end product only (PPM) or whether it affects a part of the production system and is not dependant on the characteristics of the end product (nprPPM). We use examples of regulations from the textile industry to illustrate the difference between PPMs and nprPPMs.

An example of a PPM is found in the UK mandatory government buying standards that list certain substances, including pesticides and dyes that cannot be contained in the final product in quantities more than 1 ppm (part per million)[349]. As the standard requires that the cotton produced should not have any traces of pesticides then that would be a product related PPM as the point of testing the requirement of the standard is at the end product. An example of nprPPMs can be found in the

[347] See (n 297-298). For the benefit of the reader the definitions of technical regulation and standard is provided (TBT Agreement Annex 1.1-1.2):
1. Technical regulation
Document which lays down product characteristics or their ***related*** processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)
2. Standard
Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or ***related*** processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

[348] Susanne Dröge, 'Ecological Labelling and the World Trade Organisation' (2001) Deutsches Institut für Wirtschaftsforschung, Discussion Paper No. 242, 10 <http://www.diw.de/documents/publikationen/73/diw_01.c.38485.de/dp242.pdf> accessed 29 June 2010

[349] 'Textile standards', (Government Buying Standards, Department for Environment Food and Rural Affairs) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/341550/GBS_spec-textiles.pdf> accessed on 29 June 2015

processing and manufacturing criteria of the Global Organic Textile Standard (GOTS)[350], where the prohibition or control of the quantities of metals, dyes and pesticides, and other environmental safeguards are found throughout the processing and production of the product. The points of testing for the criteria are therefore, throughout the manufacturing process. A product would fail to acquire the standard even if the end product is pesticide free.

Whether by specifying ‘related’ the TBT intends to exclude nprPPMs, has not been clearly defined[351]. Rotherham argues that, although most members agree the term to exclude nprPPMs, there are some who argue that the fact that the second part of either definition fails to mention the word ‘related’ when stating that the definition includes terminology, symbols, packaging, marking and especially labelling “as they apply to a product, process or production method” might indicate that nprPPMs are included[352].

However, analysing the negotiations preceding the formation of the TBT Agreement reveals the intention of the parties to a certain extent. The modification of ‘technical regulations’ and ‘standards’ to include the word ‘related’ and subsequently the phrase ‘their related’ (applied later only to technical regulations) was proposed by Mexico during the negotiations and legal drafting stages of the TBT Agreement[353]. Joshi argues that, given this recommendation was accepted, “voluntary and mandatory requirements based on nprPPMS are not covered by the TBT Agreement”[354]. Chang too points to the negotiations of the amendment to the TBT Agreement,

[350] ‘Ecology and Social Responsibility’ (Global Organic Textile Standard) <http://www.global-standard.org/the-standard/general-description.html> accessed on 29 June 2015 (See section on Criteria for processing)

[351] Dröge (n 348) 10

[352] Tom Rotherham, ‘Labelling for Environmental Purposes: A review of the state of the debate in the World Trade Organisation’ (2003) International Institute of Sustainable Development (IISD), Trade Knowledge Network Thematic Paper, 15, 8 <http://www.iisd.org/tkn/pdf/tkn_labelling.pdf> accessed 29 June 2015

[353] Mexico had at the very outset declared that their intention was to exclude nprPPMs from the purview of the TBT. Manoj Joshi, ‘Are Eco-Labels Consistent with World Trade Organisation Agreements?’ (2004) 38(1) Journal of World Trade 69, 74

[354] Joshi (n 353) 74

where nprPPMs were explicitly excluded and argues that consequently, nprPPMs cannot be considered when interpreting the text[355].

## 2.3.4 The Difference between *De Facto* and *De Jure* Standards

Considering the definition and scope of the term environmental standards discussed above, we can broadly divide international environmental standards into *de facto* and *de jure* standards. *De facto* standards consist of market standards. *De jure* standards would include official standards created by the formation of policies, and rules and specific provisions in international agreements. Often such provisions do not themselves dictate the level of standard desired (although they might) but rather point to standardization bodies that create such standards[356].

Market standards concerning the environment may be developed due to market and consumer demands. For example, the Tuna industry in the US experienced similar market trends after the *US – Tuna* cases in the WTO[357]. Although the Panel decided against the US measures that prohibited tuna fishing methods leading to increased dolphin mortality rates as by-catch (the Panel decision was never adopted in both Tuna cases), eco labelled "dolphin safe" tuna have considerably reduced the market of unlabelled tuna[358] becoming a *de facto* standard in the US market.

They may also be developed by private concerned parties. In time such standards may attain a larger acceptability through the proliferation of companies to other markets or even as a copying mechanism by other private groups and even have the potential to become global standards thereby evolving into *de jure* standards.

[355] Chang, S. W. GATTing a Green Trade Barrier Eco-Labelling and the WTO Agreement on Technical Barriers to Trade, (1997) 31 (1) Journal of World Trade 137, 147
[356] Schroder (n 289) 16
[357] United States – Restrictions on Imports of Tuna (Report of the Panel) (3 September 1991) GATT DS21/R-39S/155 (US – Tuna (Mexico)); United States — Restrictions on Imports of Tuna (Report of the Panel) (16 June 1994) GATT DS29/R (US – Tuna (EEC))
[358] Huilan Tian, 'Eco-labelling Scheme, Environmental Protection and Protectionism' (2003) 36(3) Canadian Journal of Economics 608, 610

The Organic Food Label standard is one such standard that has proliferated to global proportions, from fairly humble beginnings. Starting off as a voluntary and self-regulatory form of certification amongst farmers, the labelling scheme can now be found internationally and is often regulated by governments while formal standardization may be formulated by international organisations such as the ISO.[359]

Examples of d*e jure* standards include the various instances of standards found in international agreements and treaties as mentioned in the previous section. They also include the standards created by standardization bodies which are relied upon by legislations and authoritative bodies.

## 2.4 International Principles of Environmental Law

There are certain international environmental principles that govern international relationships that are required to be mentioned at this point in the thesis. These principles potentially fall under the ambiguous area between principles and rules in the Dworkinian sense[360]. These are overarching principles that influence international relationships. These principles are relied upon throughout the thesis and therefore discussed with an introductory intention in the following sections[361].

### 2.4.1 Principle not to Cause Transboundary Harm

The Principle not to cause Transboundary harm may be found in several international agreements. Both, the Rio Declaration on Environment and Development[362] and the Convention on Biological

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[359] Nelson et.al, 'Participatory organic certification in Mexico: an alternative approach to maintaining the integrity of the organic label' (2010) 27(2) Agriculture and Human Values 227, 228

[360] Beyerlin (n 219) 438

[361] One environmental principle which we do not address in this section is the polluter pays principle. According to Sands, the polluter-pays principle "establishes the requirement that the costs of pollution should be borne by the person responsible for causing the pollution". However, the principle may not have become 'an applicable rule of customary international law' as yet. Its application in international relations has been objected to by several nations and thus, in comparison to other principles of international law (such as the Precautionary Principle) the polluter-pays principle remains significantly less established. For this reason, and for the fact that the polluter-pays principle does not feature in the analysis to follow, the chapter does not describe the principle; Phillipe Sands, *Principles of International Environmental Law* (2nd Edition, Cambridge University Press, 2003) 280

[362] Rio Declaration Principle 2

Diversity (CBD) [363] provide that States have, "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This is what the 'Principle not to cause transboundary harm' entails. The Principle is often called the Principle of Prevention[364] or the Principle of Preventive action[365] and carries an obligation on a state to safeguard the environmental interests outside its jurisdiction.

The Principle is recalled in ICJ judgements as well. In its advisory opinion on the '*Legality of the Threat or Use of Nuclear Weapons*' the ICJ notes the "existence of the general obligation of States to ensure that activities within their jurisdiction and control, respect the environment of other States or of areas beyond national control."[366] Similarly, in the '*Corfu Channel Case*', the ICJ lays down that it was, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[367].

The ILC's draft articles on 'Prevention of Transboundary Harm from Hazardous Activities' expresses this obligation towards other states in relation to transboundary environmental harm. The draft articles provide that 'the state of origin' shall be the one to take appropriate action to prevent transboundary harm[368].

Given that the implementation of this standard obligation and the legislative form it may take is decided by the 'state of origin' of the environmental concern[369], a home country level of standards may potentially be grounds for discontent among states for two reasons. Firstly the inadequacy and the level of the standard to safeguard the interests of the state may be challenged in the first place. This was the case in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* dispute, where the

[363] Convention on Biological Diversity (1992) 31 ILM 818 (CBD); Article 3
[364] Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgement) [2010] ICJ; Para 101
[365] Phillipe Sands et al, *Principles of International Environmental Law* (3rd Edition, Cambridge University Press 2012) 246
[366] Legality of the Use By a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Para 29
[367] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Judgement) [1949] ICJ 22
[368] 'Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities', International Law Commission, Yearbook of the International Law Commission, 2001, vol. II, Part Two; Article 3. Also adopted in United Nations General Assembly Fifty-sixth Session, Supplement No. 10 (A/56/10)
[369] Beyerin (n 219) 439

'unilateral diversion' of the Danube, by Czechoslovakia and the construction of an over flow dam at Čunovo, severely restricted the Danube water in Hungary and led to Hungary conveying its grievances to the ICJ[370].

The other issue from a prevention of transboundary harm is the potential overreaching of standards. States on the receiving end of environmental standards may perceive strict standards to be a barrier to trade. For example the EC ban on the sale of seal products[371] within the European market was implemented to reduce animal cruelty torture and pain arising from the seal hunt of several external countries due to the market demands within the European market[372]. The potential of increasing animal welfare through a ban in its own market is perhaps an admission by the EC that the common market is a significant cause of the original problem[373] and a transboundary one, given the origin of the products were outside the EU. However, Canada and Norway argued that the EU Seal Regime violated the non-discrimination obligations under Articles I:1 and III:4 of the GATT, according seal products from Canada and Norway (imported products) treatment less favourable than that accorded to like seal products of domestic origin, created an unnecessary obstacle to trade that is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to fulfil a legitimate objective, and that it imposed quantitative restrictions on trade inconsistently with Article XI:1 of the GATT.[374] Thus the intention of preventing transboundary harm may often be perceived as intended barriers to trade.

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[370] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ 25

[371] The EC ban on seal products sought to uphold a rule of public morality and the EC Seal Regime originated in principle of public morality and not environmental standards. However the principles highlighted in the discussions of the case (i.e. the incompatibility of the Seal Regime with Articles I:1, III:4 and XI:1 of the GATT, Article 2.2 of the TBT Agreement) are conducive to the arguments proposed in the thesis; European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (Report of the Panel) (25 November 2013) WT/DS400/R WT/DS401/R (EC – Seal Products) 112 Para 7.368

[372] European Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in Seal Products [2009] OJ L 286/36 Introductory Para (4)

[373] 'Trade in Seal Products', (European Commission) <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm> accessed 29 June 2015

[374] European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (Report of the Panel) (25 November 2013) WT/DS400/R WT/DS401/R (EC – Seal Products) 25

## 2.4.2 Environmental Impact Assessments

The Rio Declaration also mentions Environmental Impact assessments. It states that, "Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority"[375]. The declaration therefore creates an obligation for states to undertake EIAs for any activity including ones that may have transboundary effect. This obligation may even be seen as a necessity and a forerunner to the previous obligation of not causing transboundary harm. An EIA may help pre-empt and thereby prevent situations that could potentially lead to environmental issues.

The Cartagena protocol also has a risk assessment and scientific evidence obligations for its Members. It requires a risk assessment to be carried out in a scientifically sound manner[376]. To fulfil this need, it provides a methodology of assessment, involving (1) identification of the potentiality of adverse effects, (2) evaluation of the possibility of their realization and thereby their consequences, (3) an estimation of the overall risk and eventually (4) a recommendation on whether such risk is acceptable or manageable or not[377].

However, there may be potential disagreement on whether a situation warrants an EIA. The Rio declaration does not specify the requirements for a carrying out an EIA. Rather it is in regional treaties that are more specific of the requirement. Several international bilateral and plurilateral treaties have EIA obligations included within their framework. One such example is the Vienna Convention for the Protection of the Ozone Layer, which provides for research and scientific assessment[378].

[375] Rio Declaration Principle 17

[376] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) UN Doc. UNEP/CBD/ExCOP/1/3 (Cartagena Protocol); Annex III.3

[377] Cartagena Protocol (n 376); Annex III.8

[378] Vienna Convention for the Protection of the Ozone Layer (1985) 26 ILM 1529; Article 3

The ICJ *Trail Smelter Arbitration* recognized provided several post-award monitoring provisions. It directed the installation of observation stations, equipment necessary to give information of gas conditions and sulphur dioxide recorders, and regular reporting requirements[379].

In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ case, Justice Weeramantry (in a separate opinion) contended that there was a requirement for continuing EIA. He elaborates on this: "Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme."[380]

### 2.4.3 The Precautionary Principle

The precautionary approach is relevant in the making of standards when there is scientific uncertainty regarding the effect of a potential threat to the environment. The Precautionary Principle is found in the Rio Declaration, which states that, "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capability. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost affecting measures to prevent environmental degradation."[381]

Often, in terms of precautionary action there is a difference in the threshold level allowing for action on the face of scientific uncertainty. The Rio Declaration threshold from the above definition seems to be a 'threat of serious or irreversible damage'. Compared to Rio, the Cartagena Protocol has a

[379] 'Trail smelter case (United States, Canada)' Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, Volume III 1905, 1934 – 1937
[380] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Separate Opinion of Vice-President Weeramantry) [1997] ICJ 112
[381] Rio Declaration Principle 15

seemingly lower threshold (and thereby a higher environmental standard) of "potential adverse effects"[382].

However, the status of the Precautionary principle is ambiguous. Several international tribunals have refrained from providing the principle with a definitive status in International law. The Appellate Body in *EC – Hormones* noted that, "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear."[383] The Appellate Body continued by stating that it was unnecessary, and imprudent, for them to take a position on this important, but abstract, question, in the present case[384]. They further observed that in the *Gabcíkovo-Nagymaros* case, the ICJ, although recognizing new norms in the field of environmental protection and standards, failed to identify the precautionary principle as one of them. The ICJ did not declare the overriding effect of the principle on other obligations of the state[385].

The *Gabčíkovo-Nagymaros* judgement, although earlier than either the Rio Declaration or the Cartagena Protocol, provided a very high threshold in which the principle could be applied (thereby decreasing the standard of environmental protection). According to the ICJ, although the scientific uncertainties might be serious, they could not establish "the objective existence of a "peril" in the sense of a component element of a state of necessity. […] [T]he mere apprehension of a possible "peril" could not suffice in that respect."[386] However, as stated before, the court failed to provide a clear applicability of the principle in international environmental law.

[382] Cartagena Protocol Article 10.6 Notification, Article 11.8 Procedure for Living Modified Organisms for Direct Use as Food or Feed, or for Processing, Article 12.1 Review of Decisions, Annex III Risk Assessment
[383] European Communities — Measures Concerning Meat and Meat Products (Hormones) (Report of the Appellate Body) (16 January 1998) WT/DS321/AB/R (EC – Hormones) 45
[384] EC – Hormones 46
[385] EC – Hormones 46
[386] Gabcikovo-Nagymaros Project 42

## 2.4.4 Common but Differentiated Responsibility

Principle 7 of the Rio Declaration underlines the Principle of Common but Differentiated Responsibility: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

The principle can be divided into two recognizable aspects. Sands[387] recommends reading the Rio definition in two parts. The first sentence contains what Sands calls 'Principle of Co-operation'[388]. It suggests the object of the responsibility that states have in terms of environmental safeguards. The next two sentences prescribe the character of such a responsibility – it is common and differentiated due to the circumstances and conditions prevalent in international states. Such circumstances result in differing environmental standards and differing obligations on states[389].

The differing emission targets in the Kyoto Protocol have already been mentioned above[390]. Similarly, the Montreal protocol on Substances that Deplete the Ozone Layer has a different compliance period to the Protocol[391].

## 2.4.5 Sustainable Development

In its advisory opinion on the 'Legality of the Threat or Use of Nuclear Weapons' the ICJ states that, "[t]he environment is not an abstraction but represents the living space, the quality of life and the

[387] Sands et al, (n 365) 249
[388] Sands et al, (n 365) 249
[389] Sands et al, (n 365) 286
[390] See Section 2.3.2 Forms of Standards
[391] Montreal Protocol on Substances that Deplete the Ozone Layer (1987) 26 ILM 1550 (Montreal Protocol); Article 5.1

very health of human beings, including generations unborn"[392]. The ICJ continues its deliberations on the environment in the *Gabčíkovo-Nagymaros* judgement. It states:

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[393]

The ICJ defines 'Sustainable Development' as the "need to reconcile economic development with the protection of the environment"[394].

The Brundtland Report provides a definition of Sustainable Development stating that it is, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[395]

Principle 4 of the Rio declaration also sees the connection between environmental protection and sustainable development. According to the principle, "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[396]

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[392] Nuclear Weapons Advisory Para 29
[393] Gabcikovo-Nagymaros Project 78
[394] Gabcikovo-Nagymaros Project 7 et seq.
[395] Brundtland G et al, Our Common Future: Report of the 1987 World Commission on Environment and Development (Oxford, Oxford University Press 1987) (Brundtland Report) Para 27.
[396] Rio Declaration Principle 4

Sustainable development therefore has two important aspects. Firstly, as recognized by the Brundtland Report, environmental protection is of the essence. Secondly, the reason for such protection is anthropocentric not only in its current objectives but also in its outlook – it is intergenerational, and seeks to secure the environment for future generations for whom the present generation holds the 'world in trust'[397]. In this regard Principle 3 of the Rio Declaration states that, "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[398]

## 2.5 Conclusion

The object of this chapter is to explain certain concepts central to the thesis. As stated, the overall purpose of the thesis is to compare the performance of mutual recognition agreements (as a mode of transnational governance of environmental standards) with unilateral environmental instruments, in order to address environmental issues and their effectiveness in increasing environmental standards. The topic lies in the intersection of the trade and environmental law regimes. The following Chapter 3 illustrates several arguments associated with this intersection of trade and the environment. Therefore Chapter 2 and Chapter 3 must be read together, as the description of the backdrop within which the specific issue of instruments propagating environmental standards is discussed.

The chapter first discusses the designation of developed and developing countries within the context of the thesis[399]. The thesis uses the North-South terminology often used in WTO literature, interchangeably with the terms 'Developed' and 'Developing' countries (where Developed countries are referred to as 'North' and Developing countries are referred to as 'South'). However, as the WTO designation of 'Developed' and 'Developing' is self-assigned by Member States and often disputed,

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[397] Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 A.J.I.L 199
[398] Rio Declaration Principle 3
[399] See Section 2.2 The Categorization of Developed and Developing Countries

the thesis uses the UNDP formulation for assigning the status of 'Developed' and 'Developing' countries.

The Chapter then attempts at defining an outline of the concept of 'standards' in environmental law[400]. The definition of standards in the Rio Declaration or the UNFCC is abstract, failing to provide a narrow enough definition that would be legally viable. On the other hand the more functional definition provided by the ISO is excessively specific, and pertains to only certain forms of standards. Comparatively, the Dworkinian concept of 'standards' which includes principles, rules and policies allows a broad scope of the definition and thereby increases the number of forms of standards potentially discussed under the thesis.

The forms of environmental standards are divided into standards related to 'pathway points' of a substance and their effect on contact with an 'entity susceptible to damage' at that point, and standards indirectly related to environmental modification. Pathway point standards include Environmental quality standards, emission standards and product standards, while examples of indirect standards would include process standards and life-cycle analysis standards. The section also briefly discusses the contention and discrimination of products through process and life-cycle analysis of standards across the North-South divide. This contention is also one of the central issues addressed throughout this thesis. One aspect of this argument is further illustrated in section 2.3.3.2.1 on PPMs under the WTO analysis section of the chapter[401].

The WTO analysis first discusses the definition of international standards under the WTO regime. It finds the WTO to be dependent on listed international standardization bodies for its definition of 'international standards'. Under the TBT and SPS Agreements of the WTO, the standards formulated by the listed international standardization organisations, are to be considered as international

[400] See Section 2.3 Standards
[401] WTO rules explicitly prohibit the discrimination of otherwise 'like products' if such discrimination is based on nprPPMs that leave no apparent distinguishable feature on the end product. WTO Members generally agree that if end products (that are otherwise 'like products') can be distinguished because of their PPMs then criterion may be placed on the method of production and processing under WTO rules.

standards. The Section identifies the various standardization bodies that may be regarded as bodies formulating environmental standards.

Section 2.3.3 then investigates the compatibility of environmental standards with the WTO regime. GATT Article XI.1 the General Elimination of Quantitative Restrictions is particularly problematic as environmental standards may be regarded as quantitative restrictions. A reading of various WTO jurisprudence reveals that standards may indeed be in violation of Article XI GATT, however, there is an exception for standards within Article XI.2(b). The subject matter of standards under the WTO regime, especially under the GATT could be deduced through the provisions of General Exceptions Article XX (GATT) as well[402]. Also, Section 2.3.3.1 of this chapter notices a prerogative of the standard formulating country to decide on its own level of protection[403]. However, such a prerogative is attached with an obligation to recognize equivalent standards[404]; a concept which foreshadows one of the instruments analysed in this thesis – Mutual Recognition[405].

Section 2.3.3.2 of this chapter also introduced the concept of using standards as technical barriers to trade. This is one of the predominant North-South points of contention which the thesis attempts to introduce at this stage. This section explored the TBT Agreement provisions that seek to prevent standards being used in a trade distortionary way. The last part of the section differentiated between *De Facto* and *De Jure* standards.

Section 2.4 introduced certain international principles of Environmental law whose themes run through the thesis. These are (1) Principle not to Cause Transboundary Harm; (2) Environmental Impact Assessment; (3) The Precautionary Principle; (4) Common but Differentiated Responsibility and; (5) Sustainable Development.

[402] These provisions are discussed more fully in Chapter 3 Trade and the Environment, and Chapter 4 Standards as General Exceptions to the GATT.
[403] Australia – Salmon Para 205
[404] This obligation is found in Article 4 SPS Agreement and Article 2.7 TBT Agreement
[405] See Chapter 6 Mutual Recognition and Mutual Recognition Agreements

The following Chapter 3 looks further into this intersection on trade and environment. It investigates the reasons of conflict between trade and environmental regimes and the relationship between economic growth and environmental degradation. It also looks at the WTO as an intermediary of trade and environmental interests and the reasons for looking at other instruments that propagate environmental standards. Eventually it introduces the choice between the unilateral imposition of environmental standards and MRAs as a form of transnational governance.

# 3. Trade and Environment

## 3.1 Introduction

Having introduced the key concept of standards and the concept of developed and developing countries, as understood for this study, the thesis now turns its attention to the relationship between trade and the environment. In this chapter we attempt to draw a relationship between the economic growth of a nation and its effect on environmental standards.

Such a relationship is necessary to define in order to understand the flow of environmental standards i.e. the demand for it from developed countries on developing countries, and why that occurs. Understanding this relationship may help in understanding the friction between developed and developing countries in relation to environmental standards affecting trade. This in turn will help in the assessment of the trade instruments analysed in this thesis – Unilateral Environmental Instruments (UEIs) and Mutual Recognition Agreements (MRAs). Furthermore, when understanding the nature of mutual recognition in Chapters 6[406], the question may also arise whether it is indeed different from other instruments increasing environmental standards, where developed countries are standard 'givers' and developing countries are standard 'takers'[407].

However, if it is possible to assess that in most cases the demand for environmental standards would arise in developed countries, we may negate such a question, and instead concentrate on instruments which would characteristically decrease international tension arising out of rigid demands, by allowing a degree of flexibility in the means to achieving such an end as long as the objective remains the same.

[406] See Chapter 6 Mutual Recognition and Mutual Recognition Agreements
[407] Khalid Nadvi, 'Global standards, global governance and the organisation of global value chains' (2008) 8 Journal of Economic Geography 323, 329-330

In order to illustrate the relationship between economic growth and environmental standards, the chapter starts with the concept of the Environmental Kuznets Curve (EKC)[408]. The EKC forms a correlation between *per capita income* of a nation and environmental deterioration. Section 3.2 also compares this structure of the EKC to Inglehart's theory of post-materialism[409].

Section 3.2.3 then discusses the views of academics such as Stern[410] and Esty[411] who further the argument for a more complex trade-environment correlation than merely a two dimensional *per capita income* against environmental degradation relationship. They argue three further components of the relationship – technique, composition and scale[412].

Section 3.3 looks at the concept of Sustainable Development in the context of the trade-environment relationship[413]. The section further highlights the 'anthropocentric – ecocentric cleavage'[414] arising out of this divided school of thought leading from the concept of sustainable development. This cleavage relates to the basis of environmental concern from which arise environmental action and standards[415].

Section 3.4 next looks at the reasons why the thesis particularly looks at the WTO[416]. Although the WTO and its treaties and case-law are discussed throughout the thesis, including in previous chapters, in Section 3.4.1 we look at some of the reasons why looking at the WTO for environmental policy making may hold certain disadvantages. Furthermore, Section 3.4.1 mentions Article XX (General Exceptions) of the GATT and some of the case-law[417] surrounding Article XX as part of the

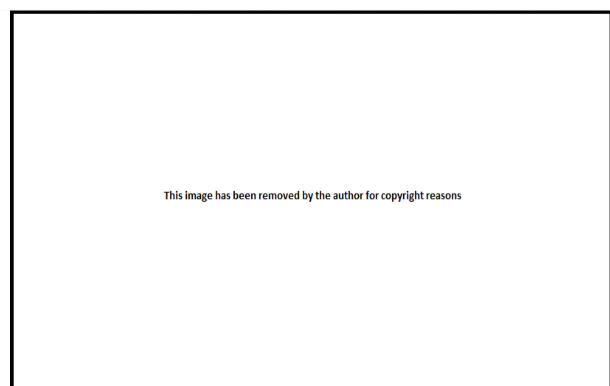
[408] See Section 3.2 The Environmental Kuznets Curve
[409] See Section 3.2.1 Post-Materialism
[410] David Stern, 'The Rise and Fall of the Environmental Kuznets Curve' (2004) 32(8) World Development 1419, 1420
[411] Daniel C Esty, 'Bridging the Trade Environment Divide' (2001) 15 Journal of Economic Perspectives 113, 115
[412] See Section 3.2.3 Other Factors Affecting the Trade-Environment Relationship
[413] See Section 3.3 Sustainable Development and the Trade-Environment Relationship
[414] Term coined by Eckersley in Robyn Eckersley, *Environmentalism and Political Theory: Towards an Ecocentric Approach*, (UCL Press 1993) 26
[415] See Eckersley (n 414) 26; See also Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movements: A Summary', in Witoszek and Brennan (eds), Philosophical Dialogue (Rowman & Littlefield, 1999) 3
[416] See Section 3.4 Looking at the WTO
[417] The case-law discussed are Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (11 December 2000) WT/DS161/AB/R WT/DS169/AB/R; European Communities – Measures Affecting Asbestos and Asbestos-containing Products (Report of the Appellate Body) (12 March 2001) WT/DS135/AB/R; United States – Import Prohibition of Certain

discussion surrounding the drawbacks of considering the WTO for global environmental issues[418]. As mentioned in Chapter 2, however, Article XX GATT also serves to discuss the permissibility of standards that would otherwise be incompatible with WTO provisions. This relationship between environmental standards and Article XX of the GATT merits a much larger dialogue and therefore has been separately discussed in Chapter 4[419]. However this Article and the case-laws are revisited in the Chapter 4 in greater detail in the context of environmental standards.

Section 3.4.2 looks at the differing priorities and national agendas of developed and developing country members of the WTO, in the context of environmental standards. It analyses how States arrive at the WTO negotiating table with pre-determined trade interests which may hinder negotiations of international environmental standards in the multilateral arena[420]. Section 3.4.3 highlights the existence of global linkages and reiterates the importance of multilateral trade forums such as the WTO in addressing issues regarding trade related environmental standards[421].

## 3.2 The Environmental Kuznets Curve

The phenomenon of increasing environmental friction as a result of economic growth had been substantiated by some academics through the Environmental Kuznets Curve (EKC) hypothesis[422]. According to this hypothesis, the reverse 'U' of the curve suggests that




The Environmental Kuznets Curve. From "The Environmental Kuznetz Curve: A Primer", Yandle Et al. pg 3

Shrimp and Shrimp Products (Report of the Appellate Body) (12 October 1998) WT/DS58/AB/R; *United States - Restrictions on Imports of Tuna* (Report of the Panel) (03 September 1991) DS21/R - 39S/155 (US – Tuna I)

[418] See Section 3.4.1Drawbacks of the WTO

[419] See Chapter 4 Standards as General Exceptions to the GATT

[420] See Section 3.4.2 The Differing Interests of Developed and Developing Countries

[421] See Section 3.4.3 Global Linkages

[422] See for example, Esty, *Bridging the Trade Environment Divide* (n 411) 115; Gene M. Grossman, and Alan B. Krueger, Environmental impacts of a North American Free Trade Agreement, (1991) National Bureau of Economic Research (NBER) Working Paper 3914; Nemat Shafik, 'Economic Development and Environmental Quality: An Econometric Analysis', (1994) 46 Oxford Economic Papers 757; Thomas M. Selden, and Daqing Song, 'Environmental Quality and Development: Is there a Kuznets Curve for Air Pollution Emissions?' (1994) 27 Journal of Environmental Economics and Management 147

environmental deterioration increases with an increase in economic growth until a certain point is reached indicating an average *per capita* income level[423] - called the Turning Point Income (TPI). Therefore, pre TPI, the environmental deterioration is directly proportional to economic growth[424].

The EKC as a concept first came to prominence through Grossman and Krueger's study on the environmental impacts of NAFTA in 1991[425] and subsequently through the 1992 World Bank Development Report[426] addressing development and the environment.[427] As a concept connecting economic development to environmental deterioration, the EKC may help shed light on a discussion on a correlation of environmental standards with economic development.

The EKC is divided into two identifiable parts – the post-TPI (Environmental Improvement) segment and the pre-TPI (Environmental deterioration/decay) segment. The theory suggests that, although with initial industrialization, the environmental health of a country first tends to deteriorate, as economic progress continues, on reaching a certain per capita income level – the TPI – the environmental degradation trend becomes inversely proportionate to economic growth. Therefore, the environmental health of a country starts improving beyond post-TPI.

This had prompted several economists to state that free trade and thereby increased GDP would eventually lead to stricter environmental standards and regulations[428]. Stern explains this excitement amongst economists with regards to the EKC because, if the concept is accurate, "economic growth would be the means to eventual environmental improvement"[429]. Academics like Judith Rees state:

> *"[T]he sustainability concept has changed radically. Ecological morality has no place in the new conception, the environment is viewed in strictly functional terms as a deliverer of goods*

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[423] Shafik (n 422) 765; Esty, *Bridging the Trade Environment Divide* (n 411) 115
[424] In this hypothesis environmental degradation is seen as a sum of all degradation, but in many studies, each curve uses one environmental factor (such as $SO_2$, toxic intensity, deforestation and other sources of either resource depletion or pollution[424]) as an axis and a function of the *per capita income* axis. See Stern (n 410) 1419
[425] Grossman and Krueger (n 422)
[426] The World Bank, 'World Development Report 1992: Development and the Environment' (New York, Oxford University Press 1992) (World Development Report)
[427] Stern (n 410) 1419
[428] Grossman and Krueger (n 422) 35
[429] Stern (n 410) 1419

*and services. The notion that the global resource base, including environmental systems, places an inevitable, absolute limit in economic development has been rejected. This rejection renders obsolete the no-growth solution to environmental problems which had been so popular in the 1970s. The emphasis has shifted dramatically; no longer is it a question of totally structuring society to meet the needs of the environment but of ensuring that the productivity of the environment is maintained in order to further long term economic and social development. It is easy to see why the notion of sustainable development has become so popular; basically it allows us to have our cake and eat it. No longer does environmental protection mean sacrifice and confrontation with dominant materialist values."*[430]

Other academics too seem to echo similar sentiments. Beckerman, for example states that,

> "there is clear evidence, although economic growth usually leads to environmental degradation in the early stages of the process, in the end the best – and probably the only – way to attain a decent environment in most countries is to become rich."[431]

While Sustainable Development may indeed be a desirable instrument towards reconciling trade and environmental concerns, it is difficult to see the relationship between trade and the environment in such absolute terms as those of academics such as Judith Rees. As a result other academics have been more cautious in their approach towards the interpretation of the EKC. Stern, Common and Barbier note that although some pollutants were consistent with the EKC hypothesis while others were not, several academics and policy makers seem to 'miss this qualification', which in the opinion of Stern *et al*, is a 'serious oversight'[432]. Arrow *et al*, also corroborate the fact that the EKC has been

[430] Judith Rees, *Natural resources: Allocation, Economics and Policy* (2nd Ed, Routledge 1990) 435
[431] Wilfred Beckerman, 'Economic Growth and the Environment: Whose Growth? Whose Environment?' (1992) 20(7) World Development 481, 482
[432] David Stern, Michael S Common and Edward B. Barbier, 'Economic Growth and Environmental Degradation: The Environmental Kuznets Curve and Sustainable Development', (1992) 20(7) World Development 1151, 1152

"shown to apply to a selected set of pollutants only" and caution that "Economic growth is not a panacea for environmental quality"[433].

Any analysis of environmental standards of nations on the EKC must consider the implications of the pre-TPI segment of a curve on the environment. One of the underlying themes through this thesis is the differing environmental standards between pre-TPI and post-TPI countries due to the increasing environmental deterioration in pre TPI nations, and the increased environmental friction as a consequence. Such underlying dynamics fuel the main purpose of this thesis to compare unilateral environmental instruments with mutual recognition, in order to analyse whether a policy instrument may be able to reduce such international friction while increasing or maintaining the desired environmental standards of post-TPI nations.

However before such analysis, we must first understand why there is such a difference in environmental standards between pre-TPI and post-TPI countries as the EKC suggests. The premise behind the theory of a post TPI decrease in environmental degradation, in the EKC, is derived from the assumption that after crossing the TPI, higher economic growth should lead to environmentally beneficial technology and as a result, market demands for higher standards[434]. The World Bank added credence to this school of thought by propagating the hypothesis in their World Development Report, 1992[435]. As suggested, the post-TPI segment includes developed nations, and has, according to the EKC, witnessed a reversal in trend with Environmental Degradation decreasing alongside a simultaneous rise in Economic Growth. This phenomenon is also discussed in Inglehart's theory of "*Post-materialism*"[436].

[433] Kenneth Arrow et al, 'Economic Growth Carrying Capacity, and the Environment' (1995) 268 Science 520, 521
[434] Esty, Bridging the Trade Environment Divide (n 411) 115
[435] World Development Report 1992 (n 426) 38; Also mentioned in Stern (n 410) 1421
[436] See Ronald F Inglehart, *The Silent Revolution: Changing Values and Political Styles among Western Publics* (Princeton University Press 1977) and Ronald F Inglehart, 'Changing Values among Western Publics from 1970 to 2006' (2008) 31 Western European Politics 130

## 3.2.1 Post-materialism

According to Inglehart, as society[437] evolves with rising *per capita* income, 'materialistic' values of economic and physical security are substituted by 'post-materialistic' values[438] [439]. In terms of concerns specifically regarding the environment, Inglehart notices in his questions to both the older and younger cohort, that there is a distinct increase in advocating stronger measures for environmental protection[440]. This is argued to be a shift from simple material consumption concerns concerning depletion of resources and environmental pollution, to a more abstract (and presumably complex) shift in cultural values to "quality of life issues"[441]. The proof that Inglehart provides uses substantial qualitative research through interviews throughout Europe[442]. Martinez-Alier explains that although environmental concerns are an integral part of these "quality of life" issues, and certainly not a "post-materialistic phenomenon", there banding together with other concerns such as human rights, feminism, peace, etc., under the encompassing head of "quality of life", renders them "post-materialistic"[443].

A caveat to this process of thinking, however, is the realization that such research was carried out at a time of relative economic abundance (or at least relative economic comfort) and, as a consequence, of abundant supply. Moreover, as Krutilla suggests, "*While we may expect production of goods and services to increase without interruption, the level of living[444] may not necessarily be improved.*"[445] Krutilla further cites the works of Barnett and Morse[446] to reveal that, although Inglehart discovered a change towards greater concern for environmental improvement, the actual

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[437] Inglehart divides society into old cohort and young cohort to signify a societal division of value change in association with age.
[438] Inglehart 2008 (n 436) 130
[439] It is assumed that the shift from materialism to post materialism occurs beyond the TPI
[440] Robert F. Inglehart, *Culture shift in Advanced Industrial societies* (Princeton University Press 1990) See 290 and (Table 9-3) at 297
[441] Joan Martinez-Alier, 'The Environment as a Luxury Good or "Too poor to be green"?', (1995) 13(1) Ecological Economics 1, 2
[442] Inglehart 2008 (n 436)
[443] Martinez-Alier (441) 2
[444] Inglehart's equivalent of "quality of life"
[445] John V. Krutilla, 'Conservation Reconsidered' (1967) 57(4) The American Economic Review 777, 778
[446] Harold J. Barnett and Chandler Morse, Scarcity and Growth: The Economics of Natural Resource Availability (Earthscan 1963: 2011)

quality of the physical environment was, in fact, deteriorating[447]. This may be a result of simplifying the relationship between economic growth and environmental improvement into an overtly linear form. The more complex nature of the relationship has been further discussed below in Section 3.3 to understand the multiple factors that determine the dynamics between the two[448]. This thesis however looks at the increased demand for environmental standards, an issue also considered by Krutilla, and the further issue of whether such an increase in environmental standards leads to an actual improvement in the standard of living of a population is not part of this study[449].

Martinez-Alier, in his research, goes further to ask whether there is a correlation between wealth and environmentalism[450]. Although there is a general trend in the affirmative, Martinez-Alier's comparison of US and Mexican (NAFTA) trade laws would hint at ambiguity, at least in the determination of the "green-ness" of a country. For example, the WTO case of US-Tuna/Dolphin[451] reveals higher environmental concerns in the US as compared to Mexico (a country with lower GDP). However, as Martinez-Alier points out, NAFTA laws on maize farming are advantageous to the US methods of mass farming than the environmentally friendlier small scale peasant farming in Mexico. Furthermore, oil transfers from Mexico to the US reveal a greater consumption pattern in the US. In light of these revelations, Martinez-Alier asks whether it is indeed possible to determine which country is greener[452], and therefore in the light of that ambiguity, whether the original question of a correlation between wealth and environmentalism can be determined with certainty.

An ambiguity in the answer to this question may always remain. However, as it may perhaps be that production methods are connected to consumption patterns, a comparison of mass farming to small scale farming may be an unfair one since the choice of production method may be a direct consequence of demand for a product (and therefore may change with an increase in demand)

[447] Krutilla (n 445) 778
[448] See Section 3.2.3 Other Factors Affecting the Trade-Environment Relationship
[449] We mention this limitation earlier in the introductory chapter. See Section 1.3 Methodology and Research Themes
[450] Martinez-Allier (n 441) 8
[451] This case has been discussed in much greater detail in Chapter 4 Standards as General Exceptions to the GATT
[452] Martinez-Allier (n 441) 9

rather than a deliberate attempt at 'greener' production. A fairer analysis would be that of the attempt to maintain or increase environmental standards in the face of increased production.

### 3.2.2 Criticisms of the EKC

Although the EKC allows a reasonable basis for understanding why the demand for environmental standards flow from developed nations to developing nations, it is of objective academic interest to see the criticisms levelled at the EKC. The criticisms are not only towards the theoretical structure of the EKC but also of the practical implications of such a theory on environmental standards. We look at the practical implications of the EKC hypothesis first.

The pattern of the curve leading from a material to a post-material society allows the assumption that post-TPI there is an increase in environmental standards. In several countries policymakers have interpreted the EKC results in a way that allows the dangerous trend to grow unsustainably first and then clean up[453]. Even if one was to assume the accurate predictability of the Environmental Kuznets Curve, it is detrimental to the wellbeing of the planet to expect a predetermined economic pathway and not take active policy decisions to counter part of the Curve's predictions. Sustainable development is a world-wide issue but to some extent more relevant to developing countries than to developed countries. Because of population growth, climatic conditions and world-wide demand for their natural resources, the economic and environmental bases of developing countries are more threatened than developed countries[454].

Using GDP figures of developing and developed nations as indicative of their positioning in the EKC one may assess the potential for growth in developing nations to reach the GDP of developed countries. Although this growth is a necessary aspect of sustainable development, it does "increase

[453] Susmita Dasgupta, Benoit Laplante, Hua Wang and David Wheeler, 'Confronting the Environmental Kuznets Curve' (2002) 16(1) The Journal of Economic Perspectives 147

[454] Ferenc Juhasz, 'Guiding principles for sustainable development in the developing countries' in Edward Dommen (ed), Fair Principles for Sustainable Development: Essays on Environmental Policy and Developing Countries (Edward Elgar 1993) 35

the overall pressures on environmental resources"[455]. Munasinghe states that in "middle income or newly industrializing countries (NICs), the intensity of natural resource use increases to support urban–industrial centres, and pollution levels rise rapidly"[456]. Moreover, empirical research suggests that pollution costs are already quite high in these countries. For example, recent World Bank estimates of mortality and morbidity from urban air pollution in India and China suggest annual losses in the range of 2-3% of GDP[457]. Therefore to use the EKC as a justification for further unfettered economic growth in developing economies (with a prevalent high rate of pollution and environmental degradation) may prove severely detrimental to the environment.

There are also a few prominent criticisms levelled at the EKC hypothesis, itself. Furthermore, the increase of environmental degradation in some LDCs might not be a direct result of their increase in economic income but because of the borderless nature of environmental problems such as cross border pollution. An example of such cross border pollution may be found in the facts of the Trail Smelter Arbitration where a smelter in the area known as Trail, in Canada let to increased emissions of Sulphur Dioxide ($SO_2$) in the neighbouring Washington state in the United States of America. Subsequent increases in production saw a corresponding increase in $SO_2$ emissions and, as claimed by the US, a larger area of environmental damage[458]. Thus an increase in emissions may be due to the processes of neighbouring states and, as a result, not have an equivalent increase in per capita income, and yet Dasgupta *et al*, reveal that such considerations are often unaccounted for in research related to the EKC[459].

Stern *et al*, also state that countries such as Japan which import a majority of their raw material requirements, may be "exporting environmental impacts" to the countries they source their raw

[455] Mohan Munasinghe, 'Is Environmental Degradation an Inevitable Consequence of Economic Growth: Tunneling through the Environmental Kuznets Curve' (1999) 29 Ecological Economics 89, 92
[456] Munasinghe, (n 455) 92
[457] Dasgupta et al. 2002, (n 453) 148
[458] 'Trail smelter case (United States, Canada)' Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, Volume III 1905, 1917. The concept of transboundary harm has been discussed in Section 2.4.1 Principle not to Cause Transboundary Harm.
[459] Susmita Dasgupta, Kirk Hamilton, Kiran D. Pandey and David Wheeler, 'Environment During Growth: Accounting for Governance and Vulnerability', (2006) 34(9) World Development 1597, 1598

material from[460]. Therefore, although environmental degradation might be stemmed, beyond a certain per capita income level on the EKC, this may not necessarily be due to an improvement of standards but merely a shift in the position of environmentally degrading processes[461].

Another such highly ambiguous variable is the time-factor determinant of the graph, especially regarding the TPI. Although the TPI has been shown to change for various environmental factors in various countries at various points of time, they have been dissimilar values for authors such as Stern[462]. This strongly hints towards the fact that a conclusion dependant on so many variables and factors cannot have such a simplistic hypothesis to be generally consistent. As Perman and Stern states, *"[taking] diagnostic statistics and specification tests into account and [using] appropriate techniques, [it is found] that the EKC does not exist."*[463] Rather, Stern finds that a more realistic view of the *per capita* income – environmental degradation relationship is that emissions of most pollutants and flow of waste are, in fact, rising with a rise in *per capita* income[464].

Moreover there may be certain environmental factors that may not show an increase in degradation at all, thereby revealing no apparent relationship with *per capita* income. This is, again, evidence of the EKC hypothesis not accounting for all variables. Other more positive globalisation factors such as Technology Transfer (TT), international global sustainability efforts or simply domestic policies intended for the wellbeing of the citizens, might show a decrease in an

Consumption of substances that deplete the Ozone Layer, Millennium Development Goal report 2012

[460] Stern et al. 1992 (n 432) 1155
[461] Vivek Suri and Duane Chapman, 'Economic growth, trade and energy: implications for the environmental Kuznets curve' (1998) 25(2) Ecological Economics 195
[462] Stern (n 410) 1425
[463] Stern (n 410) 1420
[464] Stern (n 410) 1420

environmental degradation factor or no substantial increase of factors that were not originally a problem. A very telling example of this point is the graph of the consumption of substances that deplete the Ozone Layer (opposite).

However, to conclude absolutely that the EKC does not exist, as Perman and Stern does, may not be entirely accurate. Empirical evidence, as revealed in the studies of several authors does show the EKC to exist for several substances that are important to the existence of corresponding environmental standards. It is important to conclude from this section however, that the EKC may be too simplistic in its form to account for the trade and environment dynamic in its entirety. The EKC is therefore important to the extent that it positions countries with various states of economic standing in relation to their environmental standards. There are, however, other factors that need to be recognized, and perhaps superimposed over the EKC, in order to understand the relationship between trade and environment while giving the EKC due consideration. We look at these factors in the next section.

### 3.2.3 Other factors affecting the Trade-Environment Relationship

As discussed above, the relationship between economic growth and environmental standards is more complex than a mere direct proportionality than the EKC provides. The effects of economic growth on trade cannot be construed in a two dimensional dynamic. Both Esty and Stern have identified three distinguishable components, which have a close relationship with environmental development – Technique, Composition and Scale[465].

Technique refers to development of environmentally beneficial technology and a move towards environmentally beneficial best practices. Composition refers to a preference for cleaner products by the market. Both these components are directly proportional to environmental development as an increase in either logically leads towards environmentally friendly practices. The third component

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[465] Esty, *Bridging the Trade Environment Divide* (n 411) 115; Stern (n 410) 1420

of Scale refers to consumption and production patterns and is inversely proportionate to environmental development[466]. Thus, larger the amount of consumption and production, the more environmentally degrading emissions are produced.

According to Esty, all three components increase with an increase in economic growth[467]. Therefore if these three components are factored into the parameters of the EKC, the environmental health of a nation is then dependant on the degree of rise in all three components rather than per capita income alone. Thus, even after crossing the income level point of the Kuznets Curve that hypothesizes a decrease in environmental degradation, this may not be the case if the consumption and production patterns of a nation (Scale) outweigh technological development (Technique) and market demands for greener products (Composition). Thus, unlike what is hypothesized by the EKC, economic development and free trade might not necessarily have the linear relationship, or as Stern *et al*, states – "the assumption of unidirectional causality"[468] – they are purported to have.

Martinez-Alier, also notices this relationship between scale and environmental development, and pronounces that the economic advantage gained through technology and increased productivity '*go now to buy goods and services in such increased amounts that the throughput of energy and materials in the economy is probably not decreasing*'[469].

Thus, to conclude the observations of this section discussing the EKC, although we may see a general trend in the movement of the demand for standards from developed economies to developing economies we may not assume the connection to be entirely based on economic development. Although the concept of a 'post-material' society does hold certain credence in associating economic development to the demand for higher environmental standards, factors such as scale, technique

[466] Esty, Bridging the Trade Environment Divide (n 411) 115; Ramon Lopez, 'The environment as a factor of production: the effects of economic growth and trade liberalization' (1994) 27 Journal of Environmental Economics and Management 163
[467] Esty, Bridging the Trade Environment Divide (n 411) 115
[468] Stern et al. 1992 (n 432) 1155
[469] Martinez-Alier (n 441) 5

and composition must be considered in analysing the Trade-Environment Nexus and the demand for environmental standards.

## 3.4 Sustainable Development and the Trade-Environment Relationship

Environmental degradation is one of the problems that this thesis attempts to address. One possible solution to the problem is environmentalism (as defined above)[470], and more precisely (in the interest of balancing Trade and Environmental interests) in Sustainable Development. The concept of Sustainable Development has been introduced in Section 2.4.5 of the previous chapter[471].

Broadly placed, Sustainable Development, as stated by the Report of the World Commission on Environment and Development (Brundtland Report)[472], "Is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[473] More specifically, it has been defined by Goodland to be "development without throughput growth beyond environmental carrying capacity and which is socially sustainable."[474] Similarly, the World Wide Fund for Nature (WWF) defines Sustainable Development to be the "Improvement in the quality of human life within the carrying capacity of supporting ecosystems"[475]

Crucially, the definition of Sustainable Development provides two parameters for the working of Trade-Environment policy. These two parameters are, 'environmental capacity' and 'social sustainability'. The Brundtland Report too touches on these two parameters in its definition of sustainability by stating that Sustainable Development contains two 'key concepts':

> *"1. The concept of 'needs' in particular the essential needs of the world's poor, to which overriding priority should be given, and*

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[470] See discussion on Environmentalism in Chapter 1 Introduction

[471] See Section 2.4.5 Sustainable Development

[472] Brundtland G et al, Our Common Future: Report of the 1987 World Commission on Environment and Development (Oxford, Oxford University Press 1987) (Brundtland Report)

[473] Brundtland Report (n 472) Chapter 2: Towards Sustainable Development

[474] Robert Goodland, 'The Concept of Environmental Sustainability', (1995) 26 Annual Review of Ecological Systems 1, 4

[475] World Wide Fund for Nature, 'Sustainable use of Natural Resources: Concepts, Issues and Criteria' (WWF International Position Paper Switzerland 1993) 32

*2. The idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs."*[476]

The Brundtland Report's second concept within its discussion on Sustainable Development acknowledges the limitation placed by technology on environmental capacity. This is perhaps indicative of the deviating schools of environmentalism as has been discussed by several commentators[477].

This divide has been coined by Eckersley as the 'anthropocentric – ecocentric cleavage'[478]. The same divide is found in Arne Naess' distinction between the 'shallow ecology movement' and the 'deep ecology movement'[479]. The shallow ecology movement is defined to be, "*[the] fight against pollution and resource depletion. [It's] central objective: the health and affluence of people in the developed country*"[480]. It is quite clearly anthropocentric in its outlook, in the sense that it is mindful of environmental degradation as far as it affects humanity (or a part thereof). Conversely, the deep ecology movement is defined to be the "*rejection of the man-in-environment image in favour of the relational, total-field image*"[481]. This view of the deep ecology movement has in fact been noted to be synonymous *to Ecocentrism*, "*designating a broad based ecological politics loosely coalescing around opposition to 'anthropocentrism'*"[482].

Concern for the environment has primarily been for anthropocentric reasons. This can clearly be seen in the wording and the structure of multilateral environmental treaties and agreements. For example the Stockholm Declaration which explicitly declares its intentions to protect the 'human environment' states that, "Man is both a creature and a moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, spiritual, moral and social

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[476] Brundtland Report (n 472) Chapter 2: Towards Sustainable Development
[477] See for example Samuel P Hays, Conservation and the Gospel of Efficiency (University of Pittsburgh Press, 1999), Timothy O'Riordan, Environmentalism (2nd Revised ed., Pion 1981)
[478] Eckersley (n 414) 26
[479] Eckersley (n 414) 26
[480] Naess (n 414) 3
[481] Naess (n 414) 3
[482] Peter Hay, *A Companion to Environmental Thought*, (Edinburgh University Press 2002) 42

growth"[483]. Similarly the Rio Declaration states that, "Human beings are at the centre of concerns for sustainable development"[484].

At the intersection between trade and the environment, having an anthropocentric outlook may not always be advantageous to addressing environmental concerns. A severely anthropocentric view would necessitate a prioritizing of what may be considered valuable to humanity. In such circumstances, trade and economic benefits often undermine environmental concerns.

For example, the Canadian Environmental Protection Act (CEPA), 1999[485], lists Asbestos as a toxic substance under Schedule I of CEPA[486]. Asbestos and Asbestos products are highly regulated through several Federal and State laws[487]. The Export Control List in Schedule 3 of CEPA, lists several asbestos forms[488], such as crocidolite asbestos listed in Part 2 of the list[489]. Export of substances, listed to Part 2, are subject to consent from the importing country[490]. One notable substance missing from the Export Control List is chrysotile asbestos and therefore its export is not restricted. It is interesting to note that chrysotile asbestos is the only form of asbestos extracted in Canada[491] and therefore of significant trade interest.

In terms of environmental standards, the prioritization of trade and economic concerns often distorts the level of risk to the environment due to human activity that is socially acceptable. This prioritization of trade and economic concerns is often a hindrance to a higher level of 'environmental modifications allowed by human activity'. Therefore the 'judgement' regarding such

[483] Declaration of the United Nations Conference on the Human Environment (1972) 11 ILM 1416 (Stockholm Declaration); Preamble Para 1

[484] The Rio Declaration on Environment and Development (1992) (U.N. Doc A/Conf.151/5/Rev.1) Principle 1

[485] Canadian Environmental Protection Act (CEPA), 1999 (S.C. 1999, c. 33)

[486] 'Toxic Substances List – Schedule I' (Government of Canada, Environment Canada) <http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=0DA2924D-1&wsdoc=4ABEFFC8-5BEC-B57A-F4BF-11069545E434> accessed 29 June 2015

[487] See for example, the Hazardous Products Act (Ingredient Disclosure List (SOR/88-64)); Canada Consumer Product Safety Act (Asbestos Products Regulation (SOR/2007-260)); Canadian Environmental Protection Act (Asbestos Mines and Mills Release Regulation (SOR/90-341) and Export and Import of Hazardous Recyclable Materials Regulation (SOR-2005-149)); Canada Labour Code, Part II (Canada Occupational Safety and Health Regulation (SOR /86-304)); Transportation of Dangerous Goods Act (Federal Transportation of Dangerous Goods Regulation (SOR/2011-60).

[488] CEPA Export Control List, Schedule 3

[489] CEPA Export Control List, Schedule 3 Part 2 Substances Subject to Notification and Consent

[490] CEPA 100 (b)

[491] 'Asbestos' (Government of Canada, Environment Canada) <http://www.ec.gc.ca/toxiques-toxics/Default.asp?lang=En&n=98E80CC6-1&xml=A183A275-6D44-4979-8C4F-371E7BF29B9F> accessed 29 June 2015

modification, as mentioned in the definition of environmental standards by the Report of the Royal commission[492], is dependent on the amount of digression from economic benefits that a society may allow, or can afford. Given the different economic needs of various countries, such different economic needs are often one of the factors that lead to differing environmental standards for the same environmental concern.

To understand such discrepancies in environmental standards we may look at the way international law addresses environmental concern. The earliest, most developed and still the most proliferate use of international law is with regards to transboundary issues such as air and water pollution and the protection of migratory species. Most such problems are regional in nature and regulated by regional organisations and agreements.

Some problems, however, are global issues, such as those related to climate change and the depletion of the ozone layer. In such circumstances, global solutions are required as they affect all states. However, they may not necessarily affect all states equally or states may not have the equal capacity to combat such concerns. Such differing capacity also leads to differing environmental standards[493].

It may also be the case that a national problem may be of concern to the global community. In the environmental context such global concern would relate to issues of biodiversity, the conservation of natural heritage and sustainable development. It may be the case that for more alarming instances of environmental concern, States may impose unilateral environmental standards on other States. Such standards often lead to more complex issues of sovereignty and questions of a State's responsibility to the global community at large. These issues have been discussed in Chapter 5 regarding unilateral environmental instruments[494].

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[492] Royal Commission on Environmental Pollution, 21st Report: Setting Environmental Standards (Royal Commission on Environmental Pollution, 1998); See Chapter 2 Section 2.3.1 Environmental Standards

[493] See above the discussion on Common but Differentiated Responsibility in Chapter 2 Section 2.4.4

[494] See Chapter 5 Section 5.3 The Legality of UEAs

What is clear, however, is that environmental concerns are subject to laws differing not only in content but in form as well. Transboundary environmental concerns are often addressed through customary or general international law. In the case of global environmental concerns, it is usually the law of international treaties and agreements that provide opportunities to address such issues. However, international law and, treaties and agreements require interpretation in case of disputes and in case of adverse effects on third parties.

Both general international law and the inclusion of third party interests for specific treaties and agreements require a larger forum that is more inclusive than specific treaty groupings. The UN may be such a forum. However the lack of a dispute settlement body leaves the UN outside the purview of this thesis. To look for dispute settlement bodies which are representative of at least a greater proportion of the world's nations one must look towards either the ICJ, or the) Dispute Settlement Body (DSB) within the WTO. Although several ICJ cases have been considered, the issue of non-compliance of ICJ awards is often a factor[495] which favours the DSB to be a more robust decision making body and for the reasons set out in the next section.

## 3.4 Looking at the WTO

The WTO's image as a policy maker and its DSB are both conducive to the goal of reconciling trade and environmental issues[496]. In fact, trade negotiators considered the WTO's improved dispute settlement procedures, *vis-à-vis* other international organisations, and the fact that several loopholes of previous trade agreements had been closed, as a step towards better environmental considerations in trade[497]. We therefore look at the influence of WTO policy and the interpretation of WTO legislation by the DSB and its effects on trade and environmental instruments throughout this thesis. Also we have already discussed and considered the definition of standards in terms of the

[495] Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', (2008) 18(5) The European Journal of International Law 819
[496] James Cameron and Karen Campbell, Dispute Resolution in the World Trade Organisation (Cameron May 1998) 24
[497] Brian R Copeland and M. Scott Taylor, 'Trade, Growth and the Environment' (2004) XLII Journal of Economic Literature 7

WTO[498]. In the next chapter we look at standards specifically in terms of exceptions granted under the GATT Article XX[499]. When discussing unilateral environmental instruments and mutual recognition agreements, we analyse such instruments in light of WTO legislations to consider their validity under WTO law. However, before such consideration, it is important to understand that although the WTO is influential to environmental standards, it is primarily a trade organisation and as such there are certain drawbacks to its consideration. We look at these drawbacks in the following sections.

### 3.4.1 Drawbacks of the WTO

Its global position notwithstanding, the WTO has a glaring drawback, in terms of being an environmental policy maker. It is, primarily, an organisation formed for the regulation and benefit of international trade, with members consisting of States, represented mainly by their respective trade ministries and with a traditional mandate of trade liberalization. The WTO's priority and leanings is bound to be towards trade, and this is clearly reflected in the WTO's emerging jurisprudence. In other words, although the WTO may be the best option for trade-environment convergence, it could possibly be its own, biggest hindrance in the matter[500].

Moreover, it was not until 1996 that a shift in environmental policy was witnessed within the WTO. Before that, the GATT was reputed to be unsympathetic to environmental issues. The 1992 GATT Secretarial Report on 'Trade and Environment' mentions that it is not possible for a country to make market access to its own market dependant on the environmental policies and practices of an exporting country[501]. It was only in the final days of the Uruguay round of negotiations that trade negotiators started paying attention to the environment[502].

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[498] See Chapter 2 Section 2.3.3 The WTO and Standards
[499] See Chapter 4 Standards as General Exceptions to the GATT
[500] Cameron and Campbell (n 496) 26
[501] Steve Charnovitz, 'The WTO's Environmental Progress' (2007) 10(3) Journal of International Economic Law 685, 686
[502] GATT Secretariat, Trade and the Environment, International trade 1990-1991 Volume 1 (Geneva 1992)

The ambiguity inherent in the WTO legislation facilitating environmental safeguards, and the jurisprudence developing from it, are also factors affecting the effective reconciliation of trade and environmental issues. Of the few environmental cases adjudicated under the WTO the judgement and reasoning of the original panels have often been considered flawed, especially in terms of disallowing the use of Article XX (general exceptions)[503]. It is only through the subsequent rulings of the WTO's Appellate body that a certain amount of confidence has been restored in the WTO's commitment towards the environment[504]. For example, in the Appellate Body judgement in *US – Shrimp*, the AB corrects the Panel assumption that requiring from exporting countries compliance with, or adoption of, certain policies prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. The AB states that:

> "*Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.*"[505]

Charnovitz lists similar interpretations by the AB in *US – Gasoline*[506] and *EC – Asbestos*[507] as well. According to Charnovitz, 'well-thought-out' AB decisions, even when the Panel decisions were not reversed[508], "inspired confidence in the adjudication process, and convinced many environmentalists that legitimate environmental measures would be permitted by the WTO."[509]

The following paragraphs are a short discussion on Article XX GATT in the context of the nature of the drawback of looking towards the WTO for environmental standards. A detailed discussion on

[503] Charnovitz (n 501) 686
[504] Charnovitz (n 501) 686
[505] US – Shrimp para 121
[506] United States — Standards for Reformulated and Conventional Gasoline (Report of the Appellate Body) (29 April 1996) WT/DS2/AB/R (US – Gasoline)
[507] European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Report of the Appellate Body) (12 March 2001) WT/DS135/AB/R (EC – Asbestos)
[508] See for example the AB decision in EC – Asbestos where the Panel decision on Article XX GATT was upheld but the reasoning given by the AB was different. EC – Asbestos (AB) para 115
[509] Charnovitz (n 501) 695

environmental standards under Article XX is found in the following chapter, including an analysis of the jurisprudence mentioned in the following paragraphs[510].

Article XX is usually the recourse taken by parties in justifying environmental policies, under the WTO. The relevant sections of Article XX are its Chapeau to Article XX which prevents the use of such restrictions as technical barriers to trade, Article XX(b) which necessitates restrictions for the protection of human, animal and plant life or health and Article XX(g) which requires restrictions for the conservation of exhaustible natural resources[511].

The ambiguity lies within the technical wordings of the sections. For example, in Article XX(b) the difficulty is not in identifying the measures in question, but on showing whether these measures are 'necessary', as required under the Article. This is often referred to as the 'necessity test'. The jurisprudence surrounding this test is somewhat confusing. It would seem that the 'necessity' of a certain measure would lean more towards the 'indispensability' of that measure rather than its role in obtaining a policy objective. To establish necessity a set of factors have to be determined, as laid down by the Appellate body in *Korea – Various measures on Beef*[512] and applied in *EC – Asbestos*[513]. These Factors are, however, individual to every case. Furthermore, the burden of providing evidence towards these factors lie with the defending government and if alternative measures are suggested by the complainant then the defendant has a further burden to prove why the alternatives are not as feasible as the measures in dispute[514].

Similarly, in Article XX(g) the criteria for the disputed measure has: to be concerning an exhaustible natural resource; to pertain to conservation of that resource; to be made effective in conjunction with domestic production or consumption; and to be within its remit. The definition of 'exhaustible

[510] See Chapter 4 Standards as General Exceptions to the GATT
[511] General Agreement on Tariffs and Trade (May 1952) BISD I/14-15 (GATT); Article XX
[512] Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (11 December 2000) WT/DS161/AB/R WT/DS169/AB/R (Korea – Beef) para 163
[513] EC – Asbestos (AB)
[514] Charnovitz (n 501) 698

natural resources' was, however, deemed, by the Appellate Body, in *US – Shrimp*[515], to be evolutionary, and could not be determined merely in the context of the period when the legislation was drafted[516].

The Chapeau of Article XX[517] has also led to certain controversial interpretation, including from the Appellate Body. In *US – Shrimp* and *US – Gasoline* for example, the AB has stated that the Chapeau of Article XX has to be used 'reasonably'[518]. Considering the AB rejection of the US environmental measures to protect turtles in US – Shrimp, Gaines is of the view that: "it is not and should not be the role of the WTO Dispute Settlement Body to substitute its environmental policy judgment for the not-unreasonable policy judgment of a WTO member" and that "discrimination only fails the chapeau test if one cannot reasonably explain its basis"[519].

Another instance of a controversial and seemingly environmentally unfriendly interpretation of the GATT XX Chapeau by the AB was in *US – Gasoline* where the AB held that:

> *"The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."*[520]

[515] US – Shrimp (AB)
[516] Charnovitz (n 501) 699
[517] GATT Chapeaux Article XX: "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: […]"
[518] US – Shrimp para 158; US – Gasoline 151
[519] Sanford E. Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised restriction on Environmental Measures' (2001) 22(4) University of Pennsylvania Journal of International Economic Law 739
[520] US – Gasoline 22

Furthermore the AB also stated that, "*The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception*"[521].

Accordingly, the rights of the exporting country have to be regarded along with the duties of the regulating government. In other words, the arbitrariness and unjustifiability of a certain measure becomes an increasingly easier charge especially given the fact that, in this case as well, the burden of proving otherwise lies with the defending government[522].

Two other WTO agreements, formulated during the Uruguay Round of talks, are the Sanitary and Phytosanitary Standards agreement (SPS) and the Technical Barriers to Trade agreement (TBT). The SPS provides that sanitary and phytosanitary measures for agriculture and agricultural products are applied only to the extent necessary to protect human, animal or plant life or health. The TBT addresses measures in similar lines to the SPS, and endeavours to prevent those measures not mentioned in the SPS from being used as barriers to trade. However, in both agreements, the product standards, as long as they are consistent with international standards, are to be set by the individual countries[523].

In a bid to address environmental matters more effectively, the Committee on Trade and the Environment (CTE) was formed within the WTO in 1994[524]. Whether the CTE has affectively addressed these matters is a different matter altogether. The CTE has been subject, quite often, to criticism due to its seeming inability to effectively propose changes to WTO law[525]. What the CTE is valued for, of course, is that it forms an affective venue for national trade and environmental

[521] US – Gasoline 22 - 23
[522] Charnovitz (n 501) 702
[523] Cameron and Campbell (n 496) 28
[524] 'The Ministerial Decision on Trade and Environment', Trade Negotiations Committee (06 May 1994) MTN/TNC/45(MIN); Annex II
[525] Tom Rotherham, 'Labelling for Environmental Purposes: A review of the state of the debate in the World Trade Organisation' (2003) International Institute of Sustainable Development (IISD), Trade Knowledge Network Thematic Paper, 15, vi <http://www.iisd.org/tkn/pdf/tkn_labelling.pdf> accessed 29 June 2010

officials and representatives from different Multilateral Environmental Agreements (MEAs) and UN Environmental Programmes[526].

Environmental standards are discussed within the WTO framework, under two committees: The Committee on Trade and Environment (CTE) and the Committee on Technical Barriers to Trade (TBT Committee). An example of this dual committee consideration of environmental standards can be found in the WTO's work on eco-labelling. In this regard the Doha Ministerial Conference made this an issue of special focus for the CTE[527]. In 2003 the TBT Committee held a learning event on labelling where participants "stressed that labelling schemes need to be as least trade restrictive as possible and that adherence to the obligations under the TBT Agreement could facilitate this"[528].

However, this dual committee structure has also been one of the criticisms against the WTO's handling of environmental standards. To continue with the example of eco-labels, several commentators are of the view that discussing eco-labelling in two separate committees has added to the confusion surrounding the subject[529]. Moreover, the disinclination of several Members in progressing the debate on eco labels has added to the ineffectiveness of the CTE. An EC proposal, prior to the Cancún Ministerial Conference, to allow for CTE sessions discussing the increasing of the usage of voluntary eco labelling programmes was categorically rejected by all non-European and developing countries[530].

The United Nations Environmental Programme (UNEP) in its study of ecolabels[531] has been particularly critical of the WTO dual committee approach to the issue of ecolabels. As the CTE may only make recommendations on whether any modifications of the provisions of the multilateral

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[526] Charnovitz (n 501) 690

[527] Doha WTO Ministerial Declaration (14 November 2001) WT/MIN(01)/DEC/1 Para.32 (iii)

[528] 'TBT Learning Event on Labelling' (21-22 October 2003) (World Trade Organisation) http://www.wto.org/english/tratop_e/tbt_e/event_oct03_e/labelling_oct03_summary_e.htm accessed on 29 June 2015

[529] Jasper Stein, 'The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organisation' (2009) 1(4) American Journal of Economics and Business Administration 285, 287; Rotherham (n 502) 3

[530] Steven Bernstein and Erin Hannah, 'Non-state Global Standard Setting and the WTO: Legitimacy and the need for Regulatory Space' (2008) 11(3) Journal of International Economic Law 575, 602

[531] Rotherham (n 525) 3

trading system are required[532], in the UNEP's view, the CTE does not have adequate authority to implement environmentally friendly changes. On the other hand the TBT Committee (according to the UNEP) is reluctant in distinguishing eco labels from other labelling programmes and therefore uninterested in their development[533].

The reason for slow progress and limited change does not, however, lie with the CTE alone. Most international policy making is subject to a two-level procedure and this in itself diffuses the blame to other parties. Policies start of as domestic processes amongst stake-holders leading to the formation of national positions. These positions are then, fervently argued upon in the international arena, with each state looking to further their best interests[534]. Given that, usually, trade lobbies are stronger than environmental lobbies, respective governments arrive at the WTO negotiating table with trade policies as a priority and environmental policies as an exception.

As a result, the increased interest in environmental policies has been perceived more as a hindrance rather than an opportunity to work towards converging goals.  Parties with commercial interests are also fearful of the fact that the infusion of stronger environmental policies into the working of the WTO serve as a moderating effect on trade liberalization[535]. This was clearly witnessed when, in the second *US – Restriction on imports in Tuna*[536], the challenge on a US tuna imports ban by the EC was met with a threat of counter challenging an EC directive to ban US fur products[537]. This distraction from the actual motive of the WTO prompted a few states to observe that: "Contracting parties should not let the important principles of GATT be trampled upon by governments trying to protect the environment they deemed appropriate."[538]

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[532] Ministerial Decision 1994 (n 506) Annex II
[533] Rotherham (n 525) 29
[534] Peter B. Evans, Harold K. Jacobson and Robert D. Putnam, *Double-edged Diplomacy: International Bargaining and Domestic Politics* (University of California Press 1993) 5
[535] Jagdish Bhagwati, 'On thinking clearly about the linkage between trade and the environment' (2000) 5(4) Environment and Development Economics 483
[536] US – Tuna (Mexico)
[537] Andre Nolkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC Ban on Furs from Animals Taken by Leghold Traps' (1996) 8 Journal of Environmental Law 237, 246
[538] 'Council Meeting', GATT (28 June 1991) C/M/250, pg 14

### 3.4.2 The Differing Interests of Developed and Developing Countries

However, what is deemed appropriate is, in itself, a variety of contradicting concerns. Different states have different national agendas to fulfil. Not only do they bring prioritized trade concerns to the negotiating table, but they bring extremely opposing prioritized trade concerns. And, although equal voting rights in the WTO is regarded as a step forward in international negotiations (as opposed to other organisations such as the UN), this may not necessarily convert into equal opportunity to further ones interests.

This has translated into major divisions within the WTO, derived from mutual suspicion and contradictory concerns regarding environmental issues. Not only are the usual North-South divides present, but, as trade has liberalized and the focus has changed, several North-South coalitions as well as North-North and South-South conflicts have appeared as well[539].

The problem, as is well understood by all members, is that the development process cannot gain momentum in the presence of barriers to market access and if the terms of trade of developing countries are continually depressed. This concern is made clear in Agenda 21, echoing the recommendations of the Rio Declaration[540].

Yet, the fact that environmental concerns are derived from Northern state priorities does not seem to facilitate the cause. Additionally, mistrust amongst the developing countries further stems from their grievance against trade and environment policies being isolated from their economic concerns at the multilateral negotiating table[541]. An example would be the change in priorities at the WTO mentioned next.

[539] Gregory Shaffer, 'The Nexus of Law and Politics: The WTO's Committee on Trade and Environment' in Richard H. Steinberg (ed) The Greening of Trade Law: International Trade Organisations and Environmental Issues (Rowman and Littlefield 2002) 90

[540] Shawkat Alam and Rafiqul Islam, 'The Trade Environment Interface: Issues Lurking Behind the North-South Tensions' (2005) 2 Macquarie Journal of International and Comparative Environmental Law 121, 122

[541] Alam and Islam (n 540) 124

When the GATT was first envisaged, a differential and more favourable treatment was decided to be accorded to developing and least developed countries[542]. Several concessions were given towards freer trade for developing countries with a lesser expected reciprocity. Agriculture was also a priority during these rounds of negotiations. However, this all changed with the Uruguay Round of talks. Priorities changed to northern interests such as intellectual property (TRIPS) and services (GATS)[543]. Most of the earlier concessions were taken as a buffer period for developing countries to comply with GATT requirements, or as a time for them to safeguard their interests. The eventual goal still remains all round free trade as it is considered to be most beneficial for all countries concerned[544] .

North-South friction is further fuelled because, even in sectors where greater market access has been negotiated, such promises have turned out to be false. In agriculture and textiles, for example, where developing countries are known to have an advantage, and where concessions and preferential treatment were negotiated during the Uruguay round, developed countries continue to implement excessive tariff and non-tariff barriers[545].

Developed countries use a plethora of barriers to dilute developing country interests, such as agricultural subsidies, ant-dumping rules and unilateral trade measures. In this way environmental policies have come to be perceived by developing countries as another means to thwart the economic growth of developing nations. The difficulty is in distinguishing true and pretended environmentalism, and that environment protectionism can easily be justified as environmental protection[546].

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[542] See discussion on Special and Differential (S&D) provisions in Chapter 2 Section 2.2 The Categorization of Developed and Developing Countries.

[543] Patrick Love and Ralph Lattimore, 'International Trade: Free, Fair and Open?', (2009) OECD Publishing 5 <http://dx.doi.org/10.1787/9789264060265-6-en> accessed 29 June 2015

[544] Alam and Islam (n 540) 125

[545] Oxfam, 'Kicking the door down: How upcoming WTO talks threaten farmers in poor countries' Oxfam Briefing paper (April 2005) 25

[546] Michael Rauscher, International Trade, Factor Movements, and the Environment (Oxford, Clarendon Press 1997) 224

### 3.4.3 Global Linkages

International trade forms the main impetus for developing countries to achieve fast growth. Through trade they can import the means to make their assets more productive. While a competitive micro economy and a stable macro economy are important factors of growth, global linkages – a consequence of globalisation – is another such factor, and one that is relevant to this thesis. According to Juhasz, global linkages consist of trade in goods and services, foreign investment and technology and the ability to meet world standards including environmental standards[547]. Although Juhasz lists the elements of global linkages separately, in reality these linkages are inseparable for growth and are interdependent.

Several conclusions may be drawn from this interconnectivity. Firstly, the connection between the linkage of environmental standard and the trade in goods and services renders international organisations of trade, such as the WTO, and international environmental bodies such as the UNEP as well as multilateral bodies and treaties concerning both trade and environment, as the institutions most suitable for dispute settlement and policy determination in terms of international relations, and the international trade – environment nexus. Among such institutions, the ones where there exists a functional dispute settlement body with the ability to ensure compliance of the judgements passed on a dispute would be considered even more important in addressing trade related environmental concerns. It is for this reason that this thesis considers the WTO as an overarching institution whose policies and rules must be taken into consideration when analysing instruments that may enhance environmental standards in trade. The compatibility of such instruments with WTO legislation and with the judgements of the Dispute Settlement Body (DSB) must necessarily be considered[548].

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[547] Juhasz (n 454) 34

[548] See Chapter 4 Standards as General Exceptions to the GATT; Chapter 5 Section 5.3 The Requirement of Necessity in WTO Jurisprudence; Chapter 7 Section 7.4 MRAs: The WTO Perspective

Developing countries tend to see the call for sustainable development and the raising of environmental standards suspiciously and this is discussed in greater detail in the discussion on unilateral action[549]. Furthermore Juhasz lists other reasons for the inapplicability of strict developed country principles, citing the OECD as a standard:

> "*Developing Countries cannot afford OECD standards because the cost of their implementation would destabilize their macroeconomic policies;*
> *Even if they could afford these costs, their export industries need to be subsidized to keep them competitive in the World market;*
> *Sustainable development of natural resources is a world-wide concept and developing countries cannot and should not carry the burden of conservation alone.*"[550]

## 3.5 Conclusion

We looked at the concept of environmental standards and the concept of developed and developing countries in the previous chapter. The objective of this chapter was to understand the relationship between trade and the environment, in order to understand why the demand for higher environmental standards usually flows from developed to developing countries. This does not however imply that developing countries do not demand higher environmental standards themselves, but rather that the general trend is for a demand for higher standards from countries of a higher economic growth.

The reason behind addressing this issue early in the thesis is to understand the nature of environmental standards before analysing different instruments that propagate such standards. To establish that the flow of standards generally tends to be in a certain direction allows us to search for environmental instruments that make this process more efficient while considering factors and circumstances prevalent in both developed and developing countries. The overall objective of this

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[549] See Chapter 5 Unilateral Environmental Action
[550] Juhasz (n 454) 35

thesis then is to find an instrument that propagates environmental standards while reducing North-South friction arising from this demand for higher standards.

The Chapter used the concept of the EKC to understand the relationship between economic growth and environmental standards. The EKC forms a correlation between *per capita income* of a nation and environmental deterioration. It suggests a Turning Point Index (TPI) on the graph beyond which an increasing *per capita income* leads to a decrease in environmental degradation, thereby suggesting an increase in environmental standards. This implies that the demand for increased environmental standards is found more often in countries higher in the economic growth scale (*per capita income*) that are beyond the TPI.

However, academics such Esty and Martinez-Alier argue that a more complex dynamic exists between trade and environmental standards than a two dimensional '*per capita income* against environmental degradation' relationship. They argue three further components of the relationship – technique, composition and scale. The chapter therefore argues that the relationship between environmental standards and economic growth exists in a model similar to the EKC if we superimpose the argument of the three additional components on the EKC. In other words technique composition and scale must be taken into consideration when considering the relationship between trade and environment.

The next section reintroduced the concept of sustainable development. The concept was first generally defined in the previous chapter. In this chapter we see the concept in light of the trade – environment relationship. Through the concept, and especially considering the definition of sustainable development in the Brundtland Report, we find two important parameters that need recognition in a trade – environment context and certainly in this thesis. These parameters are 'environmental capacity' and 'social sustainability'.

Considering the Brundtland Report's acknowledgement of the limitation of environmental capacity through the 'state of technology' and 'social organisation', and the commentary of several academics such as Hays and O'Riordan, we understand the division prevalent in environmentalism highlighting the 'anthropocentric – ecocentric cleavage'. This cleavage relates to the basis of environmental concern from which arise environmental action and standards.

Understanding these concepts allows an insight into the nature of environmental concern. An overtly anthropocentric outlook may lead to a prioritization of trade over environmental concerns. It also provides an insight into the way trade related environmental issues may be addressed in international forums such as the WTO.

The next section in this chapter therefore looked at the WTO. It discussed the reasons why the WTO is considered an overarching institution that is constantly analysed throughout the thesis. The presence of the DSB provides the WTO with a strong dispute resolution mechanism which makes it an important organisation in the trade – environment discussion. Compared to the UNEP, which also provides policy related to trade and environment, the WTO holds a distinct advantage because of its effective dispute settlement abilities. The relatively successful implementation of awards arising of DSB judgments provides the WTO an edge in effectiveness over other international dispute resolution bodies such as the ICJ[551].

However, before discussing the compatibility of environmental standard implementing instruments with WTO regulations, the chapter discussed the drawbacks of considering the WTO as an environmental policy maker, or at the very least an influencer of environmental policy. The most significant drawback with the WTO in the context of looking at it as an environmental policy maker, is that is it primarily a trade organisation. The WTO prioritizes trade efficiency and market access, and therefore one may be cautious of the WTO Secretariat's environmental inclinations.

[551] Llamzon (n 495) 819; This point is mentioned in the Introductory Chapter Section 1.2 Looking at the Intersection between Trade and the Environment

Furthermore, the WTO regulations referred to in this thesis i.e. the GATT Article XX and the jurisprudence surrounding Article XX have been considered to be ambiguous by academics such as Charnovitz, Cameron, Campbell etc. We mention this drawback in this chapter, but leave a detailed analysis of Article XX and the case-law involving the general exceptions for Chapter 4 Standards as General Exceptions to the GATT.

As discussed above, another drawback within the WTO is the fact that environmental standards are addressed in two separate committees – the CTE and the TBT Committee. This dual committee approach has been a criticism against the WTO's handling of environmental standards.

Finally the Chapter looked at the differences in interests between developed and developing countries and also the trade-environmental relationships developing due to global linkages.

In the next chapter we look at the environmental standards in the context of WTO regulations. We specifically look at the general exceptions allowed under the GATT in Article XX.

# 4. STANDARDS AS GENERAL EXCEPTIONS TO THE GATT

## 4.1 Introduction

Chapter 2 looked at the definition of standards under the WTO. The chapter also looked at the broader definition of standards used in this thesis. It is possible that standards defined in the broader context, and indeed standards as defined by the WTO may be deemed to be in violation of the general provisions of the GATT. The GATT prohibits border restrictions on goods, especially through (but not limited to) Articles I[552], II[553] and XI[554]. The GATT also prohibits discrimination between domestic and foreign products through Article III[555].

To justify such a standard, that would otherwise fall foul of WTO provisions, Member states may look to Article XX[556] of the GATT. Article XX of the GATT provides exceptions to the general agreement. The environmentally relevant provisions of the Article state:

> "*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:*

[552] General Agreement on Tariffs and Trade (May 1952) BISD I/14-15 (GATT) Article I: General Most-Favoured-Nation Treatment
[553] GATT Article II: Schedules of Concessions
[554] GATT Article XI: General Elimination of Quantitative Restrictions
[555] GATT Article III: National Treatment on Internal Taxation and Regulation
[556] GATT Article XX: General Exceptions

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

*[…]*

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

*[…]"*[557]

If a standard is considered to be in violation of any of the general provisions it may still be justified through the list of exceptions provided under GATT Article XX[558]. The AB in *US – Gasoline* reiterates this by stating that, "[t]he exceptions listed in Article XX […] relate to all the obligations under the *General Agreement*: the national treatment obligation and the most-favoured nation obligation, of course, but others as well."[559]

The jurisprudence surrounding Article XX is complex and continuously evolving (not least because of the organisational change of the multilateral trading platform from the GATT to the WTO). In this chapter we analyse the various available GATT and WTO case-law related to the environmental provisions of Article XX. We look at decisions from both levels of the Dispute Settlement Body (DSB) – the Panel and the Appellate Body (AB)[560].

The object of Chapter 4 of this thesis is to derive the principles incorporated into these decisions, which shape the standards that may be justified under Article XX. In terms of environmental standards effecting trade in goods, the related provisions of the General Exceptions are Article XX(b) and (g) as well as the Chapeau to the Article. This chapter therefore consists entirely of an analysis of pertinent WTO and GATT case-law surrounding these provisions. The chapter is divided according to the three relevant provisions mentioned. Although the Chapeau appears before the two provisions

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[557] GATT Article XX

[558] Michael J. Trebilcock and Robert Howse, Regulation of International Trade (Routledge 2013) 514

[559] United States — Standards for Reformulated and Conventional Gasoline (Report of the Appellate Body) (29 April 1996) WT/DS2/AB/R (US – Gasoline) (AB) 24

[560] The AB holds precedence over the decisions of the Panel

in the wording of Article XX, due to the stipulation by the AB in *US -Shrimp*[561] to apply the Chapeau at a later stage to the provisions, the chapter follows the same format in its structure.

Section 4.2 covers issues necessary for the understanding of Article XX, prior to analysing its sub-parts. It looks at the effect that the structural change, from the GATT to the WTO, including the insertion of the WTO Preamble, had on trade environmental concerns within the WTO[562]. This comprises the inclusion of the sustainable development principle and the validity of extra-jurisdictional environmental standards within the WTO ethos. Section 4.2 also considers two issues prior to an analysis of the general exceptions. Firstly, it discusses on whom the burden of justifying Article XX, lies. Secondly, it addresses the possibility of the general exceptions being invoked simultaneously with an argument of WTO compatibility.

Subsequently Section 4.2.1 discusses the order of applying the provisions of Article XX[563]. As mentioned above, a standard or measure is first examined against the relevant provision of Article XX followed by the conditions stipulated in the Chapeau.

Section 4.3 looks at Article XX(b) of the GATT[564]. It is divided into two further sections. Section 4.3.1 looks at what constitutes a measure designed 'to protect human, animal or plant life', as required by the provision[565]. Section 4.3.2 looks at the test of 'necessity', conditional to which a standard or measure may be justified under Article XX(b)[566]. For both instances the DSB has had ample opportunity, in terms of disputes brought to them, to settle the issues. The sections therefore look at the decisions of the DSB to define both terms.

[561] United States — Import Prohibition of Certain Shrimp and Shrimp Products (Report of the Appellate Body) (12 October 1998) WT/DS58/AB/R (US – Shrimp) (AB)
[562] See Section 4.2 Article XX: General Exceptions
[563] See Section 4.2.1 Application of Article XX
[564] See Section 4.3 Article XX(b)
[565] See Section 4.3.1 Article XX(b): 'to protect human, animal or plant life or health'
[566] See Section 4.3.2 Article XX(b): Necessity

Section 4.4 looks at Article XX(g) of the GATT and is divided into three sections[567]. Section 4.4.1 looks at the definition of 'exhaustible natural resources'[568]. The question asked of both the Panel and the AB is whether the term includes living resources or is limited only to non-living resources. The section looks at the various case-laws which addresses the issue. Section 4.4.2 discusses the term 'relating to'[569]. Unlike Article XX(b), Article XX(g) does not require the test of 'necessity'. Rather, a standard or measure in question must relate to the conservation of 'exhaustible natural resources'. The section analyses relevant case-law to see whether this change in terminology broadens or limits the scope of standards included within Article XX(g). Section 4.4.3 looks at the meaning of the term 'made effective in conjunction with' as discussed by the DSB[570].

Section 4.5 moves on to the analysis of the Chapeau to Article XX[571]. The Section looks at the scope of the Chapeau and how its scope different from the provisions of the Article. It discusses the relationship between the provisions and the Chapeau. Section 4.5 then divides into a further section (Section 4.5.1)that discusses the terms 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade' as defined by WTO case-law[572].

The chapter finally concludes by recapping the principles established by the DSB which limit and mould the characteristics of international environmental standards[573].

## 4.2 Article XX: General Exceptions

From the previous chapters we get a general sense of the often conflicting schools of trade and environment. Article XX of the GATT being the general exceptions to an international, multilateral trade agreement is found at the crossroads of these two conflicting schools (specifically the environmental exceptions found in Article XX(b) and (g)). The AB in *Brazil — Retreaded Tyres*

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[567] See Section 4.4 Article XX(g)
[568] See Section 4.4.1 Article XX(g): Exhaustible Natural Resources
[569] See Section 4.4.2 Article XX(g): 'relating to'
[570] See Section 4.4.3 Article XX(g): 'made effective in conjunction with'
[571] See Section 4.5 Article XX Chapeau
[572] See Section 4.5.1 Article XX Chapeau: 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade'
[573] See Section 4.5 Conclusion

discussing Article XX(b) concluded that this "illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns"[574]. However, Article XX is also, in a sense, reconciliatory of the two otherwise contradictory schools of trade and environment. Trebilcock and Howse even query whether Article XX is tantamount to a GATT environmental charter[575].

Given the WTO jurisprudence available to us on Article XX, the primacy (or even the equality) of environmental concerns over trade interests may still be debatable (although not altogether deniable), in the context of an international trade organisation where the recourse to environmental relief is in the form of general exceptions. What is visible, however, is a shift in the importance given to environmental concerns from the time of the GATT as an organisation to the formation of the WTO[576]. It is a shift we will find mentioned throughout this chapter, as we analyse various case law. The DSB (whether as a Panel or the AB) highlight this changing attitude of the multilateral trade regime since the GATT evolved into the WTO following the Uruguay round.

This shift was visible in the Preamble of the WTO Agreement which the AB in *US – Shrimp* highlighted as significant in their interpretation of Article XX[577]. According to the AB the language of the WTO Preamble was "recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994."[578] What the AB seems to be hinting at here is a greater

[574] Brazil – Measures Affecting Imports of Retreaded Tyres (Report of the Appellate Body) (03 December 2007) WT/DS332/R (Brazil – Retreaded Tyres) (AB)
[575] Trebilcock and Howse (n 558) 514
[576] See discussion on the changing nature of WTO jurisprudence towards Environmental concerns in Section 3.4.1 Drawbacks of the WTO; Also see Steve Charnovitz, 'The WTO's Environmental Progress' (2007) 10(3) Journal of International Economic Law 685, 686.
[577] US – Shrimp (AB) para 152
[578] US – Shrimp (AB) para 153

recognition of environmental concerns when interpreting Article XX, which according to the AB is what the WTO Members intended.

A relatively biased attitude against environmental issues may be argued to have been visible in case-law under the GATT[579]. In the *US – Tuna/Dolphin I* case[580], for example, Mexico challenged US measures that banned imports of tuna products from Eastern Tropical Pacific, if caught in a manner that increased dolphin mortality and also had certain labelling requirements in place[581]. The Panel declared that in the case of both Article XX(b) and (g)[582], the exceptions could not apply to the protection of plant or animal life outside the jurisdiction of the Member State[583]. In other words, the Panel declared the provisions of Article XX to not have extra-jurisdictional effect.

The Panel explained that, firstly, that the drafting history of Article XX(b) eluded to the protection of human, animal and plant health in the importing country. The Panel recalled that exception (b) in the New York Draft of the International Trade Organisation (ITO) Charter[584] originally read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the same country"[585]. The Panel did acknowledge, however, that the draft wording of the precursor to the general exceptions was later changed to its present Article XX(b) wording in the Geneva Charter of the ITO[586], as it was considered unnecessary[587]. This does beg the question why, in their assessment of the drafting history of Article XX(b), the Panel only considered the inclusion of a domestic limitation to Article XX(b) in one of the drafts to the ITO, and not the later exclusion of it.

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[579] Before the formation of the WTO
[580] It is important to note that the US – Tuna I Panel Report was not adopted or appealed to the AB by either party, through mutual consent.
[581] United States – Restrictions on Imports of Tuna (Report of the Panel) (3 September 1991) GATT DS21/R-39S/155 (US – Tuna (Mexico)) para 3.1
[582] We discuss the Tuna/Dolphin cases in detail below both under Article XX(b) and (g).
[583] US – Tuna (Mexico) (Panel) para 5.28 and para 5.33
[584] The precursor to the GATT and subsequently the WTO
[585] International Trade Organisation (ITO) Charter, New York Draft E/PC/T/34 Article 37(b)
[586] International Trade Organisation (ITO) Charter, Geneva Draft E/PC/T/189 Article XIX (1)(b)
[587] US – Tuna (Mexico) (Panel) Para 5.26

Secondly, the Panel felt that accepting the extra-jurisdictional effect of Article XX would allow the importing Member State to unilaterally impose environmental standards from which other Member States could not deviate without jeopardising their legal rights under the GATT[588].

However, later judgements seemingly rendered this assessment by the Panel in *US – Tuna (Mexico)* void. The Panel in *US - Shrimp* deliberated on whether Article XX justifies a measure of a Member State that is "conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies"[589]. Although, the Panel felt that such a measure could not be justified, the AB disagreed with the Panel's findings. The AB declared that "[C]onditioning access to a Member's domestic market on whether exporting Member's comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."[590]

The US measures on shrimp imports, on whose deliberations the conclusions of the above paragraph was reached by the AB is an example of such a standard. In this dispute, the US banned the importation of shrimp and shrimp products from countries not certified by US authorities. Countries wishing to export shrimp and shrimp products to the US could obtain a certification by demonstrating that turtle mortality rates did not cross a prescribed level due to shrimping (thus creating a standard for shrimp exports). Such a measure did therefore have the extraterritorial effect of conditioning the policies of an exporting Member State[591].

The AB felt that such measures could be justified under Article XX as "Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries

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[588] US – Tuna (Mexico) (Panel) Para 5.27

[589] United States — Import Prohibition of Certain Shrimp and Shrimp Products (Report of the Panel) (15 May 1998) WT/DS58/R (US – Shrimp) (Panel) Para 7.44 – 7.55

[590] US – Shrimp (AB) Para 121

[591] US – Shrimp (Panel)

compliance with, or adoption of, certain policies [..] prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."[592]

Conditioning access on an exporting Member is in essence an extraterritorial effect. It seems, therefore that such extraterritorial measures may be allowed to a certain degree. In other words, imposing policies that set a certain level of standards for imported goods may therefore be justified under Article XX of the GATT[593].

Before analysing the application of the relevant provisions of Article XX that are justifying environmental standards we address two issues related to the invocation of the general exceptions. These issues are necessary for understanding its application. The first of these issues is the burden of justifying Article XX. The second issue is whether the General Exceptions may be invoked while simultaneously arguing the compatibility of the measure in question with other provisions of the GATT. We address the issue of justification first.

From the Panel report in *Canada – Administration on the Foreign Investment Review Act*[594] and the Panel report in *US – Section 337 of the Tariff Act of 1930*[595] it is evident that the Member State invoking the exceptions has to demonstrate its necessity. The test for necessity is discussed later in this chapter[596]; however it is interesting to note here that the burden of justifying the invocation of Article XX is on the Member State invoking it. This was reiterated in *US – Restrictions on Imports of Tuna*[597]. The Panel in *EC – Asbestos* agreed with this notion of the burden of justification lying with the Party invoking Article XX, but clarified, however that this, "does not release the complaining

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[592] US – Shrimp (AB) Para 121

[593] However, there are other conditions attached to such extraterritorial effect which we look at further in this chapter and in later chapters regarding the unilateral imposition of standards. See Chapter 5 Unilateral Environmental Instruments.

[594] Canada – Administration on the Foreign Investment Review Act (Report of the Panel) (07 February 1984) L/5504 - 30S/140 Act; Para 5.20

[595] US – Section 337 of the Tariff Act of 1930 (Report of the Panel) (07 November 1989) L/6439 - 36S/345; Para 5.35

[596] See Section 4.3.2 Article XX(b): Necessity

[597] US – Tuna (Mexico) Para 4.5

party from having to supply sufficient arguments and evidence in response to the claims of the defending party."[598]

The second issue, as already highlighted, is of simultaneous invocation of a provision of the GATT and the general exception to such provisions. In the *US – Restrictions on Imports of Tuna* ('US Tuna') the question arose as to whether a Member state could simultaneously argue that a measure was compatible with the general rules of the GATT and could yet invoke Article XX. The Panel in US-Tuna deliberated that although the interpretation of Article XX is narrow and that it is not necessary to examine a measure under Article XX unless it is invoked, nevertheless, "a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that a measure in question would otherwise be inconsistent with the General Agreement."[599] An environmental standard could therefore continue to be argued as within the remit of WTO approved standards while being invoked as a necessary exception to the provisions of the GATT in case the argument of WTO compatibility is denied.

Thus far, we have observed the shift in the post WTO multilateral trade forum towards greater acceptability of environmental concerns. This includes the validity of extra-jurisdictional environmental standards to the extent that they may condition access to the importing Member's market. We also highlighted the conditions of invoking Article XX, including the fact that the burden of justifying Article XX lies with the Member seeking to invoke its provisions and the availability of the general exceptions simultaneously with an argument of WTO compatibility. Once the General Exceptions have been invoked, we must look towards the application of Article XX to understand the characteristics of environmental standards, which although not compatible to general GATT provisions, are compatible with the WTO as allowed exceptions. The following section 4.2.1 therefore looks at the application of Article XX once it has been invoked.

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[598] European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Report of the Panel) (18 September 2000) WT/DS135/R (EC – Asbestos) (Panel); Para 8.178

[599] US – Tuna (Mexico) Para 5.22

## 4.2.1 Application of Article XX

Looking at the text to Article XX, it is quite clear that there are two parts to the Article – the opening clause (known as the Chapeau in WTO parlance) and the provisions (a) to (j) of Article XX. When invoking the General Exceptions, both aspects of the Article must be considered. The way both the Chapeau and the relevant provisions are applied, provides an insight into what the Dispute Settlement Body (DSB), the AB and by association, the WTO would consider characteristics of a WTO compatible environmental standard. The order in which the Chapeau and the provisions are applied is also noteworthy. In the following paragraphs we therefore look at the AB mandate to consider, both, the Chapeau and the provisions, the order of doing so and the reasoning provided by the AB. The next sub-sections then look at the provisions and the Chapeau specifically and their effect on environmental standards.

In the *US – Gasoline* case, the Panel had found the US measures in question to be in violation of Article III.4 and subsequently could not be justified under the general exceptions of Article XX(b) or (g). As a result the Panel decided that it was not necessary to examine the disputed measure against the conditions provided in the Chapeau[600].

The AB however disagreed with the conclusions of the Panel and decided that the same measures were in fact justified by Article XX(g)[601]. The question then arose whether the conditions of the Chapeau were now pertinent. The AB therefore formulated this 'two-tiered' analysis of measures that sought to invoke the general exceptions. The AB stated that, "the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX."[602]

[600] US – Gasoline (Panel) Para 6.42
[601] US – Gasoline (AB) 13 – 22; The analysis of Article XX(g) by the AB in US – Gasoline is found below in Section 4.4 Article XX(g)
[602] US – Gasoline (AB) 22

The order of applying the analysis was, however left ambiguous by the AB in *US - Gasoline*. The Panel in *US – Shrimp* seemed to conclude from the *US – Gasoline* judgement that, whether the Chapeau or the provisions of Article XX should be examined first was immaterial. Thus having analysed the disputed measure against the Chapeau, and found the measure to be in violation[603], the Panel concluded that if a measure falls foul of the Chapeau of Article XX it is not necessary to examine the measure under the relevant provisions of the Article[604].

The AB disagreed with this reasoning determining that the provisions were equally important and seemed to suggest that the sequence of the analysis formulated in *US – Gasoline* needs to be maintained[605]. The Appellate Body reasoned that, "[t]he task of interpreting the Chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the Chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the application of a measure '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.' When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies."[606]

Moreover, the AB further reminded the Panel of their interpretation in *US – Gasoline*, that "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'"[607], rather than 'the object and purpose of the whole of the GATT 1994 and the WTO Agreement' as the AB felt the Panel had done in *US - Shrimp*[608]. Therefore it is

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[603] US – Shrimp (Panel) Para 7.49 and Para 7.60 – 7.61
[604] US – Shrimp (Panel) Para 7.63
[605] US – Shrimp (AB) Para 117
[606] US – Shrimp (AB) Para 120
[607] US – Gasoline (AB) Page 22
[608] US – Shrimp (AB) Para 116

necessary to examine the measure against the provisions of Article XX before examining it against the Chapeau.[609]

We therefore analyse the influence of Article XX on environmental standards in the order prescribed by the AB, first looking at the relevant provisions (Article XX(b) and (g)) followed by the conditions of the Chapeau. This aids in determining the specific characteristics an environmental standard requires to be WTO compatible before testing the standard against the broader conditions of the Chapeau.

## 4.3 Article XX(b)

Article XX(b) allows Member States to formulate standards and measures that are “necessary to protect human, animal or plant life or health”. Thus a very wide ranging set of standards may be argued under the provisions of Article XX(b) given the connection between human health and environmental issues[610]. Considering the disputes that have already been brought under the GATT or the WTO, measures argued under Article XX(b) include the protection of species such as dolphins[611] and turtles[612] as well as health and environment related issues such as smoking restrictions[613] and asbestos use[614].

This scope of Article XX(b) was elaborated upon by the Panel in *US* – Gasoline. According to the Panel, when analysing a standard or measure against Article XX(b) certain ‘elements’ had to be established by the Member invoking the Article. Firstly, that “the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health”; Secondly, that the inconsistent measures for which the exception was

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[609] The AB confirmed this sequence of testing in Brazil – Retreaded Tyres (AB), Para 139
[610] Nathalie Bernasconi-Osterwalder et.al. (eds.), Environment and Trade: A Guide to WTO Jurisprudence (Earthscan 2005) 81
[611] US – Tuna (Mexico) (Panel) Para 2.4
[612] US – Shrimp (Panel) Para 2.1 – 2.3
[613] Thailand — Restrictions on the Importation of and Internal Taxes on Cigarettes (Report of the Panel) (05 October 1990) DS10/R - 37S/200 (Thai – Cigarettes) (Panel); Para 14
[614] EC – Asbestos (Panel) Para 2.4

being invoked were necessary to fulfil the policy objective"; and lastly, that the measures were applied in conformity with the requirements of the [Chapeau] of Article XX". [615]

We discuss the last element later in Section 4.5[616]. In the following sub-sections we look at the first two elements required to justify a measure under Article XX(b). A point of note here is that the order of the determination of both elements, was set by the Panel in *EC — Asbestos*. The Panel stated that "whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies" must be established before the test of necessity is applied to the measure[617]. We look at the two elements in the order set by the Panel.

### 4.3.1 Article XX(b): 'to protect human, animal or plant life or health'

The first element towards the justifiability of a standard or measure under Article XX(b)is the determination of whether it is designed to protect human, animal or plant health. This element is of course subject to each individual case and dependent on the reasoning of the court. For example, in the abovementioned *US – Gasoline* dispute, the Panel admitted that US measures to reduce air pollution resulting from the consumption of gasoline was a 'policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b)' without elaborating on the reason behind their admission other than to highlight the agreement of all parties concerned[618].

In *EC — Tariff Preferences* the Panel stated that when "examining whether the [measures] are designed to achieve the stated health objectives, the Panel needs to consider not only the express provisions of the EC Regulations, but also the design, architecture and structure of the measure" [619].

[615] US – Gasoline (Panel) Para 6.20; Although the AB in its review did not address the specific test related to the provisions of Article XX(b), the reader will recall the AB to have addressed the general test of the provisions and the chapeau when invoking Article XX. See Section 4.2 Article XX: General Exceptions.
[616] See Section 4.5 Article XX Chapeau
[617] EC – Asbestos (Panel) Para 8.184
[618] US – Gasoline (Panel) Para 6.21
[619] European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (Report of the Panel) (01 December 2003) WT/DS246/R (EC – Tariff Preferences) (Panel) Para 7.198 – 7.199

The Panel used the reasoning put forward by the AB in *Japan – Alcoholic Beverages II*[620]. In this dispute the Panel found that the disputed EC measure[621] was not related to the 'policy objective of protecting the health of European Communities citizens' as argued by the EC. Rather, on reading the disputed measure the Panel understood its objective to be "development policy, in particular the eradication of poverty and the promotion of sustainable development in the developing countries" and that "[t]hese objectives are to favour sustainable development, so as to improve the conditions under which the beneficiary countries are combating drug production and trafficking".[622]

Similarly, in *US – Shrimp* the Appellate Body stated that "the relationship between the general structure and design of the measure […], and the policy goal it purports to serve, that is, the conservation of sea turtles"[623] needs to be examined in order to determine whether the measure pertains to the Article XX(b) i.e. to protect human, animal or plant life or health.

Therefore, seemingly, the determination of whether a measure falls within the range of policies designed to protect human, animal or plant life or health and thereby admissible for consideration under Article XX(b) is partly determined by the policy goals it seeks to achieve.

### 4.3.2 Article XX(b): Necessity

The second element required to justify a measure under Article XX(b) is that of 'necessity'. In addressing the necessity of a measure, it is prudent to first identify the aspect of the measure that falls under such scrutiny. A difference must be made between the policy goal the measure wishes to achieve, and the means used to achieve the measure. The Panel in *US — Gasoline*, held that "it was not the necessity of the policy goal that was to be examined" but rather the necessity of the

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[620] Japan — Taxes on Alcoholic Beverages (Report of the Appellate Body) (04 October 1996) WT/DS8/AB/R ; WT/DS10/AB/R ; WT/DS11/AB/R (Japan — Alcoholic Beverages II) (AB) 29; see also Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (Report of the Appellate Body) (27 March 1998) WT/DS56/AB/R (Argentina — Textiles and Apparel) (AB) Para 55

[621] Council Regulation (EC) No 2501/2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L 346/1

[622] EC – Tariff Preferences (Panel) Para 7.201

[623] US – Shrimp (Panel) Para 137

particular measure to *achieve* such policy goal[624]. The reader will recall from Chapter 2 that the level of standard i.e. the policy goal, is determined by the host country as stated by the AB in *Australia – Salmon* and *EC – Sardines*[625]. It is rather the method in which these standards or measures are achieved that determines the justifiability of a standard or measure under Article XX.

This reasoning may be seen to a certain degree in the AB's judgement in *US* – Gasoline when addressing the Panel's findings on Article XX(g)[626]. The AB, taking note of the fact that "the Panel [had] asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air" found that the Panel "was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue."[627] Thus it may be inferred that in invoking Article XX, it is already presumed that the measure in question should be analysed as an exceptions to the provisions of the GATT, and thus the test for 'necessity' inherent in paragraph (b) is based on factors other than whether the original policy or intention falls foul of the provisions of the GATT. We now look as these factors essential for the test of 'necessity'.

The AB in *Korea — Various Measures on Beef* deliberated on the term 'necessary'[628]. The AB states thus in their judgement: "the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term 'necessary' refers, in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum,

[624] US – Gasoline (Panel) 16
[625] See Chapter 2 Section 2.3.3.1 The Compatibility of Standards with the WTO
[626] The AB did not address the Panel's findings on Article XX(b)
[627] US – Gasoline (AB) 16
[628] The AB deliberated on the term 'necessity' as under Article XX(d) and not Article XX(b). As will be shown in the following paragraphs, the reasoning holds true for Article XX(b) as well.

located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[629]

Although the AB in *Korea – Various Measures on Beef* looked at the meaning of 'necessary' within the ambit of Article XX(d)[630], the Panel in *EC – Tariff Preferences* used this reasoning of the AB for the meaning of 'necessary' in Article XX(b) as well stating that, "the same considerations apply to both these subparagraphs of Article XX because the structure of Articles XX(b) and XX(d) is very similar. The Panel considers that the approach of analysis followed by the AB in *Korea – Various Measures on Beef* is also appropriate for the analysis of a measure under Article XX(b)."[631] Therefore, using the reasoning in these two judgements, it may be deduced that in considering the 'necessity' of a measure invoking Article XX(b) the indispensability of the measure in terms of its objective would be a strong factor towards its validity under the General Exceptions. The greater the contribution of the measure to its objectives, the more easily might it be considered to be "necessary".[632] This would indicate the requirement for an assessment of the contribution a measure has towards its objective in order to determine its 'indispensability'.

The AB in *Brazil – Retreaded* Tyres, attempted such an evaluation of the contribution a measure has towards its objective. According to the AB, "[s]uch a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in

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629 Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (11 December 2000) WT/DS161/AB/R WT/DS169/AB/R (Korea – Beef) Para 161.

630 GATT (n 529) Article XX(d): " necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;"

631 EC – Tariff Measures (Panel) Para 7.196

632 Korea – Beef (AB) Para 163

designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it."[633] The AB, however, further cautions that "[t]his latitude is not [..] boundless" and the Panel must determine the relation between the objective and the means "in accordance with the requirements of Article XX […]."[634]

Thus, although the AB sets out the various criteria the Panel must take into consideration in assessing a methodology to evaluate a measure's contribution towards its objective, it does give the Panel a certain degree of flexibility in forming such methodology (subject, of course, to the edicts of proportionality, reason and Article XX). According to WTO case-law such method may be either quantitative or qualitative. In *EC — Asbestos*, the Appellate Body stated that there is no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health. A risk may be evaluated either in quantitative or qualitative terms."[635] The AB in *Brazil – Retreaded Tyres* acknowledged that the "same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms."[636]

The AB in *Brazil — Retreaded Tyres* dealt with the contribution of an import ban under Article XX(b). The AB explained that "when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears […] that it would be difficult for a Panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective."[637] However, the AB clarified that, "This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b)."[638]

[633] Brazil – Retreaded Tyres (AB) Para 145
[634] Brazil – Retreaded Tyres (AB) Para 145
[635] EC – Asbestos (AB) Para 167
[636] Brazil – Retreaded Tyres (AB) Para 146
[637] Brazil – Retreaded Tyres (AB) Para 150
[638] Brazil – Retreaded Tyres (AB) Para 151

Environmental and public health issues are complex and need equally complex solutions consisting of multiple interacting measures. The contribution of some of these measures may not be immediately obvious and be difficult to isolate "from those attributable to the other measures that are part of the same comprehensive policy"[639]. Furthermore, some environmental issues such as global warming and climate change may necessitate measures, the results of which may take a substantial amount of time to manifest. As acknowledged by the AB these measures "can only be evaluated with the benefit of time"[640].

This concept of delayed realization of contributive value was acknowledged also by the AB in *US – Gasoline* in the context of Article XX(g)[641] where they stated that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable."[642]

The AB in *Brazil – Retreaded Tyres* therefore elaborated on the concept of material contribution to the achievement of a measure's objective. According to the AB a demonstration of the material contribution can be made "by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued" but also could consist of "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."[643] This reasoning of the AB seems to indicate an acceptance of the precautionary approach, as discussed in the previous chapter. Although, as the reader will recall, in *EC – Hormones* the AB was uncertain about the acceptance of the precautionary principle by the

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[639] Brazil – Retreaded Tyres (AB) Para 151
[640] Brazil – Retreaded Tyres (AB) Para 151
[641] We look at Article XX(g) below in Section 4.4
[642] US – Gasoline (AB) 21
[643] Brazil – Retreaded Tyres (AB) Para 151

Member States[644], clearly the principle appears to be an acceptable characteristic in the determination of necessity.

This brings us to the import question of the treatment of scientific data and risk assessment in determining necessity. In *EC — Asbestos* the AB gave the Panel 'a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence' and thus the Panel 'was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements'.[645] The dispute related to a French ban on the manufacture, importation and exportation, and domestic sale and transfer of asbestos products, whose effects (or rather the extent of the effects) was disputed[646].

Furthermore, the AB also considered the prerogative of the country setting the environmental standard in considering scientific evidence. According to the AB, "[i]n justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the 'preponderant' weight of the evidence."[647] In *EC — Hormones*, the AB had similarly stated that 'responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.'[648]

*EC – Asbestos* also brought up the question of alternative measures. Canada argued in their appeal in *EC – Asbestos* that, the Panel had incorrectly interpreted that the level of health protection inherent in the measure was a 'halt' to the spread of asbestos-related health risks, since it failed to

[644] See Chapter 2 Section 2.4.3 The Precautionary Principle
[645] EC – Asbestos (AB) Para 161
[646] Canada disputed the French claim of the extent to which chryolite asbestos fibres affected human health. EC – Asbestos (AB) Para 162
[647] EC – Asbestos (AB) Para 178
[648] European Communities — Measures Concerning Meat and Meat Products (Hormones) (Report of the Appellate Body) (16 January 1998) WT/DS321/AB/R (EC – Hormones) (AB); Para 194

take into consideration the risk associated with the use of substitute products without a framework for controlled use[649].

To this the AB stated that WTO Members have 'the right to determine the level of protection of health that they consider appropriate in a given situation'. According to the AB, France had determined that the chosen level of health protection i.e. the prohibition of all forms of amphibole asbestos, and the restriction of chrysotile asbestos, is a 'halt' to the spread of asbestos-related health risks and therefore the measure at issue 'is clearly designed and apt to achieve that level of health protection'[650].

The important thing to note here is that an environmental standard does not necessarily have to eradicate a health risk in its entirety but rather create a level determined by the Member state. Therefore, in the *EC – Asbestos* dispute, although Canada disputed PCG fibres as not being entirely without risk to human health, the AB felt that it was sufficient that scientific evidence indicated the risk posed by the PCG fibres to be less than the risk posed by chrysotile asbestos fibres. Thus it is "perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place."[651] Therefore, it is not necessary for a standard to eliminate the risk inherent to its objective in its entirety but rather to create a level of acceptable risk below which reasonably available alternatives may be acceptable.

However, an available alternative may perhaps be problematic to the desired standards of a Member State in some cases. The AB in *EC — Asbestos* deliberated in length on the question of 'reasonably available' alternative measures, stating that a measure is "necessary" within the meaning of GATT Article XX(b) "if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is [not] available to

[649] EC – Asbestos (AB) Para 21
[650] EC – Asbestos (AB) Para 168
[651] EC – Asbestos (AB) Para 168

it."[652] The AB then discussed at precedent set previously on the subject. We look at these judgements as discussed by the AB in *EC – Asbestos*.

The AB in *EC* – Asbestos indicated that the Panel in *US – Gasoline*, "held, in essence that an alternative measure did not cease to be "reasonably" available simply because the alternative measure involved administrative difficulties for a Member."[653] The AB acknowledged that this issue was not addressed by the AB in *US – Gasoline* and proceeded to do so in *EC – Asbestos*, instead finding that 'several factors must be taken into account', besides the difficulty of implementation, in ascertaining whether a suggested alternative measure is "reasonably available"[654].

The AB then pointed towards the Panel judgement in *Thailand* – Cigarettes. The Panel In *Thailand — Cigarettes*, observed that for evaluating whether a measure is 'necessary' under Article XX(b), "[t]he import restrictions imposed […] could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which […] could reasonably be expected to employ to achieve its health policy objectives."[655]

The AB then discussed their previous judgement in *Korea – Beef* where they had found the Panel in *Korea – Beef* to have rightly used the principle set by the Panel in *US — Section 337 of the Tariff Act of 1930*[656]. According to the Panel in *US – Section 337*, a Member State is not able to justify a measure inconsistent with another GATT provision as "necessary" if an 'alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it'. Moreover, if an alternative GATT consistent measure is not available, a Member State is 'bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions'[657].

[652] EC – Asbestos (AB) Para 171
[653] EC – Asbestos (AB) Para 169; The AB was indicating the deliberations of the Panel in US – Gasoline in Paras 6.26 – 6.28
[654] EC – Asbestos (AB) Para 170
[655] Thailand – Cigarettes (Panel) Para 75
[656] Korea – Beef (AB) Para 166
[657] Korea – Beef (AB) Para 165

The AB in *EC - Asbestos* then addressed the issue of alternative measures that would achieve the same end and that is less restrictive of trade than a prohibition. The AB wishes to determine, in terms of France's asbestos ban, whether a controlled use of asbestos was a reasonable alternative to an outright prohibition, and one that would achieve the same objectives sought by the measure at issue.[658] According to the AB, a Member State "could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt'. Such an alternative measure would, in effect, prevent [a Member State] from achieving its chosen level of health protection."[659]

The AB in *Brazil — Re-treaded Tyres* also reiterated that a reasonably available alternative must allow for a Member to achieve the desired level of protection. With such objective in mind, the AB concludes that Brazil's chosen level of protection is the 'reduction of [these] risks … to the maximum extent possible'. Therefore, according to the AB a measure or practice cannot be viewed as an alternative unless it 'preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'.[660]

The AB in Korea – Beef further stated that, "[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends".[661] It may therefore be an arguable point to make here that, international principles of environmental law, such as 'Common but Differentiated Responsibility'[662] and 'Sustainable Development'[663] have enough common interests to render a measure pertaining to such principles to be 'necessary' under the WTO. These are however questions that have not yet, been required to be addressed by the DSB.

[658] EC – Asbestos (AB) Para 173
[659] EC – Asbestos (AB) Para 174
[660] Brazil – Re-treaded Tyres (AB) Para 170
[661] Korea – Beef (AB) Para 162
[662] See Chapter 2 Section 2.4.4
[663] See Chapter 2 Section 2.4.5

## 4.4 Article XX(g)

In this sub-section we analyse the parameters set on environmental standards, by Article XX(g) of the GATT. The General Exceptions within Article XX(g) are those "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"[664]. On a cursory reading of the text to Article XX(g) we find three elements to the Article in need of discussion and thus the section is divided accordingly.

Firstly, a definition of 'Exhaustible Natural Resources' is required. The question arises whether natural resources is limited to non-living resources or would fish populations, forests and other resources of anthropocentric interest be included within the definition. If it is the latter, then the scope of standards justifiable under Article XX(g) increases manifold. We therefore look at this issue in the first sub-section.

The second observation of note is the difference in the requirement of measures being 'related to' in the case of Article XX(g) while we have already observed the requirement of 'necessity' for Article XX(b). It is interesting to note whether the requirement of 'relating to' and not 'necessity' increases the scope of Article XX(g). We discuss this in Section 4.4.2[665].

Lastly, we discuss the requirement for these measures to be 'in conjunction with' restrictions on domestic production or consumption. This may be a manifestation of the National Treatment principle within the General Exceptions. The point of interest is its effect on environmental standards.

### 4.4.1 Article XX(g): Exhaustible Natural Resources

The primary question arising out of an analysis of Article XX(g) is whether, natural resources would include 'living' resources or would be limited to the conservation of non-living resources only. This

[664] GATT Article XX(g)
[665] See Section 4.4.2 Article XX(g): 'relating to'

issue is important in the context of the thesis as environmental standards related to conservation efforts and those ensuring the safety and sustainability of species, would otherwise be excluded from the ambit of this provision if ‘living’ resources are to be excluded.

Complainants in the *US – Shrimp* case[666] seemed to argue that the term ‘exhaustible natural resources would mean to include ‘mineral’ and ‘non-living’ resources only. The reasoning behind this claim was that the term "‘exhaustible’ referred to finite sources, such as minerals, rather than biological or renewable sources"[667]. However the AB in *US – Shrimp* disagreed with the contention of the complainants stating that Article XX(g) was not limited to the conservation of ‘mineral’ or ‘non-living’ natural resources. The AB felt that ‘exhaustible’ natural resources and ‘renewable’ natural resources were not ‘mutually exclusive’[668]. Although living species are capable of reproduction and may, therefore, be considered ‘renewable’, in a sense, they are however "susceptible to depletion, exhaustion and extinction, frequently because of human activities"[669]. As the AB stated, "[l]iving resources are just as ‘finite’ as petroleum, iron ore and other non-living resources."[670]

The complainants also referred to the drafting history of Article XX(g) to further argue limiting the exception to ‘non-living resources’[671]. They pointed to the preparatory meetings of the original ITO Draft chapter which focused on ‘raw materials’[672], ‘products’[673] and ‘minerals’[674]. The AB clarified however that the wording to Article XX(g), including the term ‘exhaustible natural resources’, were crafted more than 50 years ago. Therefore, they require being interpreted in accordance with contemporary concerns such as the protection and conservation of the environment[675].

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[666] India, Pakistan, Thailand and Malaysia
[667] US – Shrimp (Panel) Para 3.240
[668] US – Shrimp (AB) Para 128
[669] US – Shrimp (AB) Para 128
[670] US – Shrimp (AB) Para 128
[671] US – Shrimp (Panel) Para 3.238
[672] ‘9th Meeting of the Preparatory Committee of the International Conference on Trade and Employment’, Economic and Social Council E/PC/T/C.II/50 Pg 4-5
[673] ‘5th Meeting of the Preparatory Committee of the International Conference on Trade and Employment’, Economic and Social Council E/PC/T/C.II/QR/PV/5 Pg 79
[674] ‘25th Meeting of the Preparatory Committee of the International Conference on Trade and Employment’, Economic and Social Council E/PC/T/A/PV/25 Pg 30
[675] US – Shrimp (AB) Para 129

The AB further pointed out the changes in the WTO since the drafting of the GATT including the attachment of the Preamble to the WTO Agreement[676]. The Preamble attached to the WTO environmental principles such as sustainable development[677]. The AB felt that the signatories to that Agreement were, therefore, "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy"[678].

Thus according to the AB, "[f]rom the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources."[679]

The AB also acknowledged the expectations of the international community with regards to sustainable development in their interpretation of exhaustible natural resources: "Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g)."[680]

[676] US – Shrimp (AB) Para 129
[677] US – Shrimp (AB) Para 129
[678] US – Shrimp (AB) Para 129
[679] US – Shrimp (AB) Para 130; The AB provides the example of Article 62 of the United Nations Convention on the Law of the Sea which refers to resources, *whether living or non-living*.
[680] US – Shrimp (AB) Para 131

Importantly, in terms of environmental standards and policies, the AB seems to indicate that the changing nature the WTO, post-Uruguay round, affects the nature of Article XX, and indeed all WTO documents, towards a more environmental friendly interpretation.

### 4.4.2 Article XX(g): 'relating to'

A very visible difference between Article XX(b) and (g) is the requirement of 'necessity'. Unlike Article XX(b), Article XX(g) does not require a measure to be 'necessary'. Rather it requires a measure to be 'relating to' the conservation of exhaustible natural resources. A discussion on the meaning of the term 'relating to' is required to understand the scope of Article XX(g) and the standards it includes.

The inherent ambiguity in the term 'relating to' was noted by the Panel in *US* – Gasoline. The Panel felt that the term, "did not in isolation provide precise guidance as to the required link between the measures and the conservation objective."[681] The Panel therefore looked towards the reasoning of the Panel in *Canada – Herring and Salmon* in its interpretation of Article XX(g) for further guidance on the matter[682]. According to the Panel in *Canada – Herring and Salmon*, the difference in terminology of the different Article XX provisions, "[suggested] that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures."[683]

The Panel in *Canada – Herring and Salmon* further elaborated that, "the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources"[684]. Therefore, according to the Panel, "while a trade measure did not have to be necessary or essential to the

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[681] US – Gasoline (Panel) Para 6.39
[682] US – Gasoline (Panel) Para 6.39
[683] Canada – Measures Affecting exports of Unprocessed Herring and Salmon (Report of the Panel) (22 March 1988) L/6268 - 35S/98 (Canada – Herring and Salmon) (Panel) Para 4.6
[684] Canada – Salmon and Herring (Panel) Para 4.6

conservation of an exhaustible natural resource, it had to be *primarily aimed at* the conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX(g). *(Emphasis added)*"[685].

The AB in *US – Gasoline*, noted that the participants and third parties to the dispute accepted the reasoning of the Panel in *Canada – Herring and Salmon* and subsequently the Panel in *US – Gasoline*, that the term 'relating to' is synonymous with the term 'primarily aimed at'. The AB therefore decided not to examine the matter any further, thereby presumably assenting to the reasoning of the Panel. The AB did however caution that, "the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."[686]

The AB in *US – Gasoline* did, however, disagree with the Panel's usage of Article XX(g) with regards to the term 'relating to'. The Panel had held that it "saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the United States objective of improving air quality in the United States" and thus the measure at issue was "not primarily aimed at the conservation of natural resources"[687].

The AB disagreed with this reasoning of the Panel. According to the AB, the Panel had wrongly asked whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources. The AB felt that the pertinent question was whether the 'measure', was 'primarily aimed at' conservation of natural resources[688]. The AB reasoned that the Panel had erred by referring to its legal conclusion on the provision of the GATT that was in violation[689] rather than of the measure being disputed. To have the General exceptions in Article XX

[685] Canada – Salmon and Herring (Panel) Para 4.6
[686] US – Gasoline (AB) Page 19
[687] US – Gasoline (Panel) Para 6.40
[688] US – Gasoline (AB) Page 16; The AB noted that the natural resource in question here was clean air.
[689] In this case it was Article III:4

invoked meant that a provision of the general agreement has been violated already[690]. The AB further added that the Chapeau of Article XX "makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment.'[691]"[692]

In *US — Shrimp*, the AB reasoned that for a measure to be "primarily aimed at" the conservation of natural resources, the 'means' must, in principle, be 'reasonably related to the ends'[693]. The AB felt that for the measure in dispute in *US – Shrimp*, "the means and ends relationship between [the measure] and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, [was] observably a close and real one"[694]. The AB therefore concluded that the measure in question was 'relating to' the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994."[695]

The AB in *US – Gasoline*, subsequently discussed the relationship between the provisions of the GATT and Article XX thus: "Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources', need to be read in context and in such a manner as to give effect to the purposes and objects of the General Agreement. The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful

[690] 'Less favourable treatment' in violation of Article III.4
[691] Or any other violation of the General Agreement necessitating the invocation of Article XX
[692] US – Gasoline (AB) Pg 16
[693] US – Shrimp (AB) Para 141
[694] US – Shrimp (AB) Para 141
[695] US – Shrimp (AB) Para 142

scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[696]

### 4.4.3 Article XX(g): 'made effective in conjunction with'

A further test in order to justify a standard or measure under Article XX(g) is the comparable application of the standard (or measure) to a like domestic product. This is due to the second part of Article XX(g) which mandates that measures that relate to the conservation of exhaustible natural resources must also be "made effective in conjunction with restrictions on domestic production or consumption"[697].

In *US — Gasoline*, the AB discussed the definition and the combined effect of the terms 'made effective' and 'in conjunction with'. According to the AB, "the ordinary or natural meaning of 'made effective' when used in connection with a measure — a governmental act or regulation — may be seen to refer to such measure being 'operative', as 'in force', or as having 'come into effect'. Similarly, the phrase 'in conjunction with' may be read quite plainly as 'together with' or 'jointly with'."[698] Combining the two definitions, the AB concluded that the second clause of Article XX(g) refers to "governmental measures […] being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources"[699]. The AB further concluded that the second part of Article XX(g) was "a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[700]

However, equivalent restrictions on similar domestic products, or as the AB mentions – 'Even-handedness' – does not imply the same level of restrictions. In fact, identical treatment or for that

[696] US – Gasoline (AB ) Pg 18
[697] GATT (n 529) Article XX(g)
[698] US – Gasoline (AB) Pg 20; The AB considered "the basic international law rule of treaty interpretation, […] that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose". Thus they defined these terms using the 'The New Shorter Oxford English Dictionary on Historical Principles (L. Brown, ed., 1993), Vol. I (See fn 40 of the AB report)
[699] US – Gasoline (AB) Pg 20
[700] US – Gasoline (AB) Pg 20

matter a strict application of other GATT provisions would render Article XX redundant. On the other hand, no restrictions at all would make it very difficult to justify a standard or a measure on an imported product. The problem at hand is similar to the one discussed in the previous section i.e. since the general exceptions are invoked when a provision of the GATT is violated, should the principles of the general agreement still be considered[701]. In the case of the second part to Article XX(g) it is the similarity to the national treatment principle of the GATT[702] that is in debate.

Addressing this issue in *US – Gasoline*, the AB stated that there was "no textual basis for requiring identical treatment of domestic and imported products"[703]. In line with their reasoning for the relationship between the GATT and Article XX[704], the AB concluded that "where there is identity of treatment — constituting real, not merely formal, equality of treatment — it is difficult to see how inconsistency with Article III:4 would have arisen in the first place"[705].

However the AB also cautioned that if limitations are placed upon imported products alone, with no restrictions on domestically-produced like products, then the measure "cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods."[706]

An instance of such reasoning can be found in the Panel decision of *Canada – Herring and Salmon*[707]. One of the several factors highlighted by the Panel in their analysis of Article XX(g), was that Canada limited purchases of unprocessed fish only by foreign processors and consumers and not by

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[701] See Section 4.4.2 Article XX(g): 'relating to'
[702] As a reminder to the reader, the National Treatment principle found in Article III.4 GATT states that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."
[703] US – Gasoline (AB) Pg 21
[704] See Section 4.4.2 Article XX(g): 'relating to'
[705] US – Gasoline (AB) Pg 21
[706] US – Gasoline (AB) Pg 21
[707] The example of the Canada – Herring and Salmon judgement was highlighted by the AB in their decision in US – Gasoline; See fn 42 of US – Gasoline (AB)

domestic processors and consumers[708]. As a consequence the Panel found the disputed measures to not be justified by Article XX(g)[709].

Similarly in *US — Shrimp* the AB found that previous to the disputed measure, which regulated the mode of harvesting of imported shrimps, the US had instituted similar domestic regulations for the national shrimp trawling fleet. Therefore, although the disputed measure did not apply to domestic shrimp trawlers, the AB felt that 'in principle', the measure was an even-handed measure[710]. As a result the AB declared that the measure was justified under Article XX(g)[711].

## 4.5 Article XX Chapeau

Once we have analysed the provisions of Article XX, in accordance with the discussion in the introduction to Article XX above, it is now prudent to discuss the Chapeau of Article XX. The reader will recall that the Appellate Body in *US – Gasoline* mandated that the provisions as well as the Chapeau of Article XX must be fulfilled for a standard or measure to be able to invoke the General Exceptions to the GATT, while in *US – Shrimp* the AB further mandated that such a standard or measure must be analysed in the order illustrated in *US – Gasoline*. We therefore, now look at the content of the Chapeau to Article XX.

The Chapeau to Article XX states:

"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:"[712]

[708] Canada – Herring and Salmon (Panel) Para 4.7
[709] Canada – Herring and Salmon (Panel) Para 4.7
[710] US – Shrimp (AB) Para 144
[711] US – Shrimp (AB t) Para 145
[712] GATT Article XX Chapeau

A point of note here is that the Chapeau, does not address the measure in question or its contents, (which is within the remit of the provisions of Article XX) but instead in "the manner in which that measure is applied."[713] The Panel in *US – Imports of Certain Automotive Spring Assemblies* noted that the Chapeau to Article XX "made it clear that it was the application of the measure and not the measure itself that needed to be examined"[714]. According to the AB in *US – Gasoline*, this characteristic of the Chapeau, and indeed its very purpose and object, "is generally the prevention of abuse of the exceptions" of Article XX[715].

Thus the AB in *US – Gasoline* further elaborated that, "[t]he Chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[716]

This relationship between the rights and duties of the Member invoking the exceptions was also mentioned by the AB in *US – Shrimp.* The AB found that "a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members"[717]. The AB further elaborated that in their view, "the language of the Chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a limited and conditional exception from the substantive obligations contained in the other

[713] US – Gasoline (AB) Page 22
[714] US – Imports of Certain Automotive Spring Assemblies (Report of the Panel) (26 May 1983) L/5333 - 30S/107 Para 56
[715] US – Gasoline (AB) Pg 22
[716] US – Gasoline (AB) Pg 22
[717] US – Shrimp (AB) Para 156

provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the Chapeau".[718]

The AB explains that, "[t]his principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[719]

Cheng explains what a reasonable and bona fide exercise of a Member's right would entail[720]. According to Cheng, a reasonable and bona fide exercise of a right should be "appropriate and necessary for the purpose of the right (i.e., in furtherance of the interests which the right is intended to protect) […], fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed."[721] In fact, an unreasonable exercise of such a right may even be considered "inconsistent with the bona fide execution of the treaty obligation and a breach of the treaty"[722].

However, the AB also cautions that "[t]he location of the line of equilibrium, as expressed in the Chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[723]

[718] US – Shrimp (AB) Para 157
[719] US – Shrimp (AB) Para 158
[720] The AB in US – Shrimp in fact highlights this explanation by Cheng in its judgement. See fn 156 of US – Shrimp (AB Report) Para 158
[721] Bin Cheng, General Principles of Law as applied by International Courts and Tribunals (Stevens and Sons, Ltd., 1953) 125
[722] Cheng (721) 125
[723] US – Shrimp (AB) Para 159

### 4.5.1 Article XX Chapeau: ‘arbitrary or unjustifiable discrimination’ and ‘disguised restriction on international trade’

In its judgement in *US — Shrimp*, the Appellate Body highlighted three elements as a test of ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’. Firstly, the application of the standard or measure must ‘result in discrimination’. Secondly, such discrimination ‘must be arbitrary or unjustifiable in character’. Lastly this discrimination ‘must occur between countries where the same conditions prevail’[724]. This section therefore looks at these three elements in order to understand the limits to an environmental standard, beyond which it may be deemed arbitrary or unjustified.

In *US — Gasoline*, the Appellate Body held that the concepts of ‘‘arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade must be read ‘side-by-side’ as they ‘impart meaning to one another’[725]. According to the AB, the concept of ‘disguised restriction’ has inherent within it the concept of ‘disguised discrimination in international trade’ but is not exhausted by it[726]. Therefore the AB further concluded that, “the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to ‘arbitrary or unjustifiable discrimination’, may also be taken into account in determining the presence of a ‘disguised restriction’ on international trade.”[727]

It may be inferred from a reading of WTO jurisprudence that what constitutes discrimination under Article XX may be different from the parameters of discrimination in other provisions of the GATT. The process for determining discrimination of the General Exceptions has been consistently stated by the AB, to be different from that of the other substantive provisions of the GATT. In *US – Gasoline* the AB stated that, “[t]he provisions of the Chapeau cannot logically refer to the same standard(s) by

[724] US – Shrimp (AB) Para 150
[725] US – Gasoline (AB) Page 25
[726] US – Gasoline (AB) Page 25
[727] US – Gasoline (AB) Page 25

which a violation of a substantive rule has been determined to have occurred."[728] This was because doing so would render the application of Article XX 'unprofitable' and '[t]o proceed down that path would be both to empty the Chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning'.[729] Thus according to the AB, the Chapeau prohibits the application of the General Exceptions in a way which would otherwise be consistent with the provisions of Article XX by disallowing 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and where there is a 'disguised restriction' on international trade.[730]

However, as mentioned above, the AB also cautions on the ambiguity of the wording of the Chapeau. The AB concludes that the requirements of the Chapeau may have 'different fields of application.'[731] To understand what constitutes 'arbitrary or unjustifiable discrimination' and a 'disguised restriction' on international trade we must look at the different instances in WTO case-law where the various measures in question have been deemed to have been inconsistent with the provisions of the Chapeau.

In *US — Gasoline* the AB considered the conduct of the US with regards to other Member states, identifying 'omissions' made by the US – firstly, "to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners" and secondly, "to count the costs for foreign refiners that would result from the imposition of statutory baselines."[732] According to the AB such omissions were beyond and above what was required to determine a violation of Article III.4. Thus the AB seems to imply that a violation, which would otherwise give the opportunity to invoke the General Exceptions, when determined to be far

[728] US – Gasoline (AB) Page 23
[729] US – Gasoline (AB) Page 23
[730] US – Gasoline (AB) Page 23
[731] US – Gasoline (AB) Page 23
[732] US – Gasoline (AB) Page 28

in excess may fall foul of the Chapeau. The AB determined that “[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.”[733]

Thus the AB concluded that the measures being discussed in *US – Gasoline* would constitute an ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade.’ The reader will recall that the very same measures was deemed to be consistent with Article XX(g) but the AB further clarified that the measures “although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.”[734]

Similar to *US – Gasoline*, the question of the imposition of standards, rather than negotiation or at the very least a consideration for the measures and circumstances available in countries on which such standards are being imposed, was also addressed by the AB in *US – Shrimp*. In analysing the US measures at issue in the light of the Chapeau of Article XX, the AB noted the “intended and actual coercive effect on other governments” to “adopt essentially the same policy” as the US. The AB likened these prevailing circumstances to an ‘economic embargo’ which required “all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement programme) as that applied to, and enforced on, United States domestic shrimp trawlers.”[735]

It is of note here that by applying the conditions uniformly to international and domestic shrimp trawlers the US essentially fulfilled their National Treatment obligations under the GATT[736]. The AB did acknowledge that the US had “applie[d] a uniform standard throughout its territories regardless of the particular conditions existing in certain parts of the country”[737]. The AB further acknowledged

[733] US – Gasoline (AB) Page 29
[734] US – Gasoline (AB) Page 29
[735] US – Shrimp (AB) Para 161
[736] See discussion in Section 4.4.3
[737] US – Shrimp (AB) Para 164

that "[i]t may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country."[738]

However, the AB refused to extend such uniformity beyond domestic application. According to the AB, "it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members."[739]

The AB also noted that for the US measures[740] under dispute the mere use of Turtle Excluder Devices (TEDs) did not relieve the home country from the prohibition of export. Shrimps of such countries were still not permitted for imports if they originated in waters of countries not certified under the certifying condition of the disputed measure. To the AB this "resulting situation [was] difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" thus suggesting that this measure, in its application, "[was] more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated". Importantly, by reviewing these conditions, the AB reiterated the principle that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries."[741]

Furthermore, the AB felt that the certification requirements of the measure "impose[d] a single, rigid and unbending requirement that countries applying for certification […] adopt a comprehensive

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[738] US – Shrimp (AB) Para 164
[739] US – Shrimp (AB) Para 164
[740] International Cooperation, Section 609 per Public Law 101-162 16 U.S. Code § 1537
[741] US – Shrimp (AB) Para 164

regulatory programme that is essentially the same as the United States programme, without inquiring into the appropriateness of that programme for the conditions prevailing in the exporting countries." According to the AB there was seemingly little or no flexibility in how officials make the determination for certification pursuant to these provisions. Thus, to the AB "this rigidity and inflexibility also constitute 'arbitrary discrimination' within the meaning of the Chapeau."[742]

In *US* – Shrimp the AB also addressed the issue of the 'due process' of the measure in question. The issue in question was to determine whether the certification process as required by the measure was a "transparent, predictable certification process"[743]. The AB found the certification processes under the disputed measure to be, "principally of administrative *ex parte* inquiry or verification"[744] by the relevant authority[745]. The AB further found that there was no 'formal opportunity' for an applicant country to state its claims for certification or to clarify or justify its position against any arguments made against it prior to a decision on grating it certification. Neither were the authorities required to provide a formal reason for, or even notify the country of, its decision. The exporting country was required to determine the decision of the authorities through a published list in the Federal Register, of permitted importing countries. There was no procedure for review of, or appeal from, a denial of an application is provided. The AB therefore found the certification process of the US to be "singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members"[746], who have no way of determining whether the certification procedures are "being applied in a fair and just manner by the appropriate governmental agencies of the United States."[747] The AB therefore further found the certification procedure to be discriminatory under the conditions of the Chapeau to Article XX.[748]

[742] US – Shrimp (AB) Para 177
[743] US – Shrimp (AB) Para 180
[744] US – Shrimp (AB Para 180
[745] The relevant authority in this case were the staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service.
[746] US – Shrimp (AB) Para 181
[747] US – Shrimp (AB) Para 181
[748] US – Shrimp (AB) Para 180-181

Another aspect analysed in WTO jurisprudence, in determining the conditions of arbitrary or unjustified discrimination, was similar criteria applied to all effected Member states. This is similar to the MFN principle of the WTO and again it may be argued that the General Exceptions are available to justify derogation to the principle. However, there may be a need for objective criteria for any discrimination as was discussed by the Panel in *EC – Tariff Preferences*.[749]

In the *EC – Tariff Preferences* case the Panel had to determine the justification of the EC's Drug Arrangement schemes with other Member states, under Article XX(b). Following the analysis of Article XX(b) the Panel had to look at whether the conditions of the Chapeau had also been fulfilled as well[750]. In determining whether there had been any 'unjustified discrimination' the Panel particularly looked at the inclusion of Pakistan as a beneficiary of the Drug Arrangement[751] while Iran was excluded from such benefits[752]. There were in total 12 beneficiary countries to the Arrangements.[753]

Using the statistics provided by the EC, to justify that the 12 beneficiary countries were the most seriously drug affected, the Panel highlighted that the drug seizures in Iran (not a beneficiary country), were substantially higher than Pakistan (one of the beneficiary countries).[754] Moreover, by virtue of the statistics provided by the EC, the Panel felt that the conditions in terms of the seriousness of the drug problem prevailing in Pakistan in 1994 (at which time Pakistan was not a beneficiary of the Drug Arrangements) were very similar to those prevailing in Pakistan in the year 2000. The Panel therefore stated that they failed to see "how the application of the same claimed objective criteria justified the exclusion of Pakistan prior to 2002 and, at the same time, its inclusion as of that year."[755] The Panel felt that such treatment of Iran, and possibly of other countries, is discriminatory and the EC had failed to provide a justification for such discrimination. The EC,

[749] EC – Tariff Preferences (Panel) Para 7.194
[750] EC – Tariff Preferences (Panel) Para 7.226
[751] EC – Tariff Preferences (Panel) Para 7.229
[752] EC – Tariff Preferences (Panel) Para 7.232
[753] EC – Tariff Preferences (Panel) Para 7.228
[754] EC – Tariff Preferences (Panel) Para 7.228
[755] EC – Tariff Preferences (Panel) Para 7.229

according to the Panel had also failed to show that the discrimination was not arbitrary and unjustifiable as between countries where the same conditions prevail.[756]

The question of whether an exception due to the instructions of a judicial or quasi-judicial body, could constitute an 'arbitrary or unjustifiable discrimination', was addressed by the Panel as well as the AB in *Brazil – Re-treaded Tyres* with diverging conclusions. Brazil had in place an import ban on remoulded tyres. However, Brazil had to institute an exemption to this ban to MURCOSUR Members[757]. This was in order to comply with a ruling issued by a MERCOSUR arbitral tribunal that had found the Brazil ban to be a violation of its obligations under MERCOSUR, thereby leading to the MURCOSUR exemptions.[758]

The Panel concluded that the MERCOSUR exemptions "[did] not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."[759] The Panel further stated that the MURCOSUR exemptions, although discriminatory, was not "*a priori* unreasonable", as the MURCOSUR agreement was recognized under Article XXIV of the GATT, allowing preferential treatment[760].

The AB however, disagreed with the Panel's reasoning. According to the AB any analysis on whether a measure results in 'arbitrary or unjustifiable' discrimination "should focus on the cause of the discrimination, or the rationale put forward to explain its existence."[761] In the AB's view, "there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner 'between countries where the same conditions prevail', and when the reasons given for this discrimination

[756] EC – Tariff Preferences (Panel) Para 7.235
[757] Article 40 Portaria No. 14 of the Secretaria de Comercio Exterior (SECEX) (17 November 2004) (Portaria SECEX 14/2004)
[758] Brazil – Re-treaded Tyres (Panel) Para 2.13
[759] Brazil – Re-treaded Tyres (Panel) Para 7.272
[760] Brazil – Re-treaded Tyres (Panel) Para 7.273
[761] Brazil – Re-treaded Tyres (AB) Para 226

bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective."[762]

In *US — Shrimp*, for example, when the disputed measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the US would be excluded from the US market it was 'difficult to reconcile with the declared objective of protecting and conserving sea turtles'.[763] Using the *US – Shrimp* judgement, the AB in *Brazil – Re-treaded Tyres* admitted that they had difficulty in "understanding how discrimination might be viewed as complying with the Chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX."[764]

The AB therefore concluded that "the ruling issued by the MERCOSUR arbitral tribunal [was] not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree."[765] Therefore, according to the AB, the application of the MERCOSUR exemption on the import ban on re-treaded tyres constituted 'arbitrary or unjustifiable discrimination'.[766]

Another relevant issue with regards to 'arbitrary and unjustifiable discrimination' arose in the Panel's interpretation in *Brazil – Re-treaded Tyres*, that although the MERCOSUR exemption was discriminatory between MERCOSUR countries and other WTO Members, it would be 'unjustifiable' only if imports of re-treaded tyres entering into Brazil 'were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined'.[767]

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[762] Brazil – Re-treaded Tyres (AB) Para 227
[763] US – Shrimp (AB) Para 165
[764] Brazil – Re-treaded Tyres (AB) Para 227
[765] Brazil – Re-treaded Tyres (AB) Para 228
[766] Brazil – Re-treaded Tyres (AB) Para 228
[767] Brazil – Re-treaded Tyres (Panel) Para 7.287

The AB assessed that the Panel's interpretation implied that "the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue"[768]. The AB disagreed with this interpretation of the Panel reiterating that an analysis of 'unjustifiable discrimination' would rather involve the cause or the rationale of the discrimination.[769]

According to the AB, however, the effects of the discrimination may be a relevant factor for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable because "the Chapeau of Article XX deals with the manner of application of the measure at issue"[770]. This was however "fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character."[771]

## 4.6 Conclusion

Chapter 2 defined the concept of standards in international environmental law. The analysis included a section on the WTO compatibility of environmental standards[772]. Articles I[773], III.4[774] and XI.1[775] of the GATT are particularly problematic in terms of environmental standards as they are designed to eliminate discrimination between goods and therefore diametrically opposed to the inherent concept of environmental standards, which distinguish between otherwise like products through criteria set by them.

Although Article XI does set an exception for standards, these standards are limited to 'the classification, grading or marketing of commodities in international trade'[776]. Yet the AB decision of

[768] Brazil – Re-treaded Tyres (AB) Para 229
[769] Brazil – Re-treaded Tyres (AB) Para 229
[770] Brazil – Re-treaded Tyres (AB) Para 230
[771] Brazil – Re-treaded Tyres (AB) Para 230
[772] See Section 2.3.3 The WTO and Standards
[773] GATT (n 529) Article I: General Most-Favoured-Nation Treatment
[774] GATT (n 529) Article III: National Treatment on Internal Taxation and Regulation
[775] GATT (n 529) Article XI: General Elimination of Quantitative Restrictions
[776] GATT (n 529) Article XI.2(b); See discussion in Chapter 2 Section__

*Australia – Salmon*[777], and the Panel decision of *EC – Sardines*[778], notes the prerogative given to member states, to determine their chosen level of environmental protection through policy objectives, in the SPS and TBT Agreement respectively[779]. Therefore, it stands to reason, that policy objectives which do not fall under the exceptions of Article XI.2(b) would need to be excepted elsewhere through a legislative mandate.

The GATT provides for such an exception through its General Exceptions clause in Article XX. This chapter has looked at the provisions of Article XX and the interpretations of the clause through various WTO and GATT disputes. This chapter looked specifically at Article XX(b), (g) and the Chapeau. These three provisions[780], when analysed in the various disputes, reveal several principles that determine the justifiability of a standard. As a concluding exercise, therefore, this section summarizes these various principles discussed in the previous sections.

One of the important subjects addressed by the DSB is that of 'extraterritoriality'. Standards condition access to a Member State's market by imposing conditions on Member States wishing to access these markets. The AB in *US – Shrimp* decided that conditioning access to a Member's domestic market may be a common aspect of measures invoking Article XX[781]. Therefore, imposing policies that set a certain level of standards for imported goods may be justified under Article XX of the GATT.

However, justifying a measure under Article XX is a two-tiered procedure subject to the tests of a specific provision followed by justification under the Chapeau of Article XX[782]. The disputed measure must first be 'provisionally justified under the particular exceptions of the provisions of Article XX

[777] Australia – Salmon (AB) Para 205
[778] EC – Sardines (Panel) Para 7.120
[779] See Chapter 2 Section 2.3.3.1 The Compatibility of Standards with the WTO
[780] The term 'provisions' is used loosely here to include the Chapeau, which is not a provision of Article XX in the strictest sense, but an inherent part of its application
[781] US – Shrimp (AB)
[782] US – Shrimp (AB) Para 117

before being 'further appraised' by the Chapeau[783]. The two Article XX provisions that are environmentally relevant are Article XX(b) and (g).

When invoking Article XX(b) the measure must fulfil three criteria. First the policy objective of the measures must be designed to protect human, animal or plant life or health. Secondly, must be *necessary* to fulfil the policy objective. Lastly, the measure must satisfy the conditions of the Chapeau of Article XX[784].

Determination of whether it is designed to protect human, animal or plant health is subject to each individual case and dependent on the reasoning of the court. For example in *US-Gasoline* the US measures to reduce air pollution resulting from the consumption of gasoline was within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b)[785]. Other case-law has elaborated on certain aspects which require to be examined in terms of this criterion including the design, architecture and structure of the measure[786] and the policy goal it purports to serve[787].

In terms of the criterion of necessity, the DSB makes it clear that it not the necessity of the policy goal that was to be examined but rather the necessity of the particular measure to achieve such policy goal[788].

The AB in *Korea – Beef* imagined a spectrum of 'necessity' ranging from the 'indispensable' to merely 'making a contribution to'. In terms of the Article XX(b) requirement of necessity, the AB felt the definition was closer to the 'indispensability' of the measure. The greater the contribution of the measure to its objectives, the more easily might it be considered to be 'necessary'[789].

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[783] US – Gasoline (AB) Page 22
[784] US – Gasoline (Panel) Para 6.20
[785] US – Gasoline (Panel) Para 6.21
[786] EC – Tariff Preferences (Panel) Para 7.201
[787] US – Shrimp (Panel) Para 137
[788] US – Gasoline (Panel) Pg 16
[789] Korea – Beef (AB) Para 163

The contribution of a measure is assessed through the nature of the risk, the objective pursued, and the level of protection sought. It also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made[790]. Both, the risk[791] as well as the contribution of the measure towards the objective[792] is evaluated in either quantitative or qualitative terms.

One factor determining the necessity of a measure is its effect on international trade. The AB in *Brazil — Retreaded Tyres* reasoned that it would be very difficult to find measures with severe restrictive effects on international trade, as 'necessary' unless they are satisfactorily shown to make a material contribution to the achievement of the objective[793].

If the contribution of a measure is not immediately observable, however, it does not mean that such a measure cannot be justified under Article XX(b)[794]. This is because measures aimed at environmental issues such as global warming and climate change, may have delayed results[795].

In such circumstances, evidence or data, pertaining to the past or the present could be used to demonstrate the material contribution of the measure. Importantly, 'quantitative projections in the future', or 'qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence' may also be used to demonstrate material contribution[796]. These quantitative projections or qualitative reasoning may represent a divergent, but qualified and respected, opinion[797]. A Member is not obliged to follow a majority scientific opinion[798].

Another factor determining the 'necessity' of a measure is the availability of alternative measures. A Member State does not have to show that a standard eliminates the risk inherent to its objective in

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[790] Brazil – Retreaded Tyres (AB) Para 145
[791] EC – Asbestos (AB) Para 167
[792] Brazil – Retreaded Tyres (AB) Para 146
[793] Brazil – Retreaded Tyres (AB) Para 150
[794] Brazil – Retreaded Tyres (AB) Para 151
[795] Brazil – Retreaded Tyres (AB) Para 151
[796] Brazil – Retreaded Tyres (AB) Para 151
[797] EC – Hormones (AB) Para 194
[798] EC – Asbestos (AB) Para 178

its entirety but rather to create a level of acceptable risk below which reasonably available alternatives may be acceptable[799].

A measure is 'necessary', if an alternative measure not 'reasonably available'. However, if an alternative GATT consistent measure is not available, a Member State is obliged to use a measure which entails the least degree of inconsistency with other GATT provisions'[800].

On the other hand, a Member State cannot be expected to use an alternative measure if that measure would allow the continuation of the risk that the environmental objective seeks to address[801]. Such an alternative measure would prevent a Member State from achieving its chosen level of health protection[802].

The two questions asked of an analysis of Article XX(g) are the scope of the terms 'exhaustible natural resources' and 'relating to'. In terms of exhaustible natural resources the AB in *US – Shrimp* included living resources within the ambit of Article XX(g)[803]. This increased the scope of the provision to include environmental standards related to conservation efforts and those ensuring the safety and sustainability of species.

The term 'relating to' broadens the scope of Article XX(g) even further. By virtue of the term, not only are 'necessary' measures covered by the provision, but a much wider range of measures which are 'primarily aimed at' the conservation of an exhaustible natural resource[804].

The Chapeau to Article XX(g) limits the measures that may be justified under the provisions. The purpose and object of the Chapeau is to prevent the abuse of the provisions[805] by guarding against 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade'.

[799] EC – Asbestos (AB) Para 21
[800] Korea – Beef (AB) Para 165
[801] EC – Asbestos (AB) Para 174
[802] Brazil – Re-treaded Tyres (AB) Para 170
[803] US – Shrimp (AB) Para 131
[804] Canada –Herring and Salmon (Panel) Para 4.6
[805] US – Gasoline (AB) Page 22

An important indicator of arbitrary or unjustified discrimination is the failure to cooperate with the governments of effected member States and to not consider the cost of a measure on parties affected by such measure[806].

Moreover, although the AB has allowed the extraterritorial effect of measures justified by Article XX, there are limits to such permission. It is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, without taking into consideration different conditions which may occur in the territories of those other Members[807].

Another aspect in determining the conditions of arbitrary or unjustified discrimination was similar criteria applied to all effected Member states. Member States are required to provide objective criteria for any discrimination.[808] Discrimination due obligations to an international body cannot be counted as 'objective criteria and would be considered 'arbitrary or unjustifiable discrimination'[809].

Understanding these limitations placed on standards and measures implementing standards allow us to analyse standard setting instruments in international trade. Keeping such limitations in mind therefore, we look at unilateral and cooperated environmental standard setting instruments in the following chapters, assessing them against WTO compatibility and efficiency in addressing environmental issues.

[806] US – Gasoline (AB) Page 29
[807] US – Shrimp (AB) Para 164
[808] EC – Tariff Preferences (Panel) Para 7.194
[809] Brazil – Re-treaded Tyres (AB) Para 229

# 5. Unilateral Environmental Action

## 5.1 Introduction

Having sought a definition of environmental standards and their relationship with the WTO, the thesis now turns its attention to the methods of implementation of environmental standards. Environmental standards in the international context can be imposed either unilaterally or in a cooperative negotiated fashion through bilateral, plurilateral or multilateral agreements. This chapter concentrates on unilateral action and its subset, Unilateral Environmental Action (UEA), and explores both the drawbacks as well as advantages associated with unilateral action in international policy making.

Before setting out the definition of unilateral action, it is necessary to restrict the term to the context of the thesis. Previous chapters identify and limit the problem of trade related environmental issues in the context of international relations between nation states. A discussion on an international trade-environmental relationship and consequent policy-making is possible with already defined parameters in terms of the principle of mutual recognition[810], as it lies in the domain of state legislation and is the prerogative of nation states to sanction. A discussion on the environmental aspects of multilateral treaties also inherently holds similar limitations.

However, unilateral action can often be found both as state sanctioned as well as a private instrument. For example, eco labels such as the EU Eco label is a legislated instrument governed by EC regulation[811], while the Fairtrade labelling program is a private, not-for-profit, non-governmental international labelling program[812].

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[810] i.e. if we are looking for parameters to restrict the discussion within the public domain.
[811] Council Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L 27/1
[812] 'Home' (Fairtrade International) <http://www.fairtrade.net/about-us.html> accessed 29 June 2015

As a result, comparing unilateral action with other implementing methods of environmental standards in inter-state relations requires limiting the discussion at the outset. Therefore, this chapter, discussing unilateral action, concentrates on the actions of states and their associated administrative and enforcement agencies rather than any form of individual or private act.

Keeping the abovementioned limitation in mind, Section 5.2 defines unilateral action and categorizes UEAs as a subset of such action. The section then classifies UEAs into five variants according to where the recipient of such threat and, as a result, protection is situated and where the origin of the causation that led to such unilateral action is situated[813]. This helps determine whether the effects of such action are restricted within national borders or have an extraterritorial effect that may potentially lead to international disputes.

The origin of causation may be either internal or external to the jurisdiction of the UEA implementing nation. Internal causation may either arise from environmental accidents or as a bi-product of the exploitation of natural resources. Section 5.3.1 therefore explores the right of countries exploit their natural resources followed by Section 5.3.2 which discusses whether, in the case of an extraterritorial effect of such exploitation, the countries duty to prevent or mitigate resulting environmental damage to other countries.

In case a country fails to prevent environmental damage through inaction or inadequate or ineffective action, the affected second country therefore experiences external causation. In such cases unilateral action leading to extraterritorial action is often scrutinized through factors of conformity and a test of necessity. The WTO jurisprudence surrounding the necessity test has been discussed in the previous chapter in Section 4.3.2 Article XX(b): Necessity. We look at 'necessity' again in this chapter in relation to UEAs and consider the provisions of 'necessity found in the

[813] The reasons for choosing the five variants and the source of the classification system are explained in Section 5.2 Classifying Unilateral Environmental Action

International Law Commission Articles on the responsibility of States for Internationally Wrongful Acts[814]. Section 5.3.3 therefore discusses UEAs from extraterritorial causation.

Section 5.4 discusses the advantages and disadvantages of UEAs especially in light of Multilateral/Plurilateral inadequacy and the international caution provided against arbitrary action. Section 5.5 concludes by analysing the characteristics of UEAs in light of the discussions on the relationship between international trade and environmental standards in previous chapters and the resulting requirements of negotiations and market access.

## 5.2 Classifying Unilateral Environmental Action

As mentioned in the Introduction above, the discussion on unilateral action is limited to the actions of states and their associated administrative and enforcement agencies. Considering these limitations, unilateral action is therefore defined to be the use by a nation of its administrative and enforcement agencies (or the threat of such use) to secure a policy goal as mandated by a domestic political process[815]. Such action is taken independent of any cooperative arrangement with any other state or international institution[816].

In terms of this thesis, Unilateral Environmental Action (UEA) is categorized as the subset of all unilateral action analysed within the trade-environment nexus and would have the purpose of either, protecting the environment, protecting the people against environmental, health and safety externalities or protecting the environmentally relevant national interests (natural or agricultural resources)[817]. Unilateral action has been defined by Builder to be, "*any action which a state takes*

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[814] The Responsibility of States for Internationally Wrongful Acts, 2001, Resolution 56/83 UNGA (28 January 2002) UN Doc A/Res/56/83 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83&Lang=E>

[815] Belinda Anderson, 'Unilateral Trade Measures and Environmental Protection Policy' (1993) 66 Temple Law Review 751, 754

[816] Richard B. Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' (1981) 14 Vanderbilt Journal of Transnational Law 51, 53

[817] We build this definition as a parameter of the discussion on UEAs.

*solely on its own, independent of any express cooperative arrangement with any other state or international institution*"[818].

Bilder has provided five methods in which UEAs may be classified. The classification of UEAs into the five variants mentioned below has been influenced by two of Bilder's methods of classification – using the motive of the state taking environmental action and the location of the principal and immediate effect[819]. The other classification methods provided by Bilder are – duration and permanence of the action, nature of the environmental threat, the impact on the interest of other nations, and the consistency of the action to international law[820].

The use of the motive of the state and the location of the effect of the UEA, as a method of classification, has been particularly influential to this thesis as it provides the opportunity to deliberate two essential doctrinal principles – extraterritoriality and sovereignty, later in this chapter[821]. These two doctrinal principles are also discussed in the context of the other instrument implementing environmental standards – Mutual Recognition Agreements[822].

The other methods of classification mentioned by Bilder, has not been used in this thesis as methods of classification. Rather, they can be seen as themes and characteristics universal to any discussion on the trade-environment nexus. For example, the method of categorizing UEAs through the impact on the interest of other countries corresponds to the theme of international friction caused by environmental action is a central theme of this thesis and indeed of this chapter[823]. Similarly, the method of categorization using the consistency or inconsistency of UEAs to present or emerging international law corresponds to the discussions of WTO compatibility and international obligations with regards to the environmental standard setting instruments mentioned in the thesis[824].

[818] Bilder (n 816) 53
[819] Bilder (n 816) 59
[820] Bilder (n 816) 61-62
[821] See Section 5.3 The Legality of UEAs
[822] See Chapter 7 Section 7.2 Mutual Recognition and the Transfer of Sovereignty
[823] See Section 5.3 The Legality of UEAs,
[824] See Chapter 4 Standards as General Exceptions to the GATT

Therefore, instead of using these methods of classification to categorize UEAs, they have been discussed as central themes to this thesis.

Considering the methods of categorization of the motive of the state and the location of the effect of the UEA, this thesis builds on its own categorization of UEAs based on two factors: (1) the location of the causation of the environmental issue leading to the UEA and (2) the location of the threatened and subsequent beneficiary to the protection offered by the UEA.[825]

Thus the five variants of UEA discussed below can be categorized into the following[826]:

(1) UEA arising from Internal Causation, Internal Effect

(2) UEA arising from Internal Causation, External Effect

(3) UEA arising from Internal Causation, External Global Effect

(4) UEA arising from External Causation, Internal Effect and

(5) UEA arising from External Causation, External Global Effect

These five variants are discussed next.

## 5.2.1 UEA Arising from Internal Causation, Internal Effect

The most obvious instance of a state's duty to implement UEAs is when the action is intended to protect the environment and the people within the state's own jurisdiction from a causation also arising from within. It is important to remember that in most cases, any form of environmental issue that is national in character i.e. both the causation as well as the effect (threat/protection) of the environmental issue arise within the borders of a country, will incur a unilateral national action

[825] Bilder (n 816) 59-62

[826] The five variants of UEAs are derived from the categorization of environmental problems found in Chapter 2 The Trade-Environment Nexus. The reader will notice that there is a 6th category of environmental problems that has not been addressed by the categorization of UEAs. This category occurs when causation is external and global while the effects are felt internally. It is submitted here that an UEA to address a causation that is global in nature would be non-effective and examples of these are non-existent. Global problems are usually addressed multilaterally/plurilaterally. There will of course be national legislation addressing such issues but these are not without an international mandate and certainly not effective individually. Global sea level rise effecting individual island nations is one such example.

rather than an international multilateral effort[827]. There are two principles behind this reasoning – *Domestic Sovereignty* (including *Permanent Sovereignty*) and *Decentralization*.

*Domestic sovereignty* refers to the organisation and control of domestic authority over internal affairs of state[828]. *Permanent Sovereignty* more specifically pertained to the right to utilize and exploit national resources.[829] *Decentralization* postulates that the quality of implementation is at best at the lower levels of governance[830].

Instances of national implementations of Environmental Policy may be found throughout the global market ranging from national fishing quotas to emission controls. The Californian Air Pollution Control Laws are a stringent set of national standards in the US that provide a relevant example of this variant of UEAs and are also an illustration of the decentralization principle (federalism in the US)[831]. The emission standards of the Californian legislations are often considered higher than even the US Federal standards (national standards), and have been implemented by fourteen other states within the US[832]. A comparative study of Californian and Federal diesel fuel and diesel fuel emissions by Hajbabaei (et al) published in 2012, corroborates the effectiveness of implementing higher environmental standards and the principle of decentralization in addressing environmental issues[833]. The Californian Global Warming Solutions Act, 2006 mandates that that the CARB determine the emission levels of 1990 and set equivalent limits to be achieved by 2020[834].

[827] Daniel Bodansky, 'What's So Bad About Unilateral Action to Protect the Environment', (2000) 11 European Journal of International Law 339, 345.

[828] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) 10

[829] Subrata Roy Chowdhury, 'Permanent Sovereignty over Natural Resources' in Kamal Hossain and Subrata Roy Chowdhury (eds.), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice*, (Palgrave Macmillan, 1984); The Principle of Permanent Sovereignty Has been discussed in greater detail below in Section 4.3.1

[830] UN Development Programme (Management Development and Governance Division, Bureau for Development Policy), 'Decentralized Governance Programme: Strengthening Capacity for People -Centred Development', (1997) 4; The principle of Decentralization has been discussed previously in Chapter 3 Doctrinal Principles relating to the Trade-Environmental Nexus.

[831] 'California Air Pollution Control Laws – 2012 Bluebook' (California Environmental Protection Agency (Air Resources Board)) <http://www.arb.ca.gov/bluebook/bb12/bb12.htm> accessed 29 June 2015

[832] 'Emission Standards: United States' (DieselNet) <http://www.dieselnet.com/standards/us/> accessed 29 June 2015

[833] Maryam Hajbabaei, Kent C Johnson, Jim Guthrie and Thomas D Durbin, 'Assessment of the emissions from the use of California Air Resources Board qualified diesel fuels in comparison with Federal diesel fuels', (2012) 14(2) International Journal of Engine Research <http://jer.sagepub.com/content/14/2/138.full.pdf+html?frame=sidebar> accessed 29 June 2015

[834] The Californian Global Warming Solutions Act, 2006 Chapter 4 Part 3 Section 38550

India's National Solar Mission is another example of unilateral implementation of environmental standards[835]. It is an ambitious project aimed at enhancing India's renewable energy capabilities and thereby reducing its dependency on carbon intensive fuels. The Mission Plan recognizes India's energy security challenge and the contributory potential of the plan to the global necessity to the challenges of climate change[836]. The Solar Mission is a joint exercise between the Central government and several State governments, and thereby involving the principle of Decentralization[837]. The objective of decentralization is also clearly evident in India's National Action Plan on Climate Change (NAPCC), which is the precursor to the Solar Mission Plan. The NAPCC states that solar energy plan "has the advantage of permitting a decentralized distribution of energy, thereby empowering people at the grassroots level".[838] The Plan aims to deploy 20,000MW of Solar Energy by 2022[839] thereby achieving Electric grid parity and further aims at achieving coal-based thermal power parity by 2030[840]. Clearly, the mission statement would indicate that the objective of meeting energy requirement through renewable energy sources (by reaching parity with conventional sources) is a clear effort to reduce India's dependency on non-renewable energy and combat unsustainable energy usage.

## 5.2.2 UEA Arising from Internal Causation, External Threat

A second variant of UEAs occur when a State implements unilateral action to protect the interests of an outside jurisdiction from the adverse environmental, health or safety incidents arising within its own territory.

[835] 'JNN Mission Scheme/Documents' (Government of India, Ministry of New and Renewable Energy), <http://www.mnre.gov.in/solar-mission/jnnsm/introduction-2/> accessed 29 June 2015

[836] 'Jawaharlal Nehru National Solar Mission: Towards Building SOLAR India', (Government of India, Ministry of New and Renewable Energy), 1 <http://www.mnre.gov.in/file-manager/UserFiles/mission_document_JNNSM.pdf> accessed 29 June 2015

[837] Mission Document (n 835) 1

[838] 'National Action Plan on Climate Change', (Government of India, Prime Minister's Council on Climate Change) (2008) 3 <http://www.moef.nic.in/downloads/home/Pg01-52.pdf> accessed 29 June 2015

[839] Mission Document (n 835) 3

[840] Mission Document (n 835) 1

An example of national Legislation preventing transboundary harm can be found in the *Canadian Federal Great Lakes Program*[841]. The group of legislations are designed to protect the water quality and the aquatic eco systems in the North American Great Lakes which are shared between the US and Canada. This is reciprocated by the US Environmental Protection Agency's (EPA) *Great Lakes National Program*[842]. Both sets of legislations (Canada and US) are a result of the commitments agreed upon in the bilateral *Canada-US Great Lakes Water Quality Agreement*[843]. The bilateral agreement provides that the national legislations are without extra-jurisdictional effects and pertain to the respective local governments and management agencies[844]. However, even with restrictions preventing transboundary authority, the legislations have transboundary effects that protect the interest of not only the country from where the legislation originates but also the neighbour.

## 5.2.3 UEA Arising from Internal Causation, External Global Threat

The third variant occurs when the action is intended to protect international environments and the global commons threatened by activities arising within its jurisdiction. Most national air pollution and emission laws may be categorized under this variant. Part IV of the UK's Environment Act deals with air quality and emission regulations[845]. This regulation not only provides national standards but, through reporting obligations to the EU and the UN recognizes the cross border nature of air pollution. As a result, the UK government reports national emission totals each year for the main pollutants to the European Commission[846] and the United Nations Economic Commission for Europe (UNECE) Convention on Long Range Transboundary Air Pollution[847].[848]

[841] 'Canadian Federal Great Lakes Program' (Government of Canada, Environment Canada), <http://www.ec.gc.ca/grandslacs-greatlakes/default.asp?lang=En&n=B390F88B-1> accessed 29 June 2015
[842] 'Great Lakes' (U.S. Environmental Protection Agency) <http://www.epa.gov/glnpo/> accessed 29 June 2015
[843] Agreement Between the United States of America and Canada on Great lakes Water Quality, 2013 (Great Lakes Agreement)
[844] Great Lakes Agreement (n 843); Article 3.2 Implementation
[845] Environment Act 1995 Part IV Air Quality
[846] Council Decision (EC) 97/101/EC of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States [1997] OJ L 035
[847] 'Convention on Long-range Transboundary Air Pollution, 1979' UN Economic Commission for Europe, < http://www.unece.org/env/lrtap/lrtap_h1.html > accessed 29 June 2015
[848] 'International, European and National Standards for Air Quality' (Gov.UK), <https://www.gov.uk/government/policies/protecting-and-enhancing-our-urban-and-natural-environment-to-improve-

Another example of a national regulation performing a UEA due to a causation arising within the originating country's borders is found in *EC ban on the sale of seal products within the European market*[849]. The ban on seal products within is markets was implemented reduce animal cruelty torture and pain arising from the seal hunt of several external countries. The potential of increasing animal welfare through a ban in its own market is perhaps an implication and admission by EU that the common market is a significant causation of the original problem[850]. Therefore this UEA legislating within its borders is designed to impact an issue concerning the global seal population.

The above three variants of UEAs had the common factor of domestic causation. The significant discussion stemming from these variants is whether countries that are home to such causation have a duty to prevent or mitigate the effects of such causation, especially if such causation has cross-border effect[851]. The final two variations listed here see the causation of unilateral action arising from an external source outside the borders of the action implementing country. This is of significance due to the possibility of international friction as a result of the extraterritorial nature of such action[852].

## 5.2.4 UEA Arising from External Causation, Internal Threat

The fourth variant of UEAs occurs when an extra-jurisdictional causation of an environmental issue prompts a state to implement unilateral action. This may be in the form of an act that affects other jurisdictions. An example in this case is the national marine pollution laws in East Asia. As a region where marine borders often overlap, many such borders are subject to disputes (see for example China's recent South China Sea controversy with the Philippines[853]). Moreover, as an archipelagic

public-health-and-wellbeing/supporting-pages/international-european-and-national-standards-for-air-quality> accessed 29 June 2015

[849] European Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in Seal Products [2009] OJ L 286/36

[850] 'Trade in Seal Products' (European Commission) <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm> accessed 29 June

[851] See Section 5.3.2. Obligation towards other States for Internal Environmental Causations and UEAs arising out of inaction

[852] See discussion on extraterritoriality in Section 5.4 UEAs in instances of Multilateral/Plurilateral inadequacy

[853] This incident is discussed below. See accompanying text to (n 970 - 974)

region, with several coastlines with a significant part of the population living in coastal areas, marine pollution through untreated sewage, industrial effluents, oils, pesticides, and hazardous wastes from land- and sea-based activities as well as overfishing, unsustainable and unplanned coastal development and the destruction of coastal habitat and ecosystems are a major environmental issue in the area[854]. However, regional cooperation is very weak in the area, especially with regards to implementation. The regional collaborative body, the Partnership in Environmental Management for the seas of East Asia (PEMSEA), formed under the UNEP, is merely a facilitating body[855]. As a result South Asian countries rely on national legislation to address these problems. For example, in Thailand the Committee on the Prevention and Combating of Oil Pollution has developed the Oil Spill Response Plan by virtue of the Regulation on the Prevention and Combating of Oil Pollution, 2004.[856] Japan, due to its obligations[857] towards the London Convention and Protocol[858], has implemented the Law Relating to the Prevention of Marine Pollution and Maritime Disaster[859].

A more common form of this variant is found in border control legislations controlling hazardous waste entering a state. An example of such legislation can be found in the UK's *The Hazardous Waste (England and Wales) Regulations*, 2005. Schedule 7 of the Regulation, deals with cross border movements of hazardous waste internationally as well as within the United Kingdom. Within the UK the regulation specifies a mutual recognition of the standards of handling such waste. The entry of waste into England however, is strictly controlled by the regulation[860].

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[854] 'Pollution Hotspots' (Partnerships in Environmental Management for the Seas of East Asia (PEMSEA)), <http://www.pemsea.org/profile/pollution-hotspots> accessed 29 June 2014

[855] 'Home' (Partnerships in Environmental Management for the Seas of East Asia (PEMSEA)) <http://www.pemsea.org/> accessed 29 June 2015

[856] 'Regulation of the Prime Minister Office On the Prevention and Combating of Oil Pollution B.E. 2547 (2004)' (Royal Thai Government (Marine Department)) <http://www.md.go.th/asean-ospar_files/regulations.pdf> accessed 29 June 2015

[857] 'Japan's report under Article 9.4.2 and 9.4.3 of the London Protocol' (2007) (International Maritime Organisation) <http://www.imo.org/blast/blastDataHelper.asp?data_id=30720&filename=Japan.pdf> accessed 29 June 2015

[858] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972) and London Protocol (1996)

[859] Law Relating to the Prevention of Marine Pollution and Maritime Disaster (Law No. 136 of 1970 as amended through Law No. 68 of 1998) (Japan)

[860] UK The Hazardous Waste Regulations (2005) Schedule 7 Section 4

## 5.2.5 UEA Arising from External Causation, External Global Threat

Lastly, UEAs may be implemented to protect the international environments and the global commons threatened by activities arising from other jurisdictions. This may either be as part of a national policy or because it has been mandated by multilateral decision. Member states to multilateral organisations often have an obligation to legislate national policy that may affect trade dynamics with other members or even non-members to such organisations. In case of the latter, it is interesting to see whether such acts may be considered in violation of international law. One of the more famous examples of a UEA in the form of a unilateral environmental instrument was the dolphin safe eco-labelling requirements mandated by the US for Tuna fishing in the Eastern Tropical Pacific Ocean (ETP)[861]. Under the *Marine Mammals Protection Act* (MMPA), 1972 the US prohibited the use of 'purse-seine' nets for tuna fishing in the ETP as it led to a high dolphin mortality rate[862]. Subsequently, this was substantiated by the *Dolphin Protection Consumer Information Act*, an amendment to the MMPA, requiring stringent labelling standards[863]. Therefore, the US implemented a UEA in order to safeguard dolphins extra-jurisdictionally[864].

## 5.3 The legality of UEAs

The common feature of the above variants of UEAs is the aspect of independent action, disassociated from the actions or interests of other involved or concerned parties. This aspect of unilateral action does not, however, extend to consultations with other nation states, as was seen in the above example of the *Canada-US Great Lakes Water Quality Agreement,* which influenced national and independent water quality and biodiversity programs in both the US and Canada[865]. However, the nature of unilateral action implies that States may consult and may even consider the

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[861] This unilateral action led to the famous WTO US – Tuna cases which have been discussed in detail in Chapter 2 and Chapter 3

[862] Marine Mammals Protection Act (1972), 16 USC § 1371 Moratorium on taking and importing marine mammals and marine mammal products Section 101(a)(2)(B) (U.S.)

[863] Marine Mammals Protection Act (1972), 16 USC § 1385 Dolphin Protection Consumer Information Act Section (d) Labelling Standard (U.S.)

[864] The US –Tuna cases were also discussed due to their non-tariff barrier implications on trade. See Chapter 2 Section 2.3.3 The WTO and Standards.

[865] See Section 5.2.2 UEA Arising from Internal Causation, External Threat.

interests of these other nation states (extra jurisdictional interests) but this creates no obligations for the fulfilment of such considerations.

This however, is purely in terms of the definition of unilateral action. Considering commercial reality in a globalized world, there may be an actual obligation in international law to consult with all interested parties before any policy implementation. This is certainly the case in WTO law where an obligation for consultation with effected/interested parties, stems from the test for necessity found in several WTO cases[866].

The exercise of analysing the legality of unilateral action is rendered more difficult than necessary if one is to consider the general bias against such action, which, as the following commentators have proposed, exists in matters of international relations. For example, Bodansky states that there is a general negative connotation attached to the term 'unilateral' in world politics[867]. Due to a globalized world, any action not taken with collective will is generally looked upon suspiciously. Accordingly, "If any action is unilateral, one need not even consider whether it is substantively right or wrong; the fact that it is undertaken by a single state rather than the 'international community' , in itself makes it illegitimate"[868].

Reisman's definition of the subject further highlights the apparent illegitimacy of unilateral action. According to Reisman, unilateral action "is an act by a formally unauthorized participant which effectively pre-empts the official decision a legally designated official or agency was supposed to take"[869].

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[866] See Section 5.3.3 The Requirement of Necessity in WTO Jurisprudence
[867] Bodansky (n 827) 339
[868] Bodansky (n 827) 339
[869] W. Michael Reisman, 'Unilateral Action and the Transformations of the World Constitution Process: The Special Problem of Humanitarian Intervention' (2000) 11 European Journal of International Law 3, 3; It is of note that such an 'act by an unauthorized participant' or at least the argument for one can only occur in the instance of international friction arising from such act. Therefore in instances of unilateral action that leads to no extraterritorial effect or extraterritorial jurisdiction, such as the first variant of UEAs described above (See Section 4.2.1), this discussion will be unnecessary.

Characterizing unilateral action in view of such negative connotations may even bring such action within the definition of an 'internationally wrongful act' as defined in 'T*he Responsibility of States for Internationally Wrongful Acts*'[870]. The Articles provide that:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the state."[871]

However, Reisman also observes that such an action, even by an 'unauthorized participant' is often justified (or attempted to be justified) through a claim of legality consisting of three characteristics, that determine whether the action (even merely in its substance) conforms to the legal system under which it was taken. These three characteristics are that:

> "(1) The pertinent legal system allows such unilateral acts in certain circumstances or on condition that substantive tests of lawfulness are met;
>
> (2) The circumstances for the particular unilateral act are claimed to be appropriate; and
>
> (3) The act, despite its procedural irregularities, has purportedly complied with the relevant substantive requirements of lawfulness"[872]

The question of substance, Reisman admits, carries far more weight than the procedural aspect in the case of unilateral action[873]. This may be a convenient characteristic of standard implementing

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[870] The Responsibility of States for Internationally Wrongful Acts, 2001, Resolution 56/83 UNGA (28 January 2002) UN Doc A/Res/56/83 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83&Lang=E> accessed 29 June 2015. The Draft Articles on The Responsibility of States for Internationally Wrongful Acts, 2001 has not been ratified to Treaty status, but has been commended several times at the UN General Assembly, to the attention of the Governments, the last time being through General Assembly resolution 65/19 of 6 December 2010. Although the Members of the UN have preferred to maintain Draft Articles' status as an ILC text approved *ad referendum* by the General Assembly, the Articles Themselves have been used in ICJ Judgments. James Crawford, Draft Articles on The Responsibility of States for Internationally Wrongful Acts, 2001, Audio Visual Library of International Law, United Nations < http://legal.un.org/avl/ha/rsiwa/rsiwa.html> accessed 29 June 2015

[871] Responsibility of States for Internationally Wrongful Acts 2001 Article 2

[872] Reisman (n 869) 4

instruments when one considers the global urgency to raise environmental standards. The factor of time necessitates quick action that may otherwise be hindered with procedural pedantry[874].

However, as mentioned earlier, commercial reality may suggest otherwise[875]. It is not certain whether such claims of legality, justifying unilateral action, would necessarily be upheld in disputes of international law. Consider these justifications in light of the US-Tuna/Dolphin cases. The GATT certainly allows unilateral action by member states to safeguard environmental interests (GATT Article XX). Therefore, in the *US – Tuna/Dolphin I* dispute, incompatibility of the US federal laws in question, to Articles III[876] and Articles X.1[877] of the GATT, led to interpretations under GATT Article XX(b) and XX(g)[878]. However, the Dispute Settlement Body (DSB) Panel decided that the provisions of XX(g) were violated by the measures due to the fact that the natural resources that the disputed measures addressed, were outside US jurisdiction[879].

Therefore, in the face of increasing Dolphin mortality rates, as a consequence of certain identified methods of Tuna fishing, the actions of the US government certainly cannot be said to be inappropriate, and clearly falls into Reisman's justification of conformity. However, after the US government labelling requirements were instituted, it was procedural irregularities (extra-jurisdictional regulation) that eventually led the DSB to strike down the disputed US federal laws.

Furthermore, looking at environmental standards, in the backdrop of reducing restrictions to trade (as is the goal of most trade agreements/forums and the WTO itself) it is submitted here that there appears to be one other factor in excess of the factors of conformity suggested by Reisman – the necessity test. As mentioned above, the principle of necessity (of which the test of necessity is a part

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[873] Reisman (n 869) 5

[874] The reader will find in later chapters that some forms of Mutual Recognition Agreements allow for flexibility regarding procedural differences, by considering the objective of a regulation. This allows for differences in national laws and regulations as long as their objectives are similar in substance. See Chapter 6 An introduction to Mutual Recognition.

[875] At least in the case of unilateral action

[876] United States – Restrictions on Imports of Tuna (Report of the Panel) (3 September 1991) GATT DS21/R-39S/155 (US – Tuna (Mexico)) para 5.42-5.43

[877] US – Tuna (Mexico) para 5.17-5.19

[878] US – Tuna (Mexico) para 5.22-5.34

[879] US – Tuna (Mexico) para 5.31

thereof) also includes a discussion on the obligation of international consultation. A significant reasoning behind such an inclusion is to ascertain whether a less trade restrictive alternative is available to the parties. Therefore even if a specific unilateral action conforms substantially to the prevalent international law or norm, and is procedurally sound there is a possibility that the availability of a less trade restrictive alternative may render such action contravening of international trade regimes, especially the WTO.

Another observation of note arises when categorizing UEAs according to the position of the causation. In the first three UEA variants therefore the environmental issue arises from within the borders of the implementing country and is therefore an internal causation. If there is an internal causation, that causation can come out of an environmental accident or out of the exploitation of natural resources or processes for such exploitation. In that case it needs to be seen whether countries have an absolute right to exploit their resources, and in case of an environmental issue arising from such exploitation, if there is an obligation to other states towards mitigating or reducing such issues. The question therefore arises whether States have an obligation towards other states in terms of environmental effects arising from within their jurisdiction or control[880].

The latter two variant of UEAs presumably arise when the State (where the causation has arisen), has been inadequate or perfunctory in their effort to mitigate or reduce such environmental issues. In the event of the non-performance of such obligation i.e. inaction, the affected State, will have a need to address such issues in an appropriate forum or perform a UEA of its own. It is in such circumstances, when the affected state performs a UEA that Reisman's factors of the conformity of UEAs as well as the principle of necessity come into play.

[880] A useful interpretation of jurisdiction and control in this context can be found in the ILC commentary on the 'Prevention of Transboundary Harm from Hazardous Activities', ILC Report (2001) GAOR A/56/10, pg 385. Accordingly, "the expression 'jurisdiction' of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority." The concept of 'control' attaches "certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*".

Considering the discussions in this Chapter hitherto, it is necessary to discuss three related topics in this section. The following sub-sections therefore address the states right to permanent sovereignty over the unilateral exploitation of its own natural resources followed by a discussion on the international obligation to act unilaterally in case of an environmental causation arising from such activity. The section then discusses the principle of necessity. Only after the conclusion of such a discussion, can an attempt be made to debate the effectiveness of unilateral environmental action/instruments. Eventually, the goal of this exercise is to head towards a discussion on the comparative benefits of a more negotiated instrument to raise environmental standards[881].

## 5.3.1 Permanent Sovereignty

There are several instances where states are in fact entitled to act unilaterally. It is a question of the sovereignty of a state for it to be able to self-determine its own policy path. Such entitlement is derived from the domestic sovereignty afforded to states through international norms.

Domestic sovereignty refers to the organisation and control of domestic authority over internal affairs of state[882]. However, in the post war de-colonization era, an added aspect was attached to the concept of Domestic Sovereignty (historically as a means of justifying nationalization in developing countries)[883]. This was the principle of 'Permanent Sovereignty' that was specific to the use of natural resources. It was the right to utilize and exploit resources and such rights were owned in perpetuity by the state in which such natural resources are found[884].

One of the earlier instances of International acceptance of such sovereign rights can be found in the UN General Assembly resolution 626 (VII) which states that, "the right of people freely to use and

[881] This comparison with other, more negotiated instruments is done in later chapters, which attempt at suggesting an increased efficiency in raising environmental standards through one particular negotiated instrument – Mutual Recognition Agreements
[882] Krasner (n 828) 10
[883] Franz Xaver Perrez, 'The Relationship Between 'Permanent Sovereignty' and the Obligation not to cause Transboundary Environmental Damage' (1996) 26 Environmental Law 1187, 1190
[884] Roy Chowdhury (n 829) 1

exploit their natural resources is inherent in their sovereignty."[885] The resolution further warns other states to "refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources."[886]

This principle was afforded a much stronger recognition by the UN General Assembly Resolution 1803 (XVII) which was titled Permanent Sovereignty and Natural Resources. It states that "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned."[887] The resolution therefore is one of the clear definitions of Permanent Sovereignty of Natural resources. It defines the limit of the right to permanent sovereignty over natural resources, to extent that it is used for the benefit of the people of the state and for the purposes of national development. It is a pertinent question in this case, whether the principle can be argued against unilateral action by another state violating this right, if the original duty of using the principle for the national benefit remains unmet.

Furthermore, the parameters of 'national benefit' are also ambiguous. The question does arise whether economic benefit at the cost of the environment is nationally beneficial. Would the arbitrary destruction or unsustainable use of natural resources by a state justify unilateral action against it without violating its permanent sovereignty, especially if such unsustainable action also affects the interest of the intervening state?

The rights of third party states are addressed, to a certain extent, by Resolution 1803 (XVII), in the case of economic investment by such state, and the subsequent profit sharing. The resolution elaborates that the relationship of between natural resources and the right of "the exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and

[885] Right to exploit freely natural wealth and resources, UNGA Resolution 626 (VII) (21 December 1952), Chapeau
[886] UN General Assembly Resolution 626 (VII), (n 862) Section 2
[887] Permanent Sovereignty and Natural Resources, UNGA Resolution 1803 (XVII) (14 December 1962), Section 1

nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities, […]"[888]. All profits derived from such activity and scheduled to be divided with a recipient country must be done so with "due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources."[889]

Furthermore, the principle of 'permanent sovereignty' has been further encapsulated in UN General Assembly Resolution 3281 (XXIX) (The Charter of Economic Rights and Duties of States) which states that, "every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."[890] This does clarify the earlier question of the relationship between economic activities and natural resources to a certain extent, allowing the state to prioritize between the two by giving it 'full permanent sovereignty' over either. However the question of whether the state holds recourse to the principle in the face of violation of its duty of national benefit, still remains.

In the ICJ '*Case concerning East Timor (Portugal v Australia)*' the dissenting opinion of Judge Weeramantry addressed the subject of permanent sovereignty[891] stating that, "the rights of self-determination and permanent sovereignty over natural resources are rights *erga omnes* belonging to the people […] and therefore generate a corresponding duty upon all States, […], to recognize and respect those rights."[892]

In the modern context, WTO principles such as Market Access, MFN and National Treatment do limit the principle of permanent sovereignty to a certain degree, at least in an economic perspective. With the advent of the WTO and an ever increasing inter connected world trade scenario there is a possibility that Sovereign rights have been diluted by these newer and more influential norms of international economics and trade policy. States are certainly restrained from showing overt

[888] UN General Assembly Resolution 1803 (XVII) (n 864), Section 2
[889] UN General Assembly Resolution 1803 (XVII) (n 864), Section 3
[890] Charter of Economic Rights and Duties of States, UNGA Resolution 3281 (XXIX) (12 December 1974), Article 2
[891] The main judgment skirted the subject as the court ruled they had no jurisdiction in the case in its entirety.
[892] *Case concerning East Timor (Portugal v Australia)* (Judgement) [1995] ICJ

favouritism towards domestic producers and other select states through these WTO principles. However, in the absence of any economic misdemeanour, the restraints on a state towards causing extraterritorial environmental harm must be explored. The following subsection therefore looks at a state's obligation towards extraterritorial harm arising from causation within its jurisdiction.

### 5.3.2 Obligation towards other States for Internal Environmental Causations and UEAs arising out of Inaction

An obligation of States with respect to the jurisdiction of other States was discussed by the International Court of Justice (ICJ) in its advisory opinion on the '*Legality of the Threat or Use of Nuclear Weapons*'[893] where:

> "The Court […] recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[894]

The ICJ, in the earlier '*Corfu Channel Case*', ruled that it was, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[895]. Using the above two obligations found in the *Nuclear Weapons* case and the *Corfu Channel* case, the ICJ, most recently in the '*Case Concerning Pulp Mills on the River Uruguay*' points to the 'due diligence required of a State in its territory' and groups these obligations under the *Principle of Prevention*[896].

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[893] *Legality of the Use By a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ
[894] Nuclear Weapons in Armed Conflict (n 870) para 29
[895] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Judgement) [1949] ICJ
[896] The Principle of Prevention is defined by the ICJ to be "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgement) [2010] ICJ Para 101

The ICJ, in the Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), (an earlier judgement than *Pulp Mills*) recognizes this international obligation and further states that such obligation can only be ignored by invoking necessity[897] in the face of 'grave and imminent peril' as laid down in Article 25 (Article 33 at the time) of the International Law Commission's (ILC) draft articles on, 'Responsibility of States for Internationally Wrongful Acts'.[898]

The ILC's draft articles on 'Prevention of Transboundary Harm from Hazardous Activities' expresses this obligation towards other states in relation to transboundary environmental harm. The draft articles provide that 'the state of origin' shall be the one to take appropriate action to prevent transboundary harm[899]. The draft articles also provide guidance on implementation[900], cooperation between states[901], risk assessment[902], and exchange of information[903].

Similarly, Principle 2 of the Rio Declaration on Environment and Development[904] and the identically worded Article 3 of the Convention on Biological Diversity (CBD)[905] provide States, "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[906] This principle was evident in the earlier mentioned bilateral *Canada-US Great Lakes Water Quality Agreement*[907]. This culminated in the independent and individual *Canadian Federal Great Lakes Program*[908] and the *Great Lakes National Program*[909].

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[897] See discussion on Necessity in Subsection 5.3.3 The Requirement of Necessity in WTO Jurisprudence
[898] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) [1997] ICJ
[899] 'Prevention of Transboundary Harm from Hazardous Activities', ILC Report (2001) GAOR A/56/10, Article 3
[900] Prevention of Transboundary Harm from Hazardous Activities (n 899) Article 5
[901] Prevention of Transboundary Harm from Hazardous Activities (n 899) Article 4
[902] Prevention of Transboundary Harm from Hazardous Activities (n 899) Article 7
[903] Prevention of Transboundary Harm from Hazardous Activities (n 899) Articles 8, 9, 12, 13
[904] The Rio Declaration on Environment and Development (1992) (U.N. Doc A/Conf.151/5/Rev.1); Principle 2
[905] Convention on Biological Diversity (1992) 31 ILM 818 (CBD)
[906] Principle 2 of the Rio Declaration and Article 3 CBD also gives States 'the sovereign right to exploit its own resources' articulating the *Principle of Permanent Sovereignty*, as discussed in Section 4.3.1
[907] Great Lakes Agreement (n 843)
[908] Canadian Federal Great Lakes Program (n 841)
[909] EPA Great Lakes National Program (n 842)

States may also implement UEAs to mitigate environmental damage to an outside jurisdiction. Such unilateral action may be in the form of compensation for an environmental event that is detrimental to a State outside the jurisdiction of the 'origin state'. This has been encapsulation in Principle 13 of the Rio Declaration on Environment and Development which states that, "[…] States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."[910]

However, the very nature of international liability suggests the requirement for the determination of the extent of liability and the subsequent compensation. Therefore, unilateral action in the case of compensation for environmental damage has often been on the behest of international decisions by an adjudicating authority. An example of a post environmental damage compensation verdict is the famous *Trail Smelter* case between Canada and the US. The case revolved around trans-boundary pollution arising from a smelter in Trail, British Colombia, Canada. The smoke from the smelter caused distress and environmental damage to the surrounding areas including across the border in the US, leading to a compensation claim[911]. This case is an example of the earlier argument in this paragraph that in international trans-boundary environmental mitigation it is often the case that the determination of the extent of liability and the subsequent compensation is given the most importance and the reason for taking such disputes to international arbitral or adjudicating bodies.

This is because, in the *Trail Smelter* case, Canada had already accepted an 'international responsibility' for the damage caused by the smelter[912], and a bilateral commission, called the International Joint Commission had awarded a compensation of $ 350,000[913], which was considered

[910] Rio Declaration Principle 13
[911] 'Trail smelter case (United States, Canada)' Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, Volume III 1905 (Trail Smelter Case)
[912] Trail Smelter Case 1912
[913] Trail Smelter Case 1918

inadequate. Thus the Convention forming the International Arbitral Tribunal was signed between Canada and the US, to determine adequate compensation and future mitigation[914].

The Tribunal, deliberated the method of determining compensation, especially in cases where the amount of damage cannot be determined with certainty. The Tribunal analysed the question of indemnity as considered by the US Supreme Court[915] in *Story Parchment Company v. Paterson Parchment Paper Company*[916] where the Supreme Court states:

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his act. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable interference, although the result may be only approximate."[917]

The Tribunal also noted the U.S. Supreme court judgment in *Allison v. Chandler*[918] which stated:

"But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainly, it is true, would thus be attained; but it would be

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[914] Special Agreement, US Treaty Series No 893, (15 April 1935) Article III:

The Tribunal shall finally decide the questions, set forth hereunder, namely:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and if so, what indemnity should be paid therefor?
(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and, if so, to what extent?
(3) In light of the answer to the preceding question, what measure or regime, if any, should be adopted or maintained by the Trail Smelter?
(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

[915] As it was required to consider both US and international law; Special Agreement (n 96) Article IV

[916] (1931), 282 U.S. 555

[917] Trail Smelter Case 1920

[918] 11 Michigan 542

the certainty of injustice…. Juries are allowed to act upon probable and inferential, as well as direct and positive proof."[919]

The notions of liability, compensation and in general the right to act against eternal environmental hazard, notwithstanding, the Rio Declaration on Environment and Development does caution against unilateral action unless unavoidable. In this regard Principle 12 reads,

> "Principle 12
>
> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."[920]

This leads to the deliberation on when an action is unavoidable, or even more appropriately when is it 'necessary'. The following subsection therefore discusses the principle of necessity, especially as laid down by WTO jurisprudence. Moreover, the recommendation within Principle 12 for 'international consensus' asks the further question of whether this creates an obligation to consult (a question asked previously in this chapter). Therefore the following subsection also looks at whether WTO jurisprudence provides for such an obligation.

[919] Trail Smelter Case 1920
[920] Rio Declaration Principle 12

## 5.3.3 The requirement of Necessity in WTO Jurisprudence

It is worth noting again that in *US – Tuna/Dolphin I* the Panel stated that Article XX(b) allows each contracting party "to set its human, animal or plant life or health standards."[921] Similarly, in *EC – Asbestos*, the AB asserted the "undisputed" right of WTO members to determine the level of protection that they consider appropriate[922].Therefore the level of an environmental standard, asserted by a WTO member is not in question. However, the unilateral implementation of a measure to assert such standards often leads to international friction and thereby a requirement to justify such a measure. Such a justification is dependent on the interpretation of the principle of Necessity.

The discussion of 'necessity' in WTO law has primarily centred on jurisprudence regarding the General Exceptions clause of the GATT. As discussed in Chapter 4, in the event of a disputed measure (UEAs in light of this discussion) that is in derogation to other WTO law provisions, Article XX is usually the recourse taken by parties in justifying such environmental measures, under the WTO. In the *US – Tuna/Dolphin I* dispute, for example, the measures in question were considered to be incompatible to Articles III[923] and Articles X.1[924] of the GATT and therefore were considered for interpretation as exceptions under GATT Article XX(b) and (g)[925].

To understand the nature of 'necessity' in greater detail we briefly look beyond the discussion in Chapter 4 and towards the International Law Commission. The previously mentioned, *ILC Articles on the Responsibility of states for Internationally Wrongful Acts*, which is an international UN legislation, and outside the purview of the WTO, does provide a useful glimpse into the characterisation of 'necessity' in international law. The ILC Articles state:

" Necessity

[921] US – Tuna (Mexico) (Panel) para 5.27
[922] EC – Asbestos (AB) para 168
[923] US – Tuna (Mexico) (Panel) para 5.42-5.43
[924] US – Tuna (Mexico) (Panel) para 5.17-5.19
[925] US – Tuna (Mexico) (Panel) para 5.22-5.34

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[926]

Admittedly, the need for raising environmental standards is not often a 'grave and imminent peril', and this is certainly reflected in the comparatively more relaxed provisions of the general exceptions in Article XX of the GATT. However, Article 25.1(a) of the ILC Articles does require the exhaustion of alternative measures in order to invoke 'necessity', which is also an essential requirement of Article XX of the GATT and discussed in detail below. Furthermore, the instructions of Article 25.1(b) of the ILC Articles to 'not seriously impair an essential interest' of other States is reflected in the 'least trade restrictive' requirement of Article XX, as laid down by WTO jurisprudence and also discussed in detail below.

To establish necessity, the Appellate Body (AB) laid down a set of factors in their deliberations in *Korea- Various measures on Beef*[927] and *EC- Measures affecting Asbestos and Asbestos containing Products*[928], and their approval of the Panel decision in *United States – Section 337 of the Tariff Act of 1930*[929]. Other characteristics are also found in various WTO case-laws that have been discussed in detail in Chapter 4. At this juncture it is however necessary to revisit these judgements in the context of unilateral action.

[926] Responsibility of States for Internationally Wrongful Acts Article 25
[927] Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Report of the Appellate Body) (11 December 2000) WTO WT/DS161/AB/R, WT/DS169/AB/R (Korea – Beef) para 163
[928] EC – Asbestos (AB)
[929] US – Section 337 approved in Korea – Beef (AB) para 165 and EC – Asbestos (AB) para 171

In attempting to clarify the meaning of 'necessary', the AB, in *Korea – Beef*, referred to the New Shorter Oxford English Dictionary, which defined it as "something 'that cannot be dispensed with or done without, requisite, essential, needful'"[930]. However, the AB also noted that Black's Law Dictionary cautioned that:

> "[The] word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful appropriate, suitable, proper or conducive to the end sought. It is an adjective addressing degree, and may express mere convenience or that which is indispensable or an absolute physical necessity."[931]

The AB then clarified that, in terms of Article XX, the 'necessity' of a certain measure would lean more towards the 'indispensability' of that measure rather than its role in obtaining a policy objective i.e. simply 'making a contribution to'[932].

The 'indispensable' nature of such 'necessity' is enhanced by other contributing factors discussed by the AB. The extent to which such measure contributes to the end objective of such a policy is certainly a consideration towards its necessity. The greater its significance and potential contribution to the end objective the more 'necessary' it becomes[933].

The Panel in *US – Tuna/Dolphin I*, did however did provide the limitation that notwithstanding the end objective of a measure, the effect of the measure must be constrained geographically to the jurisdiction of the implementing party. According to the Panel, such measures must be "in conjunction with restrictions on domestic production or consumption."[934] In *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, the Panel had determined that to be in conjunction with restrictions on domestic production, the measures had to be "primarily aimed at

[930] Korea – Beef (AB) para 160
[931] Korea – Beef (AB) para 160
[932] Korea – Beef (AB) para 161
[933] Korea – Beef (AB) para 163
[934] US – Tuna (Mexico) (Panel) para 5.31

rendering effective these restrictions."[935] Therefore, the Panel in *US – Tuna/Dolphin* I were of the opinion that countries could only effectively control production and consumption within its jurisdiction, and thus the measures it implemented would have to be limited to its own jurisdiction[936]. The Panel therefore decided that the disputed measures in *US – Tuna/Dolphin I* were in violation of Article XX(g), due to the fact that the natural resources being addressed by the measures were outside US jurisdiction[937].

It is of note that this severely limits the functioning of the fifth variant of UEAs, described above, which the reader will recall consists of UEAs arising from external causation and creating an external global threat[938]. The legitimacy of such unilateral action may therefore be determined by a multilateral mandate or there may be the necessity of an alternative instrument to address targeted environmental issues. Certainly, in a globalized world, this may be seen as a limitation of unilateral environmental action.

Similar to the *US – Tuna/*Dolphin cases, in *US – Shrimp/Turtle*, the failure to meet the requirement of GATT Article XI.1 led the Panel, and subsequently the AB, to review them under Article XX[939]. However, in this case, the AB, unlike in *US – Tuna/Dolphin I*, did not deliberate on the jurisdiction of the measure. Rather, like in *US – Gasoline*[940], the AB found that the measure is "not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species"[941]. This case is important in the respect that the AB had agreed that certain UEAs (Process and Production Methods[942] in this case) could fall under the general exception clause[943].

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[935] Canada – Herring and Salmon (Panel) para 4.6
[936] US – Tuna (Mexico) (Panel) para 5.31
[937] US – Tuna (Mexico) (Panel) para 5.31
[938] See Section 5.2.5
[939] US – Shrimp (AB) para 142
[940] US – Gasoline(AB)
[941] US – Shrimp (AB) para 141
[942] For a discussion on PPMs se Chapter 2 Section 2.3.3.2.1 PPMs
[943] Jasper Stein, 'The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organisation' (2009) 1(4) American Journal of Economics and Business Administration 285, 292

A further factor for the determination of the 'necessity' of a measure, and one that is in addition to the provisions of Article XX is found in the Chapeau of Article XX. Although the chapeau does not specifically mention the term 'necessity', deliberations on the principle in the mentioned cases, do stress on its requirements. According to the AB in *US – Gasoline*, in order to prove that a measure falls under the general exception clause it is not sufficient to satisfy the requirements of the provisions of Article XX (a)-(j). The conditions mentioned within the Chapeau of Article XX must also be fulfilled[944]. Therefore beyond the provisions mentioned in Article XX (a)-(j) the measure must also "not [be] applied in a manner which would constitute a means of *ARBITRARY* or *UNJUSTIFIABLE* discrimination between countries where the same conditions prevail[945], or a *DISGUISED RESTRICTION* on international trade […]" (*emphasis* added)[946]. This was re-iterated in US – Shrimp/Turtle[947].

In *US – Gasoline*, for example, the AB felt that though US rules on gasoline imports were within the interpretation of Article XX(g) of GATT, they failed to meet the requirements of the Chapeau of Article XX and were deemed to be "unjustifiable discrimination" and a "disguised restriction on international trade."[948] Although the US measures being deliberated in *US – Gasoline* were technical regulations rather than environmental standards, in the context of General Exceptions it is quite likely that similar procedures would be applied. For example, in *Thailand – Cigarettes*, the Panel felt that Thailand's separate practice of banning foreign cigarettes while allowing domestic ones was an inconsistency with the General Agreement [and] not "necessary" within the meaning of Article XX"[949].

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[944] US – Gasoline (AB) pg. 22
[945] This regard for similar prevalent conditions in other parties seems to indicate a greater importance awarded to the objective of measures over the actual measures themselves. As mentioned, above such a desired characteristic is certainly available in the alternative policy instrument of MRAs. MRAs, it is parenthesised here, is of course, the central and eventual, propagated instrument in this thesis.
[946] GATT Article XX Chapeau,
[947] US – Shrimp. (AB) para 124
[948] US – Gasoline (AB) pg. 29
[949] Thailand – Cigarettes (Panel) para 81

Moreover, the TBT Agreement also provides for technical regulations to "not [be] 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"[950]. This reflects the requirements of proving the necessity of a trade restriction or that the measure is not trade restrictive, within the Chapeau of XX.

In *Korea – Beef* the AB had surmised that to determine 'necessity' it was required that the restrictive effects of the measure in question on international commerce be considered[951]. In the *China – Audio Visual Case*[952] the AB agreed with the Panel that in assessing necessity, the restrictive effect of the measures on not only the imports, but also those 'wishing to engage in importing' must be considered[953]. According to the AB, although the requirement of assessing the necessity of a measure and its trade restrictive effect on 'imports' and 'importers' or in other words 'products or 'traders' were not defined in Article XX(a), the Chapeau to Article XX refers to 'restrictions on international trade'[954].

The AB in *China – Audio Visual Case* continued further in their analysis of what consists of a 'restriction to international trade'. The AB recalled that their analysis of 'necessity' in *Korea – Beef* was with regards to a measure found to be inconsistent with Article III.4 GATT which required that "no less favourable treatment be accorded not only in respect of laws, regulations and requirements directly regulating like products, but also in relation to measures affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[955] This suggested to the AB that "effects on those who sell, purchase, transport, distribute, or use the products are not beyond

[950] Agreement on Technical Barriers to Trade 1995 (TBT Agreement), Article 2.2
[951] Korea – Beef (AB) para 163
[952] China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Report of the Appellate Body) (21 December 2009) WTO WT/DS363/AB/R (China – Audiovisuals)
[953] China – Audiovisuals (AB) para 300
[954] China – Audiovisuals (AB) para 303
[955] China – Audiovisuals (AB) para 305

scrutiny under Article III:4."[956] The AB thus concluded that China's obligation to grant the right to trade to all enterprises with respect to goods[957] is "not only concerned with the question of what can be traded, but more directly with the question of *who* is entitled to engage in trading"[958]. Furthermore, the AB stated that, "[i]n view of, on the one hand, China's measures, which impose a restriction on who can engage in importing the relevant products, and, on the other hand, the nature of the specific obligation in paragraph 5.1, which stipulates who China must permit to engage in importing, we see no error in the Panel's tailoring its assessment of the restrictive effect of the provisions of China's measures to take into account the restrictive effect on *beneficiaries of the right to trade*"[959] [*emphasis added*].

The AB therefore gave the term 'international trade' a very broad scope to include those who sell, purchase, transport, distribute, or use the products and beneficiaries of the right to trade. Furthermore 'no less favourable treatment' was to be accorded not only in respect of laws, regulations and requirements directly regulating like products, but also in relation to measures affecting their internal sale, offering for sale, purchase, transportation, distribution or use. It is therefore interesting to question whether this conclusion drawn by the AB applies to exports and exporters as well (and perhaps by extension producers). This is extremely important for unilateral action with regards to technical regulations and standards. This is because the implication of such unilateral action on exporters and producers may then be considered in light of the *China – Audiovisuals* judgement. According to *Korea – Beef*, the less restrictive the effects of the measure, the more likely it is to be characterized as "necessary"[960]. Therefore if the standards created by such action are proven to be restrictive to exporters and producers it would logically appear that their

[956] China – Audiovisuals (AB) para 305
[957] Paragraph 5.1 of China's Accession Protocol
[958] China – Audiovisuals (AB) para 307
[959] China – Audiovisuals (AB) para 307
[960] Korea – Beef (AB) para 163

necessity is challenged in Article XX of GATT and by virtue of the its similarity to the Chapeau of Article XX, Article 2.2 of TBT[961].

A further factor in determining 'necessity' of a measure is the availability of an alternative, less trade disrupting measure. For example in *Thailand – Cigarettes*, the Panel decided that the measures prohibiting US cigarette imports were not necessary because Thailand had alternative measures reasonably available to them."[962] Similarly, in *US – Section 337*, the Panel had declared that a WTO member cannot justify a measure under Article XX, which is inconsistent with other GATT provisions, "if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[963]

The reasonability of an alternative measure, however, is not arbitrarily determined. Rather, it is connected to the initial statement made in this subsection that the determination of the level of the environmental standard is a right afforded to the WTO member implementing the measure. Therefore, such a party cannot "reasonably be expected to employ any alternative measure if that measure would involve the continuation of the very risk that the Decree seeks to halt."[964] This is because such an alternative would prevent the member from achieving its chosen level of protection or standard.[965]

However, the burden of providing evidence corroborating 'necessity' lies with the defending WTO member and if an alternative measure is suggested by the complainant then the defendant has a further burden to prove why the alternative is not as feasible as the measure in dispute[966]. Even in the deliberations of the Panel in *US – Tuna/Dolphin* I, it is clear that it is the responsibility of the implementing party to determine that there is no alternative measure to the disputed one, by

[961] The similarity between the wordings of Article XX GATT and Article 2.2 TBT was highlighted by the Panel in EC – Asbestos.
[962] Thailand – Cigarettes (Panel) para 81
[963] United States – Section 337 of the Tariff Act of 1930 (Report of the Panel) (7 November 1989) GATT L/6439 - 36S/345 (US – Section 337) para 5.26
[964] EC – Asbestos (AB) para 174
[965] EC – Asbestos (AB) para 174
[966] Steve Charnovitz, 'The WTO's Environmental Progress' (2007) 10(3) Journal of International Economic Law 685 698

"exhausting all options reasonably available to it". The Panel further determined that the exhaustion of options includes the "negotiation of international cooperative arrangements"[967]. Therefore, the Panel provides parties to the WTO, with an obligation to consult.

However the obligation to 'exhaust all options reasonably available' was clarified later by the AB in *China – Audio Visuals*. The AB stated that, "[t]his burden does not imply that the responding party must take the initiative to demonstrate that there are no reasonably available alternatives that would achieve its objectives. When, however, the complaining party identifies an alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not a genuine alternative or is not 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary'."[968]

Multilateral deliberations and the consequent mandate to consult between nations is certainly a requirement in a globalized and interrelated world economy. However, there are conceivable and indeed existing situations where a multilateral or even more concentrated (plurilateral) and yet negotiated solutions are inadequate or absent. In such situations unilateral action often substitutes the prevalent legislative vacuum. The following section therefore discusses instances where such unilateral action may be necessary.

## 5.4 UEAs in instances of Multilateral/Plurilateral Inadequacy

Unilateral action may also be necessary where there is a lacuna in international law, or if an international agreement on a certain issue may not have pre-empted every situation[969]. In the above

[967] US – Tuna (Mexico) (Panel) para 5.28
[968] China – Audiovisuals (AB) para 319
[969] Bodansky (n 827) 346

mentioned example of national laws formulated to address oil spills and marine pollution in South-East Asia[970], a complex system of national and individual legislations are prevalent largely due to the inadequacies of international cooperation and agreement. South-East Asia is also subject to several instances of regional treaties and memorandums of understanding (MOUs) and yet the nonexistence of accountability mechanisms within these systems necessitates a constant improvement of national laws[971].

Moreover, the inability to agree to international treaties renders several painstaking attempts at making such treaties redundant or at the very least feeble. Two very important examples of such international treaties were the Kyoto Protocol[972] and the United Nations Convention on the Law of the Sea (UNCLOS). Both treaties were affected by the fact that the US government failed to ratify them. Canada withdrew from the Kyoto Protocol in 2011[973].

The Kyoto Protocol commits its Parties to set internationally binding emission reduction targets[974]. The protocol through the principles set in the United Nations Framework Convention on Climate Change (UNFCCC) follows the principle of common but differentiated responsibility and therefore imposes a heavier responsibility on developed countries[975]. The Kyoto Protocol therefore only makes provisions for UNFCCC Annex I and Annex II countries (thereby not providing specific responsibilities to developing countries)[976]. This has added enormously to the apparent lacklustre performance of the Kyoto Protocol. In 2006, the Stern Review on the Economics of Climate Change,

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[970] See Section 5.2.4

[971] Regional cooperation treaties and MOUs include the MOU between Indonesia, Malaysia and Singapore, 1981; The Sulawesi Sea Oil Spill Network Response Plan 1981 between Indonesia, Malaysia and the Philippines; and the MOU on ASEAN Oil Spill Response Plan 1993, among others. In addition several of the countries in the region are signatories of multilateral treaties addressing oil spills such as the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and the subsequent 1996 Protocol.

[972] 'Status of Ratification of the Kyoto Protocol' (UN Framework Convention on Climate Change (UNFCCC)) <http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php> accessed 29 June 2015

[973] 'Canada: Withdrawal', C.N.796.2011.TREATIES-1 (Depositary Notification), UNFCCC, Kyoto Protocol to the United Nations Framework Convention on Climate Change, <http://unfccc.int/files/kyoto_protocol/background/application/pdf/canada.pdf.pdf> accessed 29 June 2015

[974] 'Kyoto Protocol' UNFCCC, <http://unfccc.int/kyoto_protocol/items/2830.php> accessed 29 June 2015

[975] UNFCCC Article 3 (1); The UNFCCC places various developed countries into Annex I and/or Annex II. All states not in either Annex are considered a developing country.

[976] See various provisions in the 'Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) 1997

sanctioned by the UK government (HM Treasury), close captioned the international friction arising from the differentiated standards of the Kyoto Protocol:

> "[T]he Kyoto Protocol has been heavily criticised in some quarters for creating quantitative obligations only for the rich countries, without placing any constraints on emissions from the fast growing emerging economies. The US and Australia have subsequently declined to ratify the Protocol, and a number of other countries are not taking strong steps to implement it. The developing countries did in fact take on obligations under the Kyoto Protocol, but these were un-quantified and allowed climate change to be addressed as part of wider national policies on sustainable development."[977]

Annex B of the Protocol provided quantified emission reduction commitments for specific countries[978] with the implication throughout the protocol that second and subsequent commitment periods would be negotiated in the future[979]. However, the initial commitments requirements themselves were considered inadequate and thereby rendered the treaty ineffective[980] and this reflected in the effect on potential future commitment periods. By 2012, Japan, Russia, New Zealand and Canada had indicated they would not sign up to a second Kyoto commitment period[981], while the US continued to remain un-ratified. Developing nations through the G-77 (including emerging/transitional countries like Brazil, India, South Africa and China) reiterated the need for the principle of common but differentiated responsibility[982].[983] The agreement was extended to 2020 but

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[977] HM Treasury, 'The Stern Review on the Economics of Climate Change' (Stern Review) (30 October 2006) pg 478

[978] Kyoto Protocol Annex B

[979] Kyoto Protocol Article 3(4)

[980] Sujata Gupta and Dennis A. Tirpak, 'Policies, Instruments and Cooperative arrangements', in B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds.), *Climate Change 2007: Mitigation of Climate Change,* (Cambridge University Press 2007)

[981] Doha Amendment to the Kyoto Protocol 2012 pg. 3 (see fn 13-16 of the Amendment document) <https://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf> accessed 29 June 2015

[982] Reader will recall the discussion on the 'Principle of Common but Differentiated responsibility in Chapter 2 Section 2.4.4 Common but Differentiated Responsibility. The principle allows different countries to accept differing levels of commitments towards an environmental issue depending on and subjective to their economic and political situations and abilities. In certain cases the principle may also signify commitments of certain countries (usually developing countries) on the fulfilment of commitments by other countries (usually developed countries).

[983] Statement on Behalf of the G-77 and China at the Opening Plenary of the 18th Conference of the Parties to the UNFCCC, Doha, Qatar, 26 November 2012, Paragraph 7 <http://unfccc.int/resource/docs/cop18_cmp8_hl_statements/STATEMENT%20ON%20BEHALF%20OF%20G77.pdf> accessed 29 June 2015

this second period of commitments was largely dubbed as ineffectual by the international press and reflected the increasing divide and bitterness amongst the parties to the convention[984].

The United Nations Convention on the Law of the Sea (UNCLOS) too has a similar tale of diminishing importance in global environmental issues. The UNCLOS is an international treaty of a very wide ambit of subjects relating to international waters. Subject areas range include navigation rights, natural resources, maritime borders (exclusive economic zones), marine species (fisheries and mammals) etc[985]. The US is the most noticeable country missing from the signatory list[986].

A very recent undermining of the UNCLOS authority has been China's rejection of its arbitration with the Philippines under Annex VII of UNCLOS, to settle territorial disputes over the South China Sea[987]. The Philippines, under UNCLOS Annex VII[988], instigated arbitration proceedings against China, only to have the very jurisdiction of the UNCLOS in this case rejected because China had declared 'under Article 298[989] that [it did not] accept any of the procedures provided for in Section 2 of Part XV[990] of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention'. Moreover China also felt the correct forum for settlement of this dispute would be the Declaration on the Conduct of Parties in the South China Sea (DOC)[991].[992]

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[984] Roger Harrabin, 'UN Climate Talks Extend Kyoto Protocol, Promise Compensation' *The BBC* (Doha, 8 December 2012) <http://www.bbc.co.uk/news/science-environment-20653018> accessed 29 June 2015; Fiona Harvey, 'Doha Climate Change Deal Clears Way for 'Damage Aid' to Poor Nations' *The Guardian* (Doha, 8 December 2012) <http://www.guardian.co.uk/environment/2012/dec/08/doha-climate-change-deal-nations> accessed 29 June 2015

[985] United Nations Convention on the Law of the Sea (UNCLOS), 1994

[986] The US has, however, signed implementing Agreements to the UNCLOS – The Agreement on Part XI and the UN Fish Stocks Agreement. See Consolidated table of ratifications/accessions pg 8 <http://www.un.org/depts/los/reference_files/status2010.pdf> accessed 29 June 2015

[987] Government of the Philippines Official Gazette, 'Department of Foreign Affairs Statement on China's Response to the Philippines Arbitration case before UNCLOS, (February 19 2013) <http://www.gov.ph/2013/02/19/dfa-statement-on-chinas-response-to-the-ph-arbitration-case-before-unclos/> accessed on 29 June 2015

[988] UNCLOS (n 962) Annex VII Arbitration

[989] UNCLOS (n 962) Article 298 Optional Exception to Applicability of Section 2

[990] UNCLOS (n 962) Part XV Section 2 Compulsory Procedures Entailing Binding Decisions

[991] Association of South East Asian Nations (ASEAN), 'Declaration on the Conduct of Parties in the South China Sea' (4 November 2002) <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> accessed 29 June 2015

[992] Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea' (26 April 2013) <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1035577.shtml> accessed 29 June 2015

Not only have the Kyoto Protocol and the UNCLOS witnessed a deficiency in multilateral decisiveness, but as precursors to other important international agreements, seen corresponding deficiencies in such other agreements as well. As an example of such related agreements, Article 65 of UNCLOS[993] is considered a vital endorsement of the International Whaling Commission (IWC)[994]. The IWC[995] enforces a ban on whaling and trading in whale products[996]. However, by reserving exemptions with the IWC, Japan, Norway and Iceland have managed to circumvent the moratorium[997] placed on whaling since 1985[998] thereby creating international friction with anti-whaling countries.

All the above mentioned international instances have seen some form of unilateral action in response to the prevalent multilateral vacuum. Although the Kyoto Protocol has not been ratified by the US, emission standards within the US (formulated by the Environmental Protection Agency[999]) are very high, while the state of California has even more stringent vehicular emission standards (formulated by the California Air resources Board[1000]).[1001] The standards in Europe, Japan and the US are fairly similar as well[1002]. Emerging countries such as India[1003] and China have emulated European standards through their own emission programs[1004][1005].

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[993] UNCLOS Article 65 Marine Mammals

[994] Johanna Matanich, 'A Treaty Comes of Age for the Ancient Ones: Implications of the Law of the Sea for the Regulation of Whaling', (1996) 8 International Legal Perspective 37, 38

[995] Along with the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)

[996] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 'Appendices I,II and III' (see under listing for Cetacea) <http://www.cites.org/eng/app/appendices.php> accessed 29 June 2015

[997] International Whaling Commission, 'Special Permit Catches Since 1985' <http://iwc.int/table_permit> accessed 29 June 2015

[998] International Whaling Commission, 'Catch Limits and Catches Taken' <http://iwc.int/catches> accessed 29 June 2015

[999] California Environmental Protection Agency (Air Resources Board), 'The Federal Clean Air Act 1990' <http://www.arb.ca.gov/fcaa/fcaa.htm> accessed 29 June 2015

[1000] California Air Pollution Control Laws – 2012 Bluebook (n 808)

[1001] David Bauner, 'International private and public reinforcing dependencies for the innovation of automotive emission control systems in Japan and USA' (2011) 45(5) Transportation Research Part A: Policy and Practice 375, 387

[1002] Bauner (n 1001) 387

[1003] Central Pollution Control Board, Government of India (Ministry of Environment and Forests), 'Vehicular Exhaust' <http://www.cpcb.nic.in/Vehicular_Exhaust.php> accessed 29 June 2015

[1004] DieselNet, 'Emission Standards: India' <http://www.dieselnet.com/standards/in/> accessed 29 June 2015

[1005] DieselNet, 'Emission Standards: China' <http://www.dieselnet.com/standards/cn/ld.php> accessed 29 June 2015

The UNCLOS deficiencies have been reduced through several national legislations by contracting parties. One important example in the US is Section 8 of the *Fishermen's Protective Act*[1006]. Known as the *Pelly amendment*[1007], it allows extrajudicial action in international negotiations, against countries suspected of undermining sustainable fishing efforts. The Pelly Amendment is also utilized in negotiating new species into the CITES Annexes.[1008] The Japanese import reduction on Hawksbill turtle products in 1991 and the Soviet and Japanese revocation of their CITES exemption to whaling and reverting back to the much reduced CITES permitted quota in 1975, were both a result of US threats to use the *Pelly Amendment*[1009].

Whaling bans have found support in the national legislations of several countries. The US not only uses the Pelly Amendment against whaling but also has an added weapon in the *Packwood-Magnuson Amendment*[1010] to the *Fisherman's Protective Act*. Through these amendments fish imports from offending countries could potentially be banned. Several countries including Japan and Norway are known to have joined the IWC and stopped commercial whaling due to the threat of such unilateral action from the US.[1011]

These above examples serve to show that there does appear to be a purpose for UEAs, notwithstanding the legislative restrictions placed on such instruments i.e. necessity, the obligation to consult and the inclination towards international consensus. Furthermore, the duty of the state towards its people is certainly well established in terms of the principle of permanent sovereignty of

[1006] 22 U.S.C. §§ 1979-1980 (1988)
[1007] Pub. L. No. 92-219, 85 Stat. 786 (codified as amended at 22 U.S.C. § 1978 (1988))
[1008] The United States Fish and Wildlife Agency, United States Federal Government (Department of the Interior) <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/pelly-amendment.html> accessed 29 June 2015
[1009] Brian Czech and Paul R Krausman, *The Endangered Species Act: History, Conservation Biology and Public Policy* (John Hopkins University Press 2001) pg. 22
[1010] Pub. L. No. 96-61, § 3(a), 93 Stat. 407 (codified at 16 U.S.C. § 1821(e) (2) (1988))
[1011] David D. Caron, "International Sanctions, Ocean Management and the Law of the Sea: A Study of Denial of Access to Fishing" (1989) 16 Ecology Law Quarterly 319

natural resources[1012]. The right of the state to permanent sovereignty deriving from its duty to the people also exacerbates a right to using unilateral action.

However, such unilateral action may, and in most situations arising from an intermingled world economy, does, lead to extraterritorial ramifications[1013]. Domestic sovereignty allows a state to determine its domestic affairs. However such action, if it affects a state or a situation outside its jurisdiction then there may be a case against such action[1014]. Several instances of International law mandate caution against such action.

UN Resolution 626 (VII) certainly considers international economic interconnectivity to be a significant factor to be considered when exploiting such sovereign rights. It recommends that States, in "the exercise of their rights freely to use and exploit their natural wealth and resources [...] to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation among nations."[1015] This principle is further reflected in the identical wording of the Stockholm Declaration Principle 21 and Rio Declaration on Environment and Development Principle 2:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[1016]

It must be pointed out that there lies a difference between *extraterritorial jurisdiction* and *extraterritorial effect.* In a globalized and interconnected world of trade, any policy decision in one jurisdiction will have extraterritorial effects outside its borders. Such an effect is inevitable. Although

[1012] See above Section 5.3.1
[1013] Bodansky (n 827) 341
[1014] Bodansky (n 827) 341
[1015] UN General Assembly Resolution 626 (VII) Section 1
[1016] Stockholm Declaration Principle 21 and Rio Declaration on Environment and Development Principle 2

there have been several instances of international friction resulting from such cross border effects of trade or environmental policy, the characteristic of accidental influence rather than intended consequence have often been the difference between such measures being deemed in violation of international policy or not. The globalized trade system and the borderless nature of environmental problems lead to this effect of extraterritorially beyond a nation's border[1017].

The difficulty of course, also lies in distinguishing between whether extraterritorial effect through UEAs, has been accidental or whether such effect is an intentional barrier to trade. Developed countries use a plethora of standard increasing unilateral instruments, such as agricultural subsidies, ant-dumping rules and unilateral trade measures, which may have the unintentional or intentional effect of diluting developing country interests[1018]. The problem lies in distinguishing 'true and pretended environmentalism'[1019], and that environment protectionism can easily be justified as environmental protection.

## 5.5 Conclusion

The purpose of this chapter is to highlight the characteristics of Unilateral Environmental Action (UEA), and explore both the drawbacks as well as advantages associated with unilateral action in international policy making.

As was discussed in previous chapters, for effective implementation of environmental standards in a globalized world economy two factors must be contemplated – (1) a more negotiated approach, thus reducing international friction and diplomatic mistrust and (2) continued and optimal market access, in order to fulfil international trade obligations (such as those of the WTO).

It is observed in the above discussion that UEAs are bereft of negotiations in their entirety. UEAs are independent actions of individual states, disassociated from the actions or interests of other

[1017] Anderson (n 815) 755
[1018] See discussion on 'trust' in Chapter 6 Introduction to Mutual Recognition Agreements
[1019] Michael Rauscher, *International Trade, Factor Movements, and the Environment* (OUP 1997) 3

involved or concerned parties. Although there may be an international obligation to consult, such obligation is often not executed, or at the very least disregarded. WTO jurisprudence and indeed international law cautions against arbitrary and unjustified unilateral action. Rather, even in instances when unilateral action is required, there remains an obligation to consult. However, the several examples provided in this chapter show WTO cases arising from unilateral action that have led to grievances to other member states.

Furthermore, these cases also indicate the reduced market access as a result of unilateral action. They are a direct result of barriers to international trade. Such barriers result in the economic grievances of other Member states to the WTO. Market access, is a necessary factor, as firstly, barriers to such access exacerbates the problems of international friction. Secondly, trade obligations of WTO members and the presence of a strong trade dispute settlement mechanism, coupled with weak, confusing and segregated international environmental accountability mechanisms often results in a greater position of trade issues over environmental issues. Therefore, an instrument increasing environmental standards, which becomes a barrier to trade, will often be afforded a lesser priority over market access obligations and is liable to be struck down or weakened.

Bearing these characteristics of UEAs in mind the following Chapter recommends a different environmental instrument – Mutual Recognition Agreements. It discusses the concept of mutual recognition and analyses MRAs in order to understand whether the drawbacks found in unilateral action may be circumvented using mutual recognition.

# 6. Mutual Recognition and Mutual Recognition Agreements

## 6.1 Introduction

As seen from the various WTO case-law in the previous chapter concerning unilateral instruments implementing national environmental policy, the implementation of environmental standards by nations, looking to assess environmental risk and pre-empt future environmental problems, can become the catalyst for politico-economic friction between countries. However, the concern for environmental standards and the constant effort to raise such standards for the welfare of its citizens is certainly a necessity of good governance and therefore must be a prerogative of individual nations who wish it so and have the economic ability to implement such standards. This is quite clearly reflected in several international treaties and by international forum, not least by the introduction of General Exception clauses where the predominant subject area of a particular treaty does not concern Health Safety and Environmental standards. A particularly fitting example, and one discussed in this thesis, is the General Exceptions clause (Article XX) found in the GATT[1020].

However other countries, especially countries exporting into those nations with higher environmental standards (increasingly, developing nations), may look towards such attempts at raising standards, as protectionist policies intending to distort trade through technical barriers. Wariness on the part of DCs/LDCs towards such policies may perhaps be justified given the history of international negotiations, policies and trade. Moreover, instruments of environmental standards that are in the form of unilateralist methods may distort trade even if the intention of the policy instrument implementing such standards is not to do so. Some, like voluntary eco labels, have

[1020] See Chapter 4 Standards as General Exceptions to the GATT

transnational effects and yet, being market driven cannot be challenged by the parties affected[1021]. Yet other regulations such as those invoking the Precautionary Principle[1022] may be justified because they acquire a morally higher ground, for instance the welfare of citizens, even if they distort trade and were conceived with such intention.

In light of this situation, this chapter intends to analyse Mutual Recognition (MR) and its potential ability to raise standards while reducing politico-economic friction between negotiating countries. MR is based on the principle of unencumbered sale of a product or service in one jurisdiction without having to comply with its regulations if such sale is lawfully permitted in another jurisdiction, subject to the existence of an agreement (this might be in a Mutual Recognition Agreement or an Agreement with elements of mutual recognition in it[1023]) establishing such mutual recognition of regulatory standards between the two jurisdictions[1024]. As Nicolaidis defines it, "*Mutual Recognition establishes the general principle that if a product or service can be sold lawfully in one jurisdiction, it can be sold freely in any other participating jurisdiction.*"[1025]

MRAs being reciprocal, negotiated agreements that are voluntarily discussed by parties intending to form such an agreement, the potential for politico-economic friction may be considerably reduced as compared to unilateralist trade distorting international instruments. Nicolaidis & Shaffer conveniently word this potential for a considerably more harmonious relationship between negotiating nations:

[1021] For example see Chapter 3.4.1 where the thesis discusses Eco labels especially regarding the inability of exporting countries from preventing labels becoming market standards. In the WTO cases of *US – Shrimp* and *US – Tuna I and II*, although the Appellate Body (for *US – Shrimp*) and the Dispute Panels (for the two *US – Tuna* cases)ruled against the use of Eco labels, voluntary market standards that could not be challenged effectively reduced the market for the 'un-labelled' products.

[1022] See section 2.4.3 Precautionary Principle in Chapter 2 Concepts and Definitions

[1023] Note that henceforth in this thesis the abbreviation MRA will serve to include both Agreements of Mutual Recognition and Agreements with elements of Mutual Recognition

[1024] Kalypso Nicolaidis, 'Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects' in *Regulatory Reform and International Market Openness* (OECD Publications 1997)

[1025] Kalypso Nicolaidis, 'Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon?', in Thomas Cottier and Petros C. Mavroidis, (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (The University of Michigan Press 2000) 270

> "*While mutual recognition is an expression of the broader category of 'extraterritoriality', it is not extraterritoriality of a 'unilateralist' (or 'imperial') bent, but rather extraterritoriality applied in a consensual or at least bi- or plurilateral 'other-regarding' manner.*"[1026]

Moreover, as will be analysed further, MRAs, and indeed MR in general, may have the potential of raising the environmental standards of parties to such agreements[1027]. Therefore, it is of academic interest to analyse whether MR may be considered as instruments with the potential to increase environmental standards, without raising suspicion of technical barriers or conflict between nations.

This chapter seeks to first define MR and display its different aspects of as analysed by various academic thinkers, in Section 6.2[1028]. The chapter analyses the characteristics of MR that may be conducive to international cooperation for raising standards with minimal trade distortion. Also, the chapter introduces the principle of Mutual Recognition and analyses Mutual Recognition Agreements and Agreements with elements of Mutual Recognition (Collectively MRAs).

Mutual recognition can be of two kinds. It may be recognition of rules by the parties or of conformity assessment procedures. The mutual recognition of rules is accepted where national regulatory measures and objectives are considered to be of no such nature as to allow trade restrictions[1029]. Such recognition affects the export of the products directly. Thus goods of producers meeting the regulatory requirements of the exporting country are automatically allowed into the importing country. Secondly, the subject area of MRAs may be the recognition of conformity assessment

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[1026] Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 Law and Contemporary Problems 263, 267

[1027] See section 6.4 The Advantage of MRAs in International Relations in Chapter 6 Mutual Recognition and Mutual Recognition Agreements

[1028] See Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

[1029] Frode Veggeland and Christel Elvestad, 'Equivalence and Mutual Recognition in Trade Arrangements: Relevance for the WTO and the Codex Alimentarius Commission' (2004) Norwegian Agricultural Economics Research Institute Report 2004-9 <https://www.regjeringen.no/globalassets/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_s.pdf> accessed 28 June 2015

procedures. The involved parties mutually accept each other's conformity assessment procedures as equivalent in order to ensure compliance with prevailing regulatory requirements.[1030]

The definition of MRA can, in some organisations, have a broader meaning. For example, the Trans-Atlantic Consumer Dialogue (TACD) considers mutual recognition agreements to be based on equivalence, harmonization or on the satisfaction of external criteria such as the external parties standards or international standards[1031]. As mentioned earlier, this thesis will not be considering the potential of harmonization, because such potential in the international trade context is difficult to achieve. Breaking down mutual recognition clauses reveals two essential characteristics – Equivalence and Reciprocity. The various issues of the transfer of sovereignty arising chiefly from this acceptance of the regulations of another State have been discussed in the next chapter[1032].

Following the definition, Section 6.2 looks at the two characteristics of MRAs that make it conducive to the objectives analysed by this thesis – an instrument of international trade that increases environmental standards while reducing friction between trading countries (especially in the North-South context). In this regard, the two characteristics highlighted are the reciprocity inherent in MRAs and the pre-agreement negotiations which lead to a lowest agreed level of standards (this is called the 'lowest common standard' in this thesis).

Section 6.3 then looks at the various forms of MRAs[1033]. The discussion starts with the 'original principle' found in the ECJ case of *Cassis de Dijon*. The section then highlights the various forms of MR categorized by Pelkmans according to the differences between the home country and host country regulations and eventually the degree of strictness required in achieving equivalence between such differing regulations. Section 6.3.1 then specifically analyses one of these forms – the

[1030] The mutual recognition of conformity assessment procedures is kept outside the subject area of this thesis as it concentrates on the environmental standards involving trade in goods. The discussion on MRAs is therefore based on the agreements recognizing rules alone.
[1031] TACD Briefing Paper on Mutual Recognition Agreements (TACD 2001), 5 <http://test.tacd.org/wp-content/uploads/2013/09/TACD-TRADE-2001-Briefing-Paper-on-Mutual-Recognition-Agreements.pdf> accessed 29 June 2015
[1032] See Chapter 7 Mutual Recognition and International Law
[1033] See Section 6.3 Forms of MRAs

New Approach – as it affords the highest degree of flexibility, in achieving equivalence of regulations pre-agreeing to an MRA[1034]. The thesis therefore puts forward the claim that the New Approach along with the concept of 'managed MR'[1035] may allow for a negotiated trade instrument with the flexibility of considering the objectives of both the home and host nations.

Section 6.5 looks at two specific mutual recognition agreements. These examples given below illustrate the potential for mutual recognition to be based on equivalence and external criteria (such as national environmental standards) negotiated before the recognition of equivalence.

The first agreement looked at is the US-Japan MRA on organic food products. This evolution of the agreement is analysed to show the degree of change in standards evolving into the Lowest Common Standard (LCS) but not necessarily creating an increase on the party with the higher standard.

The next agreement looked at is the North American Free Trade Agreement (NAFTA). This chapter only looks at the Agriculture and Sanitary and Phytosanitary sections and the provisions of MR within them. It analyses the preconditions imposed on the parties on which the MRA provisions and the recognition of equivalence depends.

## 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

Mutual Recognition (MR) is based on the principle of unencumbered sale of a product or service in one jurisdiction without having to comply with its regulations if such sale is lawfully permitted in another jurisdiction, subject to the existence of an agreement. In other words, there lies a contractual reciprocal obligation amongst jurisdictions, to transfer regulatory authority from the jurisdiction receiving the product (host nation) to the jurisdiction that produces and markets the product (home nation)[1036].

[1034] See Section 6.3.1 The New Approach
[1035] See Section 6.3.2 Managed MRAs
[1036] Carlo Maria Cantore, 'How Does it Feel to be on Your Own? – Mutual Recognition Agreements and Non-Discrimination in the GATS: A Third Party Perspective' (2010) 11(8) German Law Journal 707

According to Nicolaidis, "*Mutual Recognition establishes the general principle that if a product or service can be sold lawfully in one jurisdiction, it can be sold freely in any other participating jurisdiction.*"[1037] This general principle was first established by the European Court of Justice (ECJ) in the *"Cassis de Dijon"* case[1038]. We look at this case in Section 6.3[1039].

Mutual Recognition Agreements (MRAs) are specific instances where the general principle has been applied, between specific parties, applying to specific goods and services and may include more or less restrictive constraints and caveats[1040]. For the purpose of this thesis MRAs will include both Agreements of Mutual Recognition and Agreements with elements or specific sections containing the principle of Mutual Recognition.

Breaking down mutual recognition clauses found in MRAs reveals two essential characteristics:

(1) Equivalence. The essence of MRAs is the recognition by each party of the equivalence of the activities of the other party[1041]. This characteristic also points at the predominance of home country regulations and standards over those of the host country. The various issues of the transfer of sovereignty arise chiefly from this characteristic and are discussed in Chapter 7[1042].

The definition of MRAs can, in some organisations, have a broader meaning. For example, the Trans-Atlantic Consumer Dialogue (TACD) considers MRAs to be based on equivalence, harmonization or on the satisfaction of external criteria such as the external parties standards or international standards[1043]. We include the concept of external criteria when discussing international MRAs as it encompasses the idea of 'managed' MR[1044]. We look at this concept in Section 6.3.2[1045].

[1037] Nicolaidis 2000 (n 1025) 270
[1038] Case 120/78, "Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein" ECR 1979, p. 649 (Cassis de Dijon case)
[1039] Section 6.3 Forms of Mutual Recognition
[1040] Nicolaidis 1997(n 1024)
[1041] Veggeland and Elvestad (n 1029) 33
[1042] Chapter 7 Section 7.2 Mutual Recognition and the Transfer of Sovereignty
[1043] TACD Briefing Paper (n 1031) 5
[1044] Nicolaidis and Shaffer (n 1026) 265
[1045] Section 6.3.2 Managed MRAs

(2) Reciprocity. While equivalence assessments are the practical task of achieving acceptance of regulatory diversity, mutual recognition is achieved when such equivalence assessments are put into a 'broader co-operative framework'[1046]. It is "extraterritoriality applied in a consensual or at least bi- or plurilateral 'other regarding' manner"[1047]. Thus, recognition of equivalent standards is responded to with a corresponding recognition of equivalence of the recognizing party.

However the degree and limitation of the recognition of equivalence may not necessarily be of the same level. The Parties may set different levels of accepted standards to the other. An example of this is the US-Japan MRA[1048] where the pre-agreement negotiations established different levels of recognition of equivalence from either party. Such 'constraints and caveats' on the recognition of equivalence are dubbed as 'external criteria' by the TACD definition above, and as mentioned is what is termed as 'managed MR' by Nicolaidis and Schaffer[1049].

Considering the observations of the previous chapters and the potential for conflict between nations with different environmental standards, MRAs have two characteristics that may be conducive to reducing such potential for conflict while establishing higher environmental standards. We highlight these two characteristics here, and discuss it in further detail through the course of this and the following chapters.

Firstly, MRAs are reciprocal, negotiated agreements that are voluntarily discussed by parties intending to form such an agreement. Therefore, the potential for politico-economic friction may be considerably reduced as compared to unilateralist trade distorting international instruments. Nicolaidis & Shaffer express this potential for a considerably more harmonious relationship between negotiating nations:

[1046] Veggeland and Elvestaad (n 1029) 57
[1047] Nicolaidis and Shaffer (n 1026) 267
[1048] See the analysis of the US-Japan MRA in Section 6.5.1
[1049] Nicolaidis and Shaffer (n 1026) 265; See Section 6.3.2 Managed MRAs

> "*While mutual recognition is an expression of the broader category of 'extraterritoriality', it is not extraterritoriality of a 'unilateralist' (or 'imperial') bent, but rather extraterritoriality applied in a consensual or at least bi- or plurilateral 'other-regarding' manner.*"[1050]

Secondly, MRAs, and indeed MR in general, may have the potential of raising the environmental standards of parties to such agreements. In terms of pre-agreement negotiations this chapter looks at whether the negotiations increase the lowest common standard (LCS) between the negotiating parties. As the formation of a MRA follows negotiations between parties, equivalence is recognized on the basis that the standards of the parties are at a similar level and the regulatory objectives those standards wish to achieve are the same. Before such recognition, however, if such standards are not equivalent then it is likely that the party with the lower standards are required to raise theirs and likewise the parties with the higher standards may seek to compromise on the standards to continue with a state of equivalence (See for example the US-Japan MRA below[1051]).

However, the MRA does create a new level of LCS which is higher than standards achieved by the party with the lower standards, pre-negotiation. Therefore, negotiations for MRAs create an increase in standards at the point of the LCS, thereby increasing the minimum standards of the country grouping (See for example the NAFTA negotiations below[1052]).

Various WTO agreements also provide the concept of LCS. Article 4.1 of the SPS Agreement discussing equivalence states:

> "*Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the*

[1050] Nicolaidis and Shaffer (n 1026) 267
[1051] See Section 6.5.1 The US-Japan Mutual Recognition Agreement on Organic Products
[1052] See Section 6.5.2 Certain Features of the NAFTA Concerning Trade between the US and Mexico

*importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. […]*"[1053]

The article therefore allows a lower limit of standards consistent with the 'appropriate level of sanitary and phytosanitary protection' desired by the importing nation. This concept of appropriate level of SPS protection is defined further in Annex A of the SPS Agreement as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory."[1054]

Similarly, Article 2.7 of the TBT Agreement also provides for considerations of the exporting Member State's standards if such standards fulfil the objectives of the standards of the importing Member State. Article 2.7 States:

> "*Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.*"[1055]

This is, of course, consistent with the prerogative of the importing Members to set their own standards according to the Appellate Body, as has been discussed earlier[1056]. Furthermore, in the event that such a level of standard has not been adequately determined or has been done so with 'insufficient precision' by the importing Member State, the AB in Australia – Salmon has stated that a WTO Panel may establish such a level[1057].

As Nicolaidis states, MRAs are a part of the effort to reconcile trade and regulatory goals by reducing the impact on trade due to the differences in such objectives, without 'sacrificing legitimate

[1053] The Agreement on the Application of Sanitary and Phytosanitary Measures (April 1994) LT/UR/A-1A/12 (SPS Agreement) Article 4.1
[1054] SPS Agreeme Annex A.5
[1055] Agreement on Technical Barriers to Trade (1 January 1980) BISD 26S/8 (TBT Agreement) Article 2.7
[1056] See discussion on Australia – Salmon (AB) in Chapter 2 Section 2.3.3.1 The Compatibility of Standards with the WTO
[1057] Australia – Salmon (AB) Para 207

regulatory objectives'[1058]. The reader will recall that the legitimacy of regulatory objectives is an important aspect of the 'necessity' of measures propagating environmental standards[1059]. MRAs therefore may create the opportunity to maintain such regulatory objectives without having to resort to unilateral instruments thereby reducing the need to invoke the general exceptions in the GATT and subsequently reducing the potential for conflict.

## 6.3 Forms of Mutual Recognition

It is for these reasons that it is of academic interest to analyse whether MRAs may be considered as instruments with the potential to increase environmental standards, without raising suspicion of technical barriers or conflict between nations. Before analysing the characteristics of MRAs, however, we first look at the origins of the principle in the ECJ case of '*Cassis de Dijon*'.[1060] This case concerns a central cooperative undertaking called Rewe-Zentral AG (Rewe), registered in Cologne, which imported goods from other Member States of the European Community into Germany. On requesting permission to import and sell certain potable spirits including the liqueur *Cassis de Dijon* (France) from the Federal Monopoly Administration for Spirits, Rewe was informed that the *Cassis de Dijon* could not be sold within Germany. This was because Article 100 (3) of the *Branntweinmonopolgesetz* provided that only potable spirits having a wine-spirit content of at least 32% may be marketed in Germany while the *Cassis de Dijon* had a wine-spirit content of 15-20%.[1061]

The Cassis de Dijon case also demonstrated the hidden power of quantitative restrictions in dissuading particular products or producers. Although no specific point of origin was specified within Article 100 (3) of the Branntweinmonopolgesetz, it predominantly targeted and thereby affected

[1058] Nicolaidis 1997(n 1024)
[1059] See Chapter 4 Standards as General Exceptions to the GATT; Section 4.3.2 Article XX(b): Necessity
[1060] Cassis de Dijon Case 649
[1061] Cassis de Dijon Case 651

competing French products, thus deterring French exporters and, protecting German producers and isolating the German market in the process[1062].

On the case being appealed to the ECJ, the court stated:

> *"It […] appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.*
>
> *There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State […]"*[1063]

Article 28 of the EEC Treaty[1064] (which at the time of the *Cassis de Dijon* judgement was Article 30) reads:

> *"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."*[1065]

Known as the 'Origin Principle', the *Cassis de Dijon* case therefore was one of the first instances of mutual recognition whereby the ECJ surmised that a product lawfully produced and marketed in one Member State should be allowed into the market of all other EU Member States.[1066]

Nicolaidis refers to such an agreement of Mutual recognition as a "contractual norm between governments whereby they agree to the transfer of regulatory authority from the host country (or

[1062] Stephen Weatherhill, *Cases and Materials on EU Law*, (Oxford University Press, 9th edition, 2010) 382
[1063] Cassis de Dijon Case 664
[1064] The current equivalent provision in the Treaty on the Functioning of the European Union (TFEU) is Article 34
[1065] Consolidated Version of the Treaty Establishing the European Community 2006 O.J. C 321 E/37, (EC Treaty) Article 28
[1066] Jaques Pelkmans, 'Mutual Recognition in Goods: On Promises and Disillusions' (2007) 14(5) Journal of European Public Policy 702

jurisdiction) where a transaction takes place, to the home country (or jurisdiction) from which a product, a person, a service or a firm originate"[1067].

Pelkmans identifies several forms of MR based on the degree of dissimilarity between the regulatory objectives of members to an MRA and the method to achieve approximation of the said objectives. We highlight Pelkmans' classification of MRAs because one of the forms characterized by him – the New Approach – is most often found in international MRAs, and the flexibility this approach affords is most conducive to such international agreements and to the intention of reducing the impact of regulatory objectives, such as higher environmental standards, on trade. We notice from the MRAs that we analyse later in Section 6.5[1068] that Pelkmans' New Approach is evident. We therefore look at Pelkmans' categorization first.

Pelkmans relates his identification of the types of mutual recognition to certain qualifications, most prominently found in Article 28 EEC Treaty, and provided for in Article 30 (ex Article 36)[1069] of the EEC Treaty, which reads:

> "*The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*"[1070]

[1067] Nicolaidis 1997 (n 1024); see also Cantore (n 1018)
[1068] Section 6.5 Analysing MRAs
[1069] The current equivalent provision in the Treaty on the Functioning of the European Union (TFEU) is Article 36
[1070] EC Treaty Article 30

It is of note here that the prohibitions and restrictions provided in Article 36 of the TFEU (ex-Article 30 of the EEC Treaty) echo the provisions of Article XX GATT[1071]. In terms of the subject of this thesis, the relevant provisions would consist of environmental risk based regulations[1072]. Calling such prohibitions or restrictions as 'derogations', Pelkmans states that only through these derogations can a member state to an MRA, justify a deviation from the 'Origin Principle'[1073].

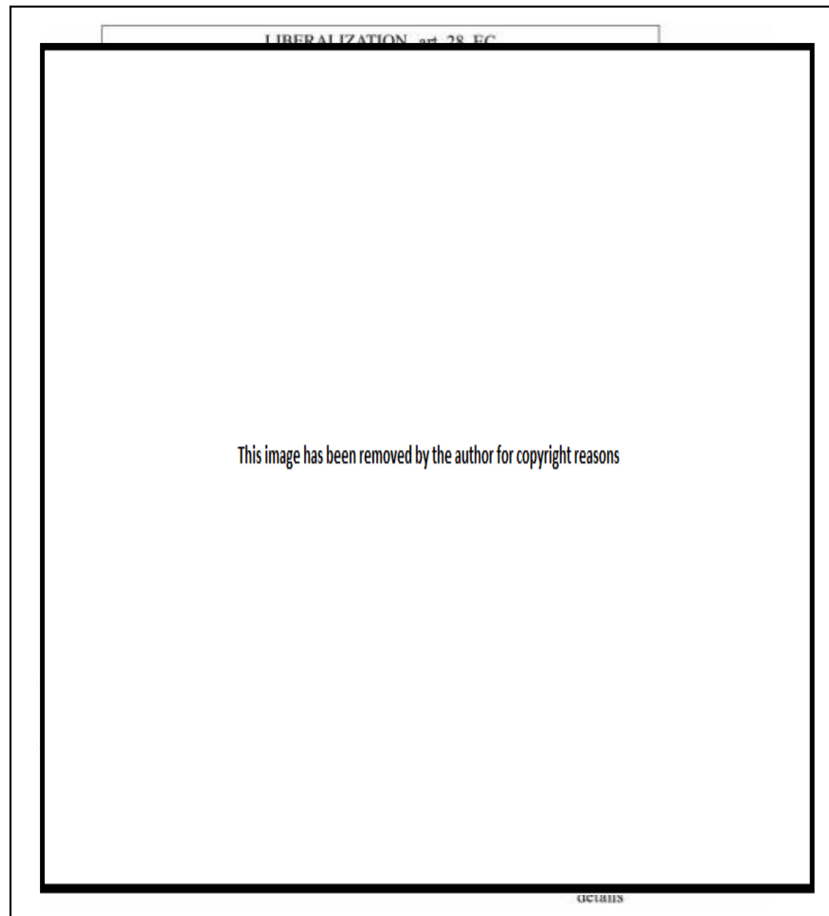


Fig 3 Diagram of Pelkmans' Categorization of the forms of MR. From J. Pelkmans, "*Mutual Recognition in Goods: On Promises and Disillusions*", 2007, pg 701

On the occurrence of such deviations from the 'Origin principle', Pelkmans states that the next step is to see whether the concerning regulations of the Home country have 'equivalent' regulatory objectives as the Host country. In the presence of such equivalence the derogations can no longer be justified, as the Host country must appreciate that the Home country regulation does not increase any of the risks listed in Article 30[1074]. Therefore, this is a form of MR with characteristics of both the 'Origin Principle' and 'Equivalence'. Pelkmans names this form of Mutual Recognition 'Judicial MR'[1075].

[1071] This is in terms of prohibitions being allowed on the grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants and the protection of national treasures possessing artistic and historic or archaeological value as long as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade.

[1072] Pelkmans argues, most safety, health, environment and consumer protection (SHEC) regulations are 'risk regulation'. Pelkmans 2007 (n 1066) 702

[1073] Pelkmans 2007 (n 1066) 702

If however, the regulatory objectives of the Home country are not 'equivalent' to the Host country, the derogations listed in Article 30 are justified. Restoring free market dynamics then necessitates an approximation approach of the Host country and Home country regulations. Pelkmans lists two separate approaches to this process of approximation. He distinguishes between a pre- *Cassis de Dijon* form of mutual recognition (Old Approach) and a post- *Cassis de Dijon* form (New Approach)[1076].

Fundamentally, the difference lies in the method of achieving environmental objectives[1077], by the parties to an MRA. The Old Approach consisted of an inflexible attempt at harmonizing the 'technical aspects' of the regulations addressing such issues[1078]. As Pelkmans, argues, the Old Approach "*violates the respect for diversity*", a necessity when discussing MR at a global level[1079], and is only justifiable when the Environmental risks are extremely high. As discussed previously, in such circumstances countries have recourse to Unilateral Environmental Instruments, and quite frequently use the precautionary approach[1080] when formulating Environmental regulations.

### 6.3.1 The New Approach

The New Approach, conversely, concentrates more on end objectives rather than the format of the regulation itself and is dependent on negotiations. Therefore, on the occurrence of a deviation from the 'Origin principle', the Home country and the Host country must define the end objectives of their competing regulations[1081]. Pelkmans dubs this form of mutual recognition as 'Regulatory MR' as opposed to the Old Approach, which was characterized by its insistence of an equivalence of

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[1074] Pelkmans 2007 (n 1066) 702
[1075] Pelkmans 2007 (n 1066) 702
[1076] Pelkmans 2007 (n 1066) 702
[1077] And other safety, health, environment and consumer protection (SHEC) objectives
[1078] Pelkmans, 2007 (n 1066) 702
[1079] See Chapter 6.3 Forms of Mutual Recognition
[1080] See Chapter 5.3.1 Permanent Sovereignty
[1081] Pelkmans 2007 (n 1066) 702

regulatory form[1082]. Importantly Pelkmans recognizes that both forms of mutual recognition help prevent the use of such objectives as technical barriers to trade[1083].

However, the 'Regulatory MR' of the New Approach is of particular interest to this thesis, as the flexibility that this form of MR affords, may be most conducive to an International framework concerning free trade. This is because of two specific reasons. Firstly, and importantly, the New Approach is dependent on negotiations. As has been discussed, the objective of this thesis is to find a negotiated Policy and Trade Instrument capable of increasing Environmental Standards[1084]. Regulatory MR is highly suitable to this objective and this characteristic of negotiations being beneficial to International Trade Relations has been discussed in greater detail below[1085].

Secondly, as has been discussed before[1086], Environmental indicators such as the EKC fail to account for certain variables. These variables are also often unaccounted for in International policy and law, and include environmental factors, economic factors etc. The significance Countries formulating National and Domestic Laws are naturally more adept at including such factors in their policy calculations. The broad ambit of negotiated objectives, arising from the New Approach of 'Regulatory MR', would allow for such variance in national policy and regulations.

The factual circumstances behind the previously discussed WTO case of US-Tuna/Dolphin I[1087] serves the purpose of illustrating how a strict seeking of 'Equivalence', similar to the Old Approach, can be detrimental to International relations while at the same time demonstrating the potential of the New Approach, had it been used in this case. The regulatory objective of the US Marine Mammals Protection Act 1972 was the prevention of Dolphin mortality in Tuna fishing[1088]. Mexico, too, had certain regulatory safeguards in place that according to them were sufficient to prevent excessive

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[1082] Pelkmans, 2007 (n 1066) 703
[1083] Pelkmans, 2007 (n 1066) 703
[1084] See Chapter 1.3 Methodology and Research Themes
[1085] See Section 6.4 The Advantages of MRAs in International Relations
[1086] See Chapter 3.2.2 Criticism of the EKC
[1087] United States – Restrictions on Imports of Tuna (Report of the Panel) (3 September 1991) GATT DS21/R-39S/155 (US – Tuna (Mexico))
[1088] Marine Mammals Protection Act (1972), 16 USC § 1371 (MMPA)

Dolphin mortality in Tuna catches[1089]. Notwithstanding the merits of the arguments on either side, historically this insistence on equivalence by the US had led to continuous international litigation and friction, between Mexico and the US. Although the incidents surrounding the Tuna embargo by the US eventually led to Mexico to refer the case to the WTO leading to the US-Tuna I Panel judgement, that itself was not the extent of the International friction surrounding the events.

It must be noted firstly, that following the Panel judgement on US-Tuna I, neither the US nor Mexico challenged the judgement at the Appellate Body or implemented it. Instead they sought out bilateral consultations with each other, 'aimed at reaching agreement outside the GATT', thereby defusing the situation temporarily[1090]. This may be construed as an example of the potential for negotiations, an important ingredient of MR (admittedly the GATT Panel judgement prior to such consultations may have had a catalytic effect). Perhaps it is possible to conceive that continued and vigorous bilateral negotiations could have prevented further escalation of the Tuna/Dolphin situation.

However, the awkwardly brokered negotiation was short lived and has since led to many international incidences and two further Tuna/Dolphin cases. A further example of the escalation arising from the Tuna/Dolphin situation can be seen in the situation that unfolded within the Inter American Tropical Tuna Convention (IATTC)[1091], an international organisation whose membership includes the US, Mexico and the European Union[1092] (parties to the three Tuna/Dolphin cases). On the US Senate blocking the legislation H.R.2823[1093], aimed at reversing Dolphin safeguard measures in existence in the US, Mexico immediately suspended its participation in the La Jolla Agreement under the IATTC, by withholding mandated information required for supervising Tuna catches in order to maintain Dolphin Safety. Moreover, the IATTC members further reprimanded the US

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[1089] US – Tuna (Mexico) Para 3.34, Para 3.36 and Para 5.28

[1090] 'Mexico etc versus US: 'tuna-dolphin', (The World Trade Organisation) <http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm> accessed 29 June 2015

[1091] 'Home' (Inter American Tropical Tuna Convention) <http://www.iattc.org> accessed on 29 June 2015

[1092] 'Members of the IATTC' (Inter American Tropical Tuna Convention) <http://www.iattc.org/HomeENG.htm> accessed on 29 June 2015

[1093] 'International Dolphin Conservation Program Act, 1996' <http://www.govtrack.us/congress/bills/104/hr2823/text> accessed on 29 June 2015

Dolphin safe program instead of addressing Mexico's blatant refusal to adhere to its treaty obligations[1094]. Subsequent pressure on the Clinton Administration led to the passing of a lightly amended legislation[1095], The International Dolphin Conservation Protection Act 1997 (IDCPA) (H.R. 408)[1096], thereby compromising and severely diluting previously established Dolphin Safety regulations.

The primary purpose of the IDCPA was firstly, to give effect to the Declaration of Panama[1097], and thereby '[eliminating] the ban on imports of tuna from those nations that are in compliance with the International Dolphin Conservation Program'[1098]. Coincidentally the signatories to the Declaration of Panama (other than Honduras) were also members of the IATTC. Importantly, in terms of Environmental standards, the IDCPA amended the definition of "dolphin safe" in the prevalent eco labelling program mandated by the Dolphin Protection Consumer Information Act, 1990[1099], to include Purse Seine fishing by countries that were members of the International Dolphin Conservation Program[1100]. Therefore, international political friction arising from a Unilateral Environmental Instruments (the 'Dolphin safe' Eco labelling mandate of the US), when seen in totality, led to the actual decrease of Environmental Standards. This further highlights the disadvantages of the non-negotiatory nature of unilateral Environmental Instruments as opposed to the inherent negotiations required in any form of mutual recognition in a MRA or any Bilateral/Plurilateral Regime.

The Appellate Body, too, has commented on the need for equivalence in comparative regulations rather than a rigid approach. In US – Shrimp/Turtle it stated:

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[1094] 'Earth Island Press Release', March 12 1997 <http://www.tomzap.com/tuna1.html> accessed on 29 June 2015

[1095] 'Dolphin Alert' (Greenpeace Foundation) <http://www.greenpeacefoundation.org/dolphinfalse.html> accessed on 29 June 2015

[1096] International Dolphin Conservation Program Act, 1996

[1097] 'Declaration of Panama 2007' <http://www.state.gov/p/wha/rls/81491.htm> accessed on 29 June 2015

[1098] International Dolphin Conservation Protection Act 1997 Section 2 (a) Purpose and Findings,

[1099] International Dolphin Conservation Protection Act 1997 Section 5 Amendments to Dolphin Protection Consumer Information Act

[1100] International Dolphin Conservation Protection Act 1997 Section 2 (a) Purpose and Findings

*"In our view there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorising an importing member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required."*[1101]

## 6.3.2 Managed MRAs

Having seen Pelkmans' categorization of Mutual recognition into Judicial MR, the New Approach (Regulatory MR) and the Old Approach, we now look at another mode of categorization of mutual recognition as proposed by Nicolaidis – 'pure MR' and 'managed MR'[1102].[1103]

According to Nicolaidis, "pure mutual recognition implies granting fully unconditional and open-ended rights of access."[1104] Contrastingly, managed MR is a form of MR in which "home-country control is conditioned, partial and monitored"[1105]. Nicolaidis lists four "dimensions" which determine whether and the extent to which mutual recognition has been managed. These are:

(1) prior conditions for equivalence;

(2) automaticity;

(3) scope; and

(4) ex-post guarantees[1106]

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[1101] US – Shrimp (AB) para 144
[1102] Kalypso Nicolaidis, 'Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services' in *Liberalization of Trade in Professional Services*, (OECD Publications 1997)
[1103] It is important to note that these are separate methods of categorization with different sets of criteria. Therefore there may be overlaps between the two methods of categorization. Thus, as an illustration, a form of mutual recognition may be both Regulatory as well as managed at the same time.
[1104] Nicolaidis 1997b (n 1102)
[1105] Kalypso Nicolaidis and Susanne Schmidt, Mutual recognition 'on trial': the Long Road to Services liberalization, 14(5) (2007) Journal of European Public Policy, 717, 718
[1106] Nicolaidis 1997b (n 1102)

According to Nicolaidis and Schmidt, managed MR consisted of some form of “prior harmonization or convergence of standards”[1107]. Managed MR also “[diminishes] the automaticity of access to host country markets by granting residual host-country control, reducing its scope in various ways and setting up mechanisms of ex-post guarantees and monitoring”[1108]. Nicolaidis and Shaffer, state that recognition by a host nation, and thereby a relinquishing of the host nation’s own rules governing standards, is always conditional to obligations placed on a home nation by the negotiated MR regime itself[1109].

An example of such managed MR may be seen in the Japan – US Mutual Recognition Agreement on Organic Products discussed below[1110] where pre-agreement negotiations excluded substances from the ‘organic’ label and created notification, information and inspection obligations *ex-post*[1111].

## 6.4 The Advantage of MRAs in International Relations

In order to discuss the importance of mutual recognition in the context of trade and the environment, it is first necessary to recognize the growing shift towards standards in regional trade. According to Chen and Mattoo this change has been brought about because of two specific reasons[1112]. Firstly, the gradual elimination of tariffs and quotas, in the multilateral trading system, has not been complemented with an equal reduction in non-tariff barriers. Walner refers to this as the ‘law of constant protection’ whereby, according to him, non-tariff barriers ‘fill the void’ created by a reduction in tariff barriers under the WTO[1113].

[1107] Nicolaidis and Schmidt, (n 1105) 721
[1108] Nicolaidis and Schmidt, (n 1105) 721
[1109] Nicolaidis and Shaffer (n 1026) 264
[1110] See Section 6.5.1 The US-Japan Mutual Recognition Agreement on Organic Products
[1111] MAFF Letter 2013 See Annex I; Please note, all correspondence with USDA regarding the US-Japan MRA has been annexed to the thesis under Annex I
[1112] Maggie Xiaoyang Chen and Aaditya Mattoo, ‘Regionalism in Standards: Good or Bad for Trade?’ (2008) 41(3) Canadian Journal of Economics 838, 839
[1113] Klaus Walner, *Mutual recognition and the Strategic Use of International Standards* (Economic Research institute 1998) 4

Secondly, although multilateral trading platforms such as the WTO seek to reduce technical barriers to trade, agreements on standards are in fact encouraged[1114]. For example, Article 2 of the Technical Barriers to Trade (TBT) Agreement concerns the preparation adoption and application of technical regulations by Member states[1115]. Although the article upholds the principles of national treatment[1116] and discourages the use of technical regulations as barriers to trade[1117], it does encourage recognizing the equivalence of standards between member states through Article 2.7. Article 2.7 states:

> "*Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.*"[1118]

The wording of the Article is clearly reminiscent of Pelkman's "New Approach" theory of mutual recognition (see above), where the importance is given to the end result of such regulations rather than the similarities and dissimilarities they have in their format. This is perhaps symbolic of the shift in recent times towards regional integration and harmonization of standards.

It is of course obvious that standards when negotiated through the WTO will not be considered a TBT. The point is when the standards are imposed unilaterally and not through negotiation. Then the curse of TBT arises.

As mentioned earlier, Pelkmans is of the opinion that both regulatory and judicial MR help in preventing parties to use the environment, health, safety and consumer protection objectives as technical barriers to trade[1119]. This is because, even with a difference in equivalence levels between

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[1114] Chen and Mattoo (n 1112) 839
[1115] Agreement on Technical Barriers to Trade (1 January 1980) BISD 26S/8 (TBT Agreement) Article 2 Preparation, Adoption and Application of Technical Regulations by Central Government Bodies
[1116] TBT Agreement Article 2.1
[1117] TBT Agreement Article 2.2
[1118] TBT Agreement Article 2.7
[1119] Pelkmans 2007 (n 1066) 703

regulatory and judicial MR, the eventual defining of regulatory objectives between parties to the MRA would render the use of technical barriers moot in light of equivalent standards.

This is an important aspect of mutual recognition in terms of involving developing countries to address environmental concerns. The characteristic mistrust between developing and developed nations stemming from a constant suspicion of technical barriers to trade[1120] may be circumvented if standards are negotiated, compromised upon and mutually agreed to in the form of MRAs. This is more significant in the negotiation of international standards within the framework of bilateral agreements as parties are more understanding and can easily facilitate the development of trust towards the other party's standards[1121].

Moreover, MR is also a more favourable approach in terms of standards because of a more negotiated approach to standards, unlike other environmental instruments (UEAs), as was seen in the *US – Tuna* and *US – Shrimp* Cases[1122]. As Chen and Mattoo argue, it is difficult to negotiate a decrease in standards, unlike tariffs, because the premise behind standards is increasing welfare[1123]. Therefore it is unlikely for host nations to compromise with a substantial decrease in standards[1124].

Economically, this translates to the fact that in order for home country products to be sold in the host nation, and for the host nation to recognize the home nation's standards, such recognition must be preceded by an increase in standards in the home nation. An example of such initial increase in standards can be found in the NAFTA Side Agreements concerning labour and environmental standards, specifically the North American Agreement on Environmental Cooperation

[1120] Scott Vaughan, '*Trade and Environment: Some North South Consideration*, (1994) 27(3) Cornell International Law Journal 591, 593
[1121] Nicolaidis and Shaffer (n 1026) 273
[1122] See Chapter 5 Unilateral Environmental Action
[1123] Chen and Mattoo (n 1112) 839
[1124] David Vogel, '*Trading Up and Governing Across: Transnational Governance and Environmental Protection*' (1997) 4(4) Journal of European Public Policy 556, 558

(NAAEC). The NAAEC was customized to address the deficiencies in Mexico's environmental standards[1125]. Article 3 of the NAAEC reads"

"Article 3 Levels of Protection

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."[1126]

NAFTA was only passed by the US Congress after Mexico agreed to uphold such environmental obligations (and similar labour standards)[1127]. Thus the NAAEC and through it NAFTA[1128] became the first environmental agreement with trade sanctions[1129].

According to Vogel environmental standards are determined by domestic preferences and interests and are more prominent in 'affluent nations'[1130]. He observes that there is no evidence of a lowering of environmental standards by such nations in order to compete with trading partners[1131]. This may be observed in intra-EU trade whereby, a prerequisite for membership to the EU for new applicant is the adoption of the EU's safety, environment and labour standards[1132]. In fact, within the EU there is evidence of constant friction between the poorer member states trying to keep standards low in

[1125] J.I. Garvey, "*AFTA after NAFTA: Regional Trade Blocks and the Propagation of Environmental and Labour Standards*" (1997) 15(2) Berkley Journal of Law 245, 255
[1126] North American Agreement on Environmental Cooperation 1993 32 ILM 1482 (NAAEC) Article 3
[1127] Walner (n 1113) 4
[1128] See discussion on the NAFTA in Section 6.5.2 Certain Features of the NAFTA Concerning Trade between the US and Mexico
[1129] Steve Charnovitz, '*The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy and American Treaty Making*' (1994) 8 Temple International and Comparative Law Journal 284
[1130] This is similar to Inglehart's theory of post-materialism as discussed in Chapter 3.2.1 Post-Materialism
[1131] Vogel (n 1124) 558
[1132] Walner (n 1113) 2

order to invite investment while the richer and more affluent economies continuously trying to upgrade standards[1133].

Nevertheless, such friction should be relatively reduced as compared to other forms of standard implementation such as the use of eco labels and the precautionary principle. This is primarily because the difference in the strategies of implementation, again has to do with the degree of imposition of standards on the sovereignty of another state[1134].

## 6.5 Analysing MRAs

Having analysed these characteristics of MRAs the chapter now analyses the claim that MRAs are conducive to the increase in standards (environmental or otherwise) between the contracting parties. In this regard, there are two identifiable areas where such standards may be determined. These are firstly in pre-agreement negotiations and thereafter in the actual agreement and the post agreement market effects. This may be true to agreements of recognition of conformity assessment procedures or the recognition of the actual goods or services themselves.

In terms of pre-agreement negotiations the chapter looks at whether the negotiations increase the lowest common standard (LCS) between the negotiating parties. As discussed earlier, the formation of a mutual recognition agreement follows negotiations between parties. Equivalence is recognized on the basis that the standards of the parties are at a similar level and the objectives those standards wish to achieve are the same. Before such recognition, however, if such standards are not equivalent then it is likely that the party with the lower standards are required to raise theirs and likewise the parties with the higher standards may seek to compromise on the standards to continue with a state of equivalence[1135]. This is dependent on negotiating power and is often determined by the market incentive on joining such an agreement. However, the MRA does create a new level of

[1133] Vogel (n 1124) 558

[1134] See below the discussion on Cosmopolitan Law and the discussion on Ex-ante trust and ex-post conflict of environmental instruments in section 7.2.3 Kantian Middle Path: Cosmopolitan Law

[1135] This is witnessed in the US – Japan MRA which we discuss in Section 6.5.1 The US – Japan Mutual Recognition Agreement on Organic Products

LCS which is higher than standards achieved by the party with the lower standards, pre-negotiation. Therefore, negotiations for MRAs create an increase in standards at the point of the LCS, thereby increasing the minimum standards of the country grouping[1136].

This section analyses these two areas in the context of MRAs. It looks at two examples of MRAs to see if they conform to their potential to increase environmental standards. Each subsection first identifies the element of mutual recognition within the agreement. Subsequently, it analyses the pre-agreement circumstances. It looks at the negotiation history and the conditions of recognition. Most agreements fall within the definition of 'managed' MR as described above[1137]. Recognition in these cases is subject to pre-conditions set by one or both parties to the agreement that reflect their national standards. This substantiates both earlier discussed theories of mutual recognition maintaining sovereign integrity and precluding a decrease in environmental standards. As Nicolaidis and Shaffer claim, the recognition by a host nation, and thereby a relinquishing of the host nation's own rules governing standards, is always conditional to obligations placed on a home nation by the negotiated Mutual Recognition regime itself[1138]. These obligations will vary depending on 'compatibility thresholds' between the parties[1139]. Compatibility thresholds are similar to the concept of LCS discussed above in Section 6.2[1140].

The following subsections look at two mutual recognition agreements to analyse whether the preceding arguments are reflected in their provisions. They look at the market access achieved by the agreements and the increase in [environmental] standards.

Moreover, MR is also a more favourable approach in terms of standards because of the relative lack of a blatant imposition of standards by one party on another, unlike other environmental

[1136] See for example the NAFTA negotiations below analysed in Section 6.5.2 Certain Features of the NAFTA Concerning Trade between the US and Mexico
[1137] Section 6.3.2 Managed MR; See also Nicolaidis and Schaffer (n 1026); and Nicolaidis and Trachtman, 'From Policed Regulation to Managed Recognition in GATS' in Pierre Sauvé and Robert Mitchell Stern (eds.) *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000) for a discussion on managed recognition
[1138] Nicolaidis and Schaffer (n 1026) 265
[1139] Nicolaidis and Schaffer (n 1026) 290
[1140] See Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

instruments (such as eco labels seen in the *US-Tuna/Dolphin* and *US-Shrimp/Turtle* Cases[1141]), yet with the potential for their qualitative increase. As Chen and Mattoo argue, it is difficult to negotiate a decrease in standards, unlike tariffs, because the premise behind standards is increasing welfare (or at the very least it is claimed to be)[1142]. Therefore it is unlikely for host nations to compromise with a substantial decrease in standards[1143]. Economically, this translates to the fact that in order for home country products to be sold in the host nation, and for the host nation to recognize the home nation's standards, such recognition must be preceded by an increase in standards in the home nation.

The first agreement looked at is the US-Japan MRA on organic food products. Unlike conventional agreements, this agreement was negotiated through a set of correspondences between the parties[1144], firstly as recognition of equivalence in 2002 which later evolved into an MRA in 2013. This evolution of the agreement is analysed to show the degree of change in standards evolving into the LCS but not necessarily creating an increase on the party with the higher standard. It is reiterated again that MRAs serve to increase the standards of the party with the lower standards, thereby increasing the average standard of the country grouping.

The next agreement looked at is the North American Free Trade Agreement (NAFTA). The NAFTA is essentially a broad ranging Free Trade Agreement that includes both host nation and home nation levels of control. The agreement contains a wide range of subject matter. This chapter only looks at the Agriculture and Sanitary and Phytosanitary sections and the provisions of MR within them. It analyses the preconditions imposed on the parties on which the MRA provisions and the recognition of equivalence depends.

[1141] See Chapter 5 Unilateral Environmental Action
[1142] Chen and Mattoo (n 1112) 839
[1143] Vogel (n 1124) 558
[1144] See MAFF Letters Annex I

## 6.5.1 The US-Japan Mutual Recognition Agreement on Organic Products

This subsection looks at the provisions of the US-Japan MRA on Organic food products. The Agreement made was between the Ministry of Agriculture, Forestry and Fisheries (MAFF), Japan and the United States Department of Agriculture (USDA), through inter-governmental correspondence[1145].

As noted earlier market incentive is an important factor in parties coming together for a trade agreement (including MRAs). The corresponding increase in environmental standards is a consequential phenomenon. In that respect, in the US-Japan agreement the parties are significant players in the organic market. According to the 2013 organic market survey carried out by the Research Institute of Organic Agriculture (FiBL) and the International Federation of Organic Agricultural Movements (IFOAM), the US is the largest domestic market for organic food, with the largest distribution of revenues in a single market and the largest distribution of organic food sales (according to the most recent survey – 2011)[1146]. Japan is the ninth largest domestic market for organic food and the largest in Asia according to the same survey[1147]. It is therefore economically advantageous for the parties to form such an MRA.

Another point to note before the analysis of the agreement is in terms of the LCS in the Agreement. This is set by the definition of organic food by the parties. The term 'Organic' is defined by national regulation of individual countries and is a standard in itself. In Japan it is set by the Ministry of Agriculture, Forestry and Fisheries (MAFF) and is known as the JAS Standard[1148]. In the US similar standards are set by the United States Department of Agriculture (USDA) through its National Organic Program (NOP)[1149]. Although 'organic' standards may differ world-wide, they generally

[1145] see MAFF Letters Annex I
[1146] FiBL and IFOAM, 'The World of Organic Agriculture; Statistics and emerging trends 2013' (14th ed FiBL and IFOAM 2013) < https://www.fibl.org/fileadmin/documents/shop/1606-organic-world-2013.pdf> accessed 29 June 2015
[1147] FiBL and IFOAM (n 1146)
[1148] 'Organic JAS Standards and Technical Criteria' <http://www.maff.go.jp/e/jas/specific/criteria_o.html> accessed 29 June 2015
[1149] 'National Organic Program' <http://www.ams.usda.gov/AMSv1.0/nop> accessed 29 June 2015

pertain to a certain level of standards and are by virtue of their characteristic, higher than ordinary agriculture and agricultural products. The differences in organic standards have led to managed MR provisions in agreements as will be seen below.

#### 6.5.1.1 Analysis of the Agreements

The first set of negotiations appeared in 2001 culminating in the 2002 Agreement notified to the WTO. This was an equivalence recognition agreement between the US and Japan and was notified to the WTO on April 2002[1150].

The 2001 MAFF correspondence recognized the equivalence of US organic products by stating that "*the grading system of organic agricultural products and organic agricultural products processed food in the US, which is stipulated in [the] National Organic Program, is equivalent to the grading system of organic products under the Japanese Agricultural Standards.*"[1151]

The 2001 letter of correspondence sent by the MAFF set certain conditions for the recognition of equivalence of the USDA organic food programme. These were the exclusion of the following substances in US organic food products that were to be exported to Japan:

(1) Alkali Extracted Humic Acid

(2) Lignin Sulfonate

(3) Potassium Bicarbonate[1152]

Furthermore, the correspondence mandated change notification, information and inspection obligations.[1153] This qualification of the recognition of equivalence is similar to the aspect mentioned in 'managed' MRAs, although this agreement in 2002 was still a recognition of equivalence by Japan of US Organic food products.

[1150] G/TBT/10.7/N/36
[1151] MAFF Letter 2001 Annex I
[1152] MAFF Letter 2001 Annex I
[1153] MAFF Letter 2001 Annex I

Subsequently, the agreement was re-asserted in 2013 between the MAFF and the USDA through inter-governmental correspondence[1154] converting the agreement to an MRA.

The recognition element can be found in both sets on correspondences from either party in 2013. The MAFF concluded that "*the grading system on organic products (organic agricultural products and organic agricultural product processed food) in the United States is equivalent to the system under the Law concerning Standardization and Proper Labelling of Agricultural and Forestry Products (the JAS law), after examining the equivalence in United States in March 13, 2002.*"[1155]

In reciprocity, the USDA determined that:

> "*certain agricultural products produced and handled in accordance with Japan's organic certification program that provides safeguards and guidelines governing the production and handling of such products that are at least equivalent to the requirements of the OFPA[1156].*
>
> *[…]*
>
> *Accordingly […] certain agricultural products produced and handled in conformity with Japan's organic certification program […] are deemed by the USDA to have been produced and handled in accordance with the OFPA and USDA's organic regulations under the National Organic Program (NOP). […] These products may be sold, labelled, or represented in the United States as organically produced, including by display of the USDA organic seal as well as the JAS[1157] organic logo […].*"[1158]

Thus, this listing of preconditions and the subsequent limitations to the recognition of equivalence meant that the US – Japan MRA was not a pure MR agreement but rather a managed one[1159]. Furthermore, the agreement was a not only a dual MRA recognizing product standard rules as well

[1154] See MAFF Letters Annex I
[1155] MAFF Letter 2013 Annex I
[1156] Organic Foods Production Act, 1990
[1157] Japanese Agricultural Standard
[1158] MAFF Letter 2013 Annex I
[1159] As described in section 6.3.2 managed MR

as conformity assessment programs, but also a recognition agreement of each other's labelling program.

### 6.5.1.1.1 Changes between the 2002 Equivalence Recognition Agreement and the 2013 Mutual Recognition Agreement

The 2013 post agreement conditions may be too recent to produce any significant development for analysis. However, the several changes between the 2002 Equivalence Agreement and the 2013 MRA brings out very interesting differences, and hints at the role of MRAs in increasing environmental standards. This section looks at how this is so.

The 2002 agreement was essentially an agreement of managed recognition of equivalence[1160] that required all US Organic Products being exported to Japan not containing the substances Alkali Extracted Humic Acid, Lignin Sulfonate and Potassium Bicarbonate. Apart from this the Agreement also required notification, information and inspection obligations[1161]. The lack of reciprocity in the agreement limited its scope and precluded the agreement from being a true MRA. As discussed earlier, mutual recognition is the recognition by each party of the equivalent standards and conformity assessment of the other party.

The 2013 Agreement on the other hand shows several developments to the original equivalence agreement. Firstly, the agreement is now a reciprocal agreement with both parties recognizing the equivalence of the other's organic grading system (this has been discussed earlier in this section). The reader will recall this to be an essential characteristic of MRAs.

The second change is in the actual terms of the agreement. From an agreement simply qualifying the exports from the US (2002 agreement), to the current complex agreement of mutual recognition,

[1160] It was not yet a pure MRA in 2002 due to the lack of reciprocity in the recognition of equivalence by the US
[1161] MAFF Letter 2013 Annex I

the agreement terms now include rules governing product labelling requirements, standards and certification bodies.

### 6.5.1.2 Labelling recognition

The labelling requirements in the agreement are designed to keep either label (MAFF or USDA) functional and provide a choice for importers or exporters. Labelling requirements for Japanese products imported into the US are simpler than US products being exported into Japan. Japanese organic products for export to the US "are expected to be labelled according to USDA-NOP organic labelling requirements"[1162] and accompanied by a NOP Import Certificate from either "a MAFF-accredited or USDA accredited certification body based in Japan"[1163].

On the other hand for US products to be exported to Japan there are four scenarios:

(1) A US product produced and handled by an operator certified by a USDA-NOP accredited certifier may display the USDA organic seal if compliant with the USDA organic labelling requirements[1164]. If such a product has a JAS seal then it is expected to be imported by a JAS-certified importer[1165].

(2) A US product produced and handled by an operator, who has a JAS-labelling contract with a JAS-certified importer, and is certified by a USDA-NOP accredited certifier may display the JAS seal if compliant with the JAS organic labelling requirements[1166] and/or the USDA seal in Japan. The operator is expected to be imported by a JAS-certified importer[1167].

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[1162] The US-Japan Mutual Recognition Agreement on Organic Products 2013(US – Japan Agreement) Agreement Appendix 1 Section I.B (See Agreement copy in Appendix I of the thesis)
[1163] US – Japan Agreement Appendix 1 Section I.C
[1164] US – Japan Agreement Appendix 1 Section II.B.2
[1165] US – Japan Agreement Appendix 1 Section II.B.3
[1166] US – Japan Agreement Appendix 1 Section II.C.2
[1167] US – Japan Agreement Appendix 1 Section II.C.3

(3) A US product certified to the JAS standard by a MAFF-accredited certifier may display the USDA organic seal if compliant with USDA requirements[1168] and/or the JAS organic seal if compliant with JAS requirements[1169].

(4) Lastly, for non-regulated organic products (with the exception of alcoholic beverages) for export to Japan, certified by a USDA-NOP accredited certifier may display the USDA organic seal[1170] and the product may be labelled 'organic' in English or Japanese[1171].

The Labelling requirements of US products entering the Japanese market reflect the general conditions Japan had earlier imposed on the 2002 equivalence recognition agreement. This reflects the higher standards the domestically produced Japanese organic products pertain to, and the difference in such standards with the US market. As mentioned before, such differences lead to the imposition of conditions to mutual recognition and thereby a 'managed' agreement.

### 6.5.1.3 Omission of substances

The most glaring change between the two agreements, however, has been the omission of the 3 substances earlier prohibited from organic product exports to Japan. The MAFF in its correspondence of acknowledgement of the agreement recognises its change of conditions. It states that, "*with a view to ensuring the future equivalence in United States and to maintaining the public confidence to the graded organic product, MAFF will replace the previous conditions with the ones set forth in section II of Appendix 1 and the arrangement regarding the Organics Working Group described in Appendix 2.*"[1172] The Organics Working Group is a body consisting of representatives of

[1168] US – Japan Agreement Appendix 1 Section II.D.2
[1169] US – Japan Agreement Appendix 1 Section II.D.3
[1170] US – Japan Agreement Appendix 1 Section II.E.2
[1171] US – Japan Agreement Appendix 1 Section II.E.3
[1172] MAFF Letter 2013 Appendix I

the USDA, USTR and the MAFF set up to monitor and review the operations of the arrangement in order to 'enhance regulatory and standards cooperation'[1173].

Although the US general ban on the three substances were being considered in order to allow producers to conform to one set of rules[1174], these substances continue to be in use in production and processing of organic products in the US [1175].

Thus the fact that Japan chose to withdraw these conditions corroborates the argument that MRAs may not necessarily increase the standards of all parties to the agreement to the level of the party with the highest standards (this is rather a characteristic of harmonization than equivalence and mutual recognition). Instead, MRAs seek to achieve the lowest common standard possible amongst the parties, thereby increase the standards of the party with the lower standards[1176]. In this case however, the lowest standard is pre-determined to the levels required for organic status.

### 6.5.2 Certain features of the NAFTA concerning Trade between the US and Mexico

The analysis of the NAFTA agreement seeks to substantiate the claim whether in order for home country products to be sold in the host nation, and for the host nation to recognize the home nation's standards, such recognition must be preceded by an increase in standards in the home nation. In order to effectively analyse MR provisions within the agreement, this subsection looks at the related provisions within NAFTA concerning Agricultural products and Sanitary and Phytosanitary provisions[1177].

[1173] US – Japan Agreement Appendix 2
[1174] Veggeland and Elvestad (n 1029) 40; National Organic Program, Amendments to the National list of allowed and prohibited substances, 2003
[1175] See list of Synthetic substances allowed for use in organic crop production. Code of Federal Regulations 7 CFR § 205.601
[1176] The level of increase in standards will be dependent on various factors, including the negotiatory powers and the market incentives of the parties to the agreement. This has been discussed earlier in Chapter 4 Trade and Environment
[1177] North American Free Trade Agreement (1993) 32 ILM 289, 605 (NAFTA); Chapter 7

The difference between National Treatment obligations under the GATT and mutual recognition lies in the fact that national treatment obligations consider host country regulations and standards, while MR considers home country standards and regulations[1178]. This difference can be found in the North American Agreement on Environmental Co-operation (NAAEC) side-agreement of the NAFTA. Although the NAFTA and the NAAEC side-agreement are strongly influenced by the WTO and other international agreements[1179] there are specific provisions within the NAAEC that create WTO *plus* standards[1180]. This reveals the agreement's intention to raise the level of the LCS above those already mandated by the WTO and also to recognize the equivalence of the other parties.

For example Article 710, NAFTA directs that "Articles 301 (National Treatment) and 309 (Import and Export Restrictions), and the provisions of Article XX(b) of the GATT as incorporated into Article 2101(1) (General Exceptions)NAFTA, do not apply to any sanitary or phytosanitary measure."[1181] This paves the way for creating standards amongst the parties that are higher than those mandated by the WTO. The Agreement therefore continues with provisions for equivalence recognition[1182], international standards[1183], risk assessment[1184], notification obligations[1185], cooperation[1186], etc., of its own creating a framework for standards (negotiated prior to the acceptance of the agreement) that is higher than the general GATT initiated standards available to parties to the Agreement.

An example of such a pre-agreement negotiated increase in standards can be found in the NAFTA side agreements concerning labour and environmental standards, including the previously

[1178] Susanne K. Schmidt, 'Mutual Recognition as a New Mode of Governance' 14(5) (2007) Journal of European Public Policy 667, 671
[1179] See for example NAFTA Article 903 "[T]he Parties affirm with respect to each other their existing rights and obligations relating to standard related measures under the GATT Agreement on Technical Barriers to Trade and all other international agreements, including environmental and conservation agreements, to which those Parties are party."
[1180] WTO *Plus* Standards are standards which are more stringent than those required by the WTO [citation required]
[1181] NAFTA Article 710
[1182] NAFTA Article 714
[1183] NAFTA Article 713
[1184] NAFTA Article 715, 717
[1185] NAFTA Article 718
[1186] NAFTA Article 720, 722, 723

mentioned NAAEC. The NAAEC was customized to address the deficiencies in Mexico's environmental standards[1187]. Article 3 of the NAAEC reads"

> "Article 3 Levels of Protection
>
> Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."[1188]

The NAAEC and through it NAFTA became the first environmental agreement with trade sanctions[1189]. A precondition of NAFTA being passed by the US Congress was Mexico agreeing to uphold such environmental standards (and similar labour standards)[1190] obligated under the NAAEC.

Provisions within the NAAEC side-agreement serve to illustrate two specific points mentioned in this thesis[1191]. Firstly, pre-agreement negotiations serve to raise the lowest common standards of the parties, thereby increasing the lower level of standards. This is clear from the negotiated provisions of the NAAEC mentioned above, and the importance that the Clinton administration in the US, laid on the acceptance of the NAAEC provisions by Mexico, in order to agree to the NAFTA[1192].

Secondly, once such an LCS has been achieved, the regulatory provisions for standards need not necessarily be stringent in its interpretation but rather look towards the substantive objectives of the parties. This may be done through recognition of equivalence. In the following section we analyse the NAAEC side-agreement to see whether it provides opportunities for such equivalence.

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[1187] Garvey (n 1125) 255
[1188] North American Agreement on Environmental Cooperation 1993 (NAAEC) Article 3
[1189] Charnovitz, (n 1129) 284
[1190] Walner (n 1113) 4
[1191] See Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements
[1192] Charnowitz (n 1129) 257

### 6.5.2.1 Analysis of the Agreement

The treatment of imported goods, especially in terms of discrimination, is governed by the *National Treatment* principle of the GATT. This is mirrored in the NAFTA as well (despite Article 710 mentioned above) through Annex 703.2 which states that, "where a Party adopts or maintains a measure respecting the classification, grading or marketing of a domestic agricultural good, it shall accord treatment to a like qualifying good destined for processing no less favourable than it accords under the measure to the domestic good destined for processing."[1193] This is problematic in terms of defining the agreement as an MRA as clearly the standards set are according to the host country regulations, albeit taking cognizance of home country like-products.

Furthermore, Article 712 states that, "notwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in accordance with Article"[1194]. Through this provision the host country is allowed to set its preferred level of standards.

Therefore the NAFTA agreement sections concerning Agricultural Products cannot be considered an MRA in the strictest sense. It is essentially a broad ranging Free Trade Agreement that includes both host nation and home nation levels of control. However, elements of mutual recognition are found in the NAFTA in its provisions concerning Agriculture and Sanitary and Phytosanitary provisions (discussed in Section 6.5.2.2) and on its provisions on General Standard related measures (discussed in Section 6.5.2.3).

[1193] NAFTA Annex 703.2
[1194] NAFTA Article 712 Section 2

#### 6.5.2.2 Mutual Recognition Provisions Concerning Agriculture Products Standards and Related Sanitary and Phytosanitary Standards

In Chapter 7 NAFTA on Agriculture, the provision most relevant to this discussion is Article 714 which deals with Equivalence. The Article seeks to balance the level of standards the host country wishes to achieve, with recognition of the home country standards. It does so by requiring that, "[w]ithout reducing the level of protection of human, animal or plant life or health, the Parties shall, to the greatest extent practicable and in accordance with this Section, pursue equivalence of their respective sanitary and phytosanitary measures."[1195]

A point of note here is that equivalence (and indeed mutual recognition, as these provisions are applicable to all parties to the Agreement and thus reciprocal) is with regard to individual measures governing sanitary and phytosanitary standards in agricultural products and not regulation creating a single lowest common standard for goods for export[1196]. Article 714 further provides the procedure involved in achieving such equivalence. According to the Article the recognition of equivalence of sanitary and phytosanitary measures by the host country (importing Party) is achieved when the home country (exporting Party) "provides to the importing Party scientific evidence or other information, in accordance with risk assessment methodologies agreed on by those Parties, to demonstrate objectively, […] that the exporting Party's measure achieves the importing Party's appropriate level of protection."[1197]

Therefore, the appropriate level is determined for each individual measure and at the level of the host country standards. Thus in this scenario the LCS is either increased or left at the level of either contracting party. The reciprocity and the consequent open market (along with the presumption that producers and regulators would find it economically beneficial to have a single sanitary and phytosanitary standard for their products) would determine an increase in standards. Once a similar

[1195] NAFTA Article 714 Section 1
[1196] This is dealt with in the following sub-section on General Standards
[1197] NAFTA Article 714 Section 2 (a)

level of standards is achieved, equivalence may be recognized thereby leading to mutual recognition. However, when determining such standards and in the development of such sanitary or phytosanitary measures, the parties are required to "consider relevant actual or proposed sanitary or phytosanitary measures of the other Parties"[1198]. Therefore equivalence of levels of sanitary and phytosanitary standards must be determined in a substantive way, reminiscent of the 'regulatory MR' category defined by Nicolaidis and Schaffer[1199].

To maintain the level of standards or at the very least a status quo of recognition of equivalence, the Agreement provides for "inspection, testing and other relevant procedures" within its territory[1200]. In the event that the home country measures do not achieve the appropriate level of measurements of the host country, the agreement allows the host country to determine so (on a scientific basis)[1201] and provide the home country such reasons for determining so[1202]. This acts as a deterrent to the decreasing of standards of either party.

Such equivalence of sanitary and phytosanitary measures must also be determined taking into consideration regional circumstances such as the existence of eradication or control programs in that area[1203] and any relevant international standard, guideline or recommendation[1204]. The host country must also base its determination geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary or phytosanitary controls of the home country[1205]. This therefore substantiates the possibility of equivalence recognition in 'managed' conditions. This is in strong contrast to requirements of unilateral measures and strict determination of potentially equivalent

[1198] NAFTA Article 714 Section 4
[1199] See section 6.3 Forms of Mutual Recognition
[1200] NAFTA Article 714 Section 3
[1201] NAFTA Article 714 Section 2(b)
[1202] NAFTA Article 714 Section 2(c)
[1203] NAFTA Article 716 Section 1(b)
[1204] NAFTA Article 716 Section 1(c)
[1205] NAFTA Article 716 Section 2

laws. As seen in earlier chapters Mexico and the US, have in fact had disputes due to such strict interpretation and unilateral requirements[1206].

Furthermore, the host country will have to 'pursue an agreement' with the home country on specific requirements, which when fulfilled will achieve the host country level of protection and thus allow goods produced in an area of low pest or disease prevalence in the territory of the home country to be imported into the territory of the host country[1207]. Thus a 'managed'[1208] form of recognition is created where, in each such minor agreement for the determination of a sanitary or phytosanitary standard, a pre-agreement level of standard is first created. Given that the requirements are determined by the nation with the higher standards, an increase of the LCS may be assumed again.

#### 6.5.2.3 Mutual Recognition Provisions Concerning Standards Related Measures

Another section of the NAFTA where elements of mutual recognition may be observed is the more general Chapter 9 on standard related measures[1209]. As mentioned above, the objectives of the Parties, in relation to standards, is to create a WTO *plus* agreement. The Parties therefore assert in this section of NAFTA, their obligations relating to standard-related measures under the TBT Agreement and other international agreements, including environmental and conservation agreements[1210].

Similar to the above discussed section on agricultural products standards, Chapter 9 also give rights to the host country in determining levels of General standards, "including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers,

[1206] See for example the US labeling measures for dolphin safe tuna leading to the US-Tuna disputes at the WTO. At the time of such measures, Mexico had its own prevalent laws for the prevention of Dolphin mortality. However the US insistence on imposing the use of purse-seine nets for tuna imported into its markets eventually led to the case being taken to the DSB, as well as post determination market and governmental politics eventually leading to an actual decrease in standards. See the discussion of this case in Chapter 5 Unilateral Environmental Action
[1207] NAFTA Article 716 Section 6
[1208] As described in section 6.3.2 Managed MRAs
[1209] NAFTA Chapter 9 Standard Related Measures
[1210] NAFTA Article 903

and any measure to ensure its enforcement or implementation. Such measures include those to prohibit the importation of a good of another Party […]"[1211].

However, such measure may not be arbitrary and unjustifiable[1212], a disguised restriction on trade[1213] and one that discriminates between 'similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits'[1214]. Furthermore *National Treatment* and 'like-product' principles similar to the GATT must be observed as well[1215]. The measures must therefore be able to demonstrate that its purpose is to achieve a 'legitimate objective'[1216] and that it does not exclude goods from another Party that achieve the same objective[1217].

As stated before, host country standard determinations, though legitimate, preclude defining an agreement as an MRA (unless just determinations are from pre-agreement negotiations which create a 'managed' MRA). The argument that the NAFTA is predominantly a FTA, rather than an actual MRA, is substantiated by these provisions. However, Chapter 9 (similar to the more specific Chapter 7) also has specific provisions that contain elements of MR.

The relevant Article embodying principles of mutual recognition is Article 906: Compatibility and Equivalence. According to Article 906, the Parties to the NAFTA require to work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers[1218]. However, as long as it is not detrimental to the objectives of raising these

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[1211] NAFTA Article 904 Section 1
[1212] NAFTA Article 907 Section 2(a)
[1213] NAFTA Article 907 Section 2(b)
[1214] NAFTA Article 907 Section 2(c)
[1215] NAFTA Article 904 Section 3(a)&(b)
[1216] NAFTA Article 904 Section 4(a); A 'legitimate objective' is defined in Article 915 to "include an objective such as: (a) safety; (b) protection of human, animal or plant life or health, the environment or consumers, including matters relating to quality and identifiability of goods or services, and; (c) sustainable development; considering among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification but does not include the protection of domestic production."
[1217] NAFTA Article 904 Section 4(b)
[1218] NAFTA Article 906 Section 1

standards, the Parties are required to 'make compatible'[1219] their respective standards-related measures, in order to facilitate trade[1220]. This recognition of equivalency includes standards as well as conformity assessment procedures[1221].

Importantly Article 915 states that, "[e]ach importing Party shall treat a technical regulation adopted or maintained by an exporting Party as equivalent to its own where the exporting Party, in cooperation with the importing Party, demonstrates to the satisfaction of the importing Party that its technical regulation adequately fulfils the importing Party's legitimate objectives"[1222] or give reasons for not doing so[1223].

Similar provisions can be found with regards to conformity assessment procedures in Article 908. These include an obligation on Parties to the agreement to make conformity assessment procedures in their respective territories compatible[1224] and on terms no less favourable than those accorded to conformity assessment bodies in its territory[1225]. These procedures are not to be stricter, nor applied more strictly, than necessary[1226]. If a home nation so requests, then a 'sympathetic consideration' must be given by the host nation, to an agreement of mutual recognition of the results emerging from a home nation's conformity assessment procedure[1227].

## 6.6 Conclusions

The objective of this chapter was to define Mutual Recognition in the context of this thesis and to analyse its potential as an instrument to raise Environmental standards. This exercise was a

[1219] To 'make compatible' is defined in Article 915 to mean "[bringing] means bring different standards-related measures of the same scope approved by different standardizing bodies to a level such that they are either identical, equivalent or have the effect of permitting goods or services to be used in place of one another or fulfil the same purpose.
[1220] NAFTA Article 906 Section 2
[1221] NAFTA Article 906 Section 3
[1222] NAFTA Article 906 Section 4
[1223] NAFTA Article 906 Section 5
[1224] NAFTA Article 908 Section 1
[1225] NAFTA Article 908 Section 2
[1226] NAFTA Article 908 Section 3(a)
[1227] NAFTA Article 908 Section 6

necessary progression to the analysis of the Trade-Environment relationship[1228] and Unilateral Environmental Instruments[1229] in the preceding two chapters. As witnessed in Chapter 3, the Trade-Environment analysis has predominantly shaped up to be a Developing/transitional country – developed country issue, and a question of Environmental standards. Developed countries in a partially post-materialistic society – largely because of already having gone through the industrialization process – can afford to look beyond material concerns, towards abstract societal benefits such as standards of living. Developed country markets therefore have a demand for high environmental standards.

Developing countries on the other hand cannot afford such high standards for their domestic industries, if such industries are to compete with international firms. Furthermore, developing countries tend to bring up the argument that developed countries have reaped the benefits of industrialized pollution and now wish to hinder developing countries' economic progress[1230].

Now although there are merits to this argument, one important drawback is the time factor. Although there might be a case of a relatively recent increase in Environmentalism due to developed countries reaching the post-materialist stage of their societal evolution, this increase in Environmentalism may be – given the finite nature of natural resources – because of an increased need for it. In such circumstances, notwithstanding the past benefits reaped by developed countries, they may have a very strong case for Environmental development and increased Environmental standards.

Countries wishing to advocate environmental change do so in the International extra-territorial context through two diverging processes – unilaterally, where national laws are made and implemented without sufficient consultation of the Nations being affected, or bilaterally or pluri-laterally through negotiations.

[1228] See Chapter 3 Trade and Environment
[1229] See Chapter 5 Unilateral Environmental Action
[1230] See Chapter 3 Trade and Environment

The examination of WTO case law in Chapters 4 and 5 revealed that a significant problem with Unilateral Environmental instruments is that they invariable lead to political and economic friction between countries. Therefore, the thesis searched for a trade instrument which would propagate environmental standards while reducing international friction by allowing nations the flexibility to achieve equivalent environmental objectives while keeping domestic conditions in mind. The thesis therefore suggests looking at the concept of MR and thereby the MRAs forming out of negotiations considering the concept.

In order to look at mutual recognition in the international context this chapter looked most closely at the categorization set by Pelkmans. He divides mutual recognition into what he calls “Judicial MR” as well as the Old Approach and the New Approach which he calls ‘Regulatory MR’.

In the Old Approach, MR is achieved by a strict harmonization of the regulations of the participating countries. It is inflexible and impractical in the International sense given the myriad of variables and permutations to be considered. The New Approach, alternatively, considers the equivalence of the regulatory objectives of the participating countries rather than the actual regulatory instruments. If the instruments to be compared have the same regulatory objective then mutual recognition can be achieved. It is this flexible form of mutual recognition that is important in the international context.

The intention of this chapter was to observe the potential of MRAs in increasing environmental standards. The increase of standards through mutual recognition agreements may occur in two identifiable areas of the negotiated instrument. These are either in the pre-agreement negotiations or in the negotiated text of the agreement. Often, the text of the agreement will reflect the intention of the parties before agreement.

This was observed in the NAFTA Agreement, for example where the apprehension of Mexico’s lower standards entering the US-Canada Free Trade Agreement (the predecessor to the NAFTA), led to the

parties deciding on the NAFTA side agreements on labour and environmental standards (such as the NAAEC).

Similarly, the 2002 equivalence recognition agreement between the US and Japan sought to ban the use of certain substances in organic in organic food products to be imported into Japan. Japan's higher standards of organic food products not only influenced the agreement but forced the US to mull over a general ban on the substances in order to have one set of rules for their domestic producers[1231]. Although this did not materialize, it shows the potential a 'managed' recognition has in increasing environmental standards.

Furthermore both sets of agreement show the potential for mutual recognition in the international context lies in designing 'managed' mutual recognition agreements. In the following chapter the thesis discusses the issue of sovereignty in mutual recognition agreements. By formulating managed agreements, the parties are allowed to withhold certain host country sovereignty by determining the minimal level of standards required for import. Not only does this allay fears of diluting sovereignty through extraterritorial home country rules, but also, the minimal standard determination increases the lowest common standards (LCS) between the parties.

However, the potential of MRAs in raising standards is aided by a globalized interconnected market. Global market links and lucrative markets create incentives to join agreements that reduce market barriers to trade. MRAs are agreements that reduce trade barriers[1232]. As mentioned above[1233], MRAs also have a consequential increase in lowest common environmental standards (the LCS). Therefore, a third party wishing to join such an agreement is obliged to increase their standards. As mentioned above, negotiation power may be a factor in the level of LCS, which may be significantly higher if the market that a country wants to join is already more advanced with environmental standards due to a pre-existing agreement.

[1231] Veggeland and Elvestad (n 1029) 40
[1232] TACD Briefing Paper (n 1031)
[1233] See Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

This was the case with Mexico wanting to join the Canada-US Free Trade Agreement. In order for NAFTA to be agreed to, Mexico was pressed into agreeing to the additional NAFTA side-agreements of labour and environmental standards.

The Organic products chain also has the potential to create such dynamics. Consider the example of India in the Organic production chain. India has the largest number of organic producers in the world[1234]. Its organic regulations are formulated by the Ministry of Commerce and Industry through the National Programme for Organic Production (NPOP)[1235]. India and the US have an MRA on certifying agents of Organic food products thereby allowing easier access to each other's markets[1236].

Therefore both Japanese and Indian organic products have a common market in the US. Indian organic products entering the US market through mutual recognition of standards would theoretically be of equivalent levels to Japanese standards or at the very least compatible to the US import requirements. However, India and Japan do not yet have such an agreement between themselves. If the MRA between the US and Japan was a pure MRA similar to the characteristics of the Origin Principle found in the *Cassis de Dijon* definition[1237], instead of the current 'managed' one, products entering one market would have to be allowed into the other.

The barriers still prevalent in such international trade agreements do, however, serve to safeguard the legitimate environmental interests of parties to agreements. The diverse levels of environmental standards in international trade necessitate so. The barriers also serve the purpose of incentivising countries to raise their level of standards in order to enter markets with higher standards, thereby continuously increasing the LCS as more trade agreements are formulated amongst nations and country groupings.

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[1234] FiBL and IFOAM (n 1146)

[1235] National Programme for Organic Production <http://www.apeda.gov.in/apedawebsite/organic/> accessed 29 June 2015

[1236] National Organic Program; International Trade Policies: India <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=NOPTradeIndia> accessed 29 June 2015

[1237] See section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

In the following chapter we look at two final issues required in our analysis of MRAs. It first looks at the issue of sovereignty associated with MRAs as these agreements entail the acceptance of home country regulations and standards by the host country. The chapter finally looks at the WTO compatibility of MRAs.

# 7. MUTUAL RECOGNITION AND INTERNATIONAL LAW

## 7.1 Introduction

There are two major issues that require discussion when examining MR. Firstly, MRAs constitute a horizontal transfer of power to another jurisdiction and therefore questions regarding sovereignty come to light. Therefore, the issue of sovereignty must be analysed in the present discussion. Secondly, MRAs are in effect agreements of preferential treatment and therefore must be seen in light of and in comparison to the most favoured nation (MFN) principle of the WTO[1238]. This chapter therefore discusses two prominent issues regarding MR.

Section 7.2 first looks at the issue of sovereignty. Notwithstanding the fact that there lies a mutual agreement to recognize standards prevalent within another jurisdiction, essentially, such recognition is an acceptance of the standards of another jurisdiction and therefore may imply a direct or indirect transfer of sovereignty. Detractors of MR may see this as an important drawback of such an instrument. To study the dynamics of MR and agreements based on a transfer of sovereignty, it is therefore pertinent to discuss the question of a transfer of sovereignty. This is the first important issue that this chapter attempts to addresses.

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[1238] As a reminder to the reader, Members to the GATT (and subsequently the WTO) have contracted that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties treat all other members equally in terms of tariffs applied to imports" as per Article I of the GATT. This is known as the Most Favoured Nation (MFN) Principle. Derogation of this principle would be seen as Preferential Treatment and would normally be incompatible with the MFN Principle. Exceptions allowing Preferential Treatment include the Generalised System of Preference (GSP) and Special and Differential Treatment (S&D) Provisions of Developing countries (See discussion on S&D Provisions in Chapter 2 Section 2.2 The categorization of Developed and Developing Countries) and in Article XXIV of the GATT (Territorial Application — Frontier Traffic — Customs Unions and Free-trade Areas). See Anne O. Krueger (ed), The WTO as an International Organisation, 2000 (The University of Chicago Press) 4

Secondly, within the context of the WTO, MRAs may be seen as agreements of preferential treatment. Section 7.3 discusses MRAs in the WTO context, especially regarding regional agreements *viz-à-viz* the Most Favoured Nation principle. It also analyses the potential of a conflict between a GATT provision allowing mutual agreements and other WTO provisions within the GATT, SPS and TBT agreements preventing discrimination within Member States.

## 7.2 Mutual Recognition and the Transfer of Sovereignty

It is important to assess whether MR can be considered an instrument of governance or merely a facilitator of one. Trachtman argues, that given the inherent deregulatory nature of mutual recognition, and its characteristic of negotiating a choice of Home country regulations and thereby allocating regulatory jurisdiction makes mutual recognition, "not so much a rule of governance in the normal sense, but a rule of choice of governance"[1239]. In such a situation, the sovereignty of a nation is scarcely affected as firstly, national regulations are not superimposed by a separate set of regulations. Secondly, the power allowing for the choice of governance is derived from the sovereignty of the nation, as was asserted by the Constitutional Court of the Republic of Germany in the below discussed Maastricht case[1240].

However, Maduro contradicts this by pointing to the processes generated by MR and the social outcomes arising from MR regimes[1241]. Schmidt, differentiates this form of international governance from the national scenario by calling MR a form of 'governance without government'. According to her, this form of governance, "*exposes the need for non-hierarchical solutions to co-ordination and co-operation*", unlike in the case of national governments[1242].

[1239] Joel P. Trachtman, '*Embedding mutual Recognition at the WTO*' (2007) 14 Journal of European Public Policy 780, 783
[1240] Brunner v European Union Treaty CMLR [1994] 57; German Constitutional Court decision from 12 October 1993, BVerfGE 89, 155 (Maastricht Case)
[1241] Miguel P. Maduro, 'So close yet so far: The Paradoxes of Mutual Recognition' (2007) 14:5 Journal of European Public Policy 814
[1242] Susanne K. Schmidt, 'Mutual Recognition as a new mode of Governance' (2007) 14:5 Journal of European Public Policy 667

Nicolaidis and Schaffer tend to agree with this view of MR being a form of governance and conclude that it is a necessary manifestation of the chaotic and globalized nature of Word Trade[1243]. In such circumstances, the issue of whether there is a transfer of sovereignty through MR becomes particularly important. This is because; beyond the mutually agreed lowest common Environmental Standard negotiated prior to recognition of a product, a host country is obligated to accept the standards of the home country[1244].

However unlike harmonization, MR does not entail a high degree of vertical transfer of sovereignty to the 'supernational level'. In other words, responsibility for the regulation of the chosen sectors is transferred to the home state[1245]. According to Maduro[1246] and Nicolaidis[1247] this exchange of horizontal transfer of sovereignty through mutual negotiation, instead of a complete transfer of sovereign powers to a supernational institution is often a preferred instrument of economic integration.

Sovereignty as a legal concept has several varying definitions and usages. Therefore, in discussing sovereignty, it is essential to clarify and segregate the particularities of the connotations of the term as required within the discussion. This however, is easier said than done considering the abstract nature of the legal concept of sovereignty.

The United Nations Charter mentions sovereignty as one of its core principles of international relations. Article 2.1 of the Charter reads:

"The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. Organisation is based on the principle of the sovereign equality of all its Members."

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[1243] Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 Law and Contemporary Problems 263
[1244] Nicolaidis and Shaffer (n 1243) 267
[1245] Schmidt, (n 1242) 672
[1246] Maduro (n 1241) 818
[1247] Kalypso Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14(5) Journal of European Public Policy 682

Yet defining sovereignty is considerably difficult, not only given its abstract nature, but also given the fact that the context of the usage of the term is equally important. The plethora of contingencies occurring under the vast subject of sovereignty makes it necessary to first restrict the definition to the desired context and define the parameters of the definition. This difficulty has led academics such as Hoffman to consider sovereignty to be a 'bothersome' concept and one that is insoluble in essence[1248].

Sarooshi suggests that the concept of sovereignty is an 'essentially contested concept'[1249]. An essentially contested concept, according to Samantha Besson, is one that:

"not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, what the concept is itself. To claim that a concept is contestable is to make the analytical claim that debates about the criteria of correct application of a concept are inconclusive"[1250].

This is obvious from the various viewpoints that one is able to analyse the concept of sovereignty. Several academics such as Sarooshi[1251], Hoffman[1252], etc. have generally identified sovereignty under the categories of political, legal, economic, external and internal sovereignty. However, such differentiation can be further expanded according to the degree of its application, i.e. domestic, national or international deliberations on sovereignty or the interplay of one or more of such levels. Krasner therefore, lists four separate forms of sovereignty independent of institutional necessity, and more closely related to the degree of application. According to him, sovereignty could be divided into domestic, interdependent, international legal and Westphalian sovereignty[1253]. This

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[1248] John Hoffman, "*Sovereignty*" (University of Minnesota Press, 1998) 2
[1249] Dan Sarooshi, "*International Organisations and Their Exercise of Sovereign Powers*", (OUP 2005) 4.
[1250] Samantha Besson "Sovereignty in conflict." (2004) 8(15) European Integration online Papers, 6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594942> accessed 29 June 2015
[1251] Sarooshi, (n 1249) 4.
[1252] Hoffman (n 1248) 11
[1253] Stephen D. Krasner, Sovereignty: Organized Hypocrisy (Princeton University Press, 1999) 9

categorization of sovereignty is convenient for this discussion as it best highlights the interplay of politico-legal and economic policies in a domestic or international standpoint instead of a division dependant on the subject matter (political, economic etc.). This concentrates the discussion towards the governance hierarchies prevalent – from domestic vote banks all the way to international organisations – thereby aiding discussion on international relationships between various countries with regards to environmental standards, and further MRAs as an instrument to increase such environmental standards. Given this present part of the chapter considers the loss or transfer of sovereignty within the ambit of MRAs and not sovereignty itself, it would perhaps be easier to identify such a transfer or loss when considering sovereignty in terms of the Krasner model in order to see at which level such loss or transfer might occur (if at all).

Domestic sovereignty refers to the organisation and control of domestic authority over internal affairs of state. In terms of historical discussions on sovereignty, domestic sovereignty most closely resembles the subject matter under consideration. The English school of thought on sovereignty (historically) was associated with this form[1254].

International legal sovereignty, on the other hand, is the recognition of the governmental authority or the state (the two are not necessarily the same) by the international community. Discussions on international legal sovereignty mirror the relationship of actors at the domestic level i.e. the citizens and the state. The equivalent actor to the citizens in domestic sovereignty is the state when discussing international legal sovereignty[1255].

Westphalian sovereignty is the ability of a domestic authority to function without the influence of external factors. It is different from international legal sovereignty because in the case of Westphalian sovereignty whether the act influencing the sovereignty of a nation is voluntary or coerced is immaterial. Any form of international transaction (not just economic) may be said to have influential repercussions on the decision making process of a state. Whether these decisions are

[1254] Krasner (n 1253) 10
[1255] Krasner (n 1253) 14

taken in good faith or coerced would determine the international legal sovereignty of a nation. However, the nature of the decision making process is not a factor in determining Westphalian sovereignty as any transnational intercourse could be said to be an influential external factor and thereby a transgression of sovereignty [1256].

## 7.2.1 Mutual Recognition and Interdependent Sovereignty

Interdependent sovereignty concerns the ability of a national authority to control transborder movement within their jurisdiction. Krasner reveals this form of sovereignty as the primary factor behind the diversion of discussions on sovereignty in general from topics of domestic sovereignty to a more international colour. He places globalisation as the cardinal antecedent for this shift in the academic discussion of sovereignty[1257]. Rosenou, in the same light, identifies a change in international systems and a consequent requirement for states to become interdependent and move away from the dogmas associated with a strict notion of domestic sovereignty. International issues, such as environmental problems, which do not recognize political and national borders, are increasingly requiring multilateral or at least bilateral co-operation amongst states. According to Rosenou, it is impossible for states to provide solutions to such issues individually[1258].

This is why, in terms of MRAs, the concept of Interdependent sovereignty is perhaps the most applicable. The inherent mutual negotiation, for the formation of MRAs between states is, in itself, a reassertion of Interdependent Sovereignty. However, it is prudent to note that all four variations of sovereignty mentioned by Krasner (or at least more than one), is inevitably affected by extraneous changes on each other. This is best illustrated by the simultaneous dilution of domestic and Westphalian sovereignty because of a change in the interdependent sovereignty of nation states joining international organisations such as the EU, NAFTA or the WTO. It is perhaps this concurrent

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[1256] Krasner (n 1253) 20. The detailed analysis of all four types of sovereignty is beyond the scope of this piece as it discusses the effect of MRAs on sovereignty and not sovereignty itself. For further reading on Krasner's analysis of sovereignty see "Sovereignty: Organized Hypocrisy"

[1257] Krasner (n 1253) 12

[1258] James Rosenau, "*Turbulance in World Politics: A Theory of Change and Continuity*", (Princeton University Press 1990) 13

change in different aspects of sovereignty that may be perceived as a transfer and the relinquishing of sovereign powers.

The distinctive feature of the loss of interdependent sovereignty, as compared to the other forms of sovereignty would be a characteristic erosion of control rather than actual authority[1259]. As mentioned before, interdependent sovereignty is concerned with the authority to regulate transborder movement of goods, persons, pollutants, diseases and ideas[1260]. With the advent of globalisation, an increase in online internet transactions and because of the redundancy of national borders with regards to natural systems (for example, adverse effects on species, pollutants etc, originating in one state will not be limited within its borders), control over a state's borders has systematically decreased. Moreover globalized trade and contemporary international politico-economic phenomenon have led to states wilfully relinquishing such control in exchange for mutual benefit. This, however, does not in any way imply a loss of authority as well.

Therefore, in terms of MR, and indeed MRAs, it is essential to consider whether sovereignty is seen as a dilution of authority or a dilution of control. If sovereignty is considered in terms of the authority that governments and states possess then MR cannot be considered an instrument for the weakening of sovereign powers as in MR there is no transfer or dilution of authority. An example of such refusal to dilute the authority of the state may be found in views of the Constitutional Court of the Republic of Germany, in the Maastricht case, where the court states that the community authority of the EU is derived from its Member states and that the Member states retain their sovereignty (and thereby authority) because of such derived authority of the EU[1261]. However, if sovereignty is considered as a measure of control then relinquishing interdependent sovereignty

[1259] Janice E. Thompson, 'State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research' (1995) 39(2) International Studies Quarterly 213, 216
[1260] Krasner (n 1253) 12
[1261] See Chapter 3.3.2 The Delegation and Transfer of Sovereign Powers

also affects domestic sovereignty considerably. As put forward by Krasner, "if a state cannot regulate what passes across its borders, it will not be able to control what happens within them."[1262]

The most obvious example of such relinquishing of control would be the formation of the European Union and its common market. The domestic sovereignty of member states vis-à-vis transborder movement has, in a way been relinquished to the higher collective authority of the European Union. However, academics such as Hoffman argue that joining the EU is in effect an increase in sovereignty rather than the contrary. The essence of the argument is looking at European sovereignty as a whole and thereby to strengthen the EU's sovereignty would be to strengthen the sovereignty of individual states[1263].

## 7.2.2 The Delegation and Transfer of Sovereign Powers

A measure of the degree of conferral of sovereign powers due to MRAs, and their effect on the sovereignty of a nation is whether such an agreement results in the delegation of sovereign power or the transfer of it. The distinguishing factor between the two lies in the degree of revocability of the sovereign powers conferred by the state, in lieu of the agreement. In the case of the delegation of power, the state continues to have the power to revoke conferred rights at its own discretion[1264].

In reality the most obvious instance when such power may be invoked occurs when a party to an agreement (a state) wishes to withdraw unilaterally from the agreement. The degree of revocability allowed by the treaty may then depend on the availability of an express withdrawal clause[1265]. If a treaty contains an express withdrawal clause stipulating the time frame of withdrawal then it is quite clear that the sovereignty of the party in question has been temporarily delegated and is by no means absolute and irreversible[1266].

[1262] Krasner (n 1253) 13
[1263] Hoffman, (n 1248) 13
[1264] Sarooshi, (n 1249) 55
[1265] Sarooshi, (n 1249) 55
[1266] Sarooshi, (n 1249) 55

On the other hand, if there is no withdrawal clause, then parties to an agreement are governed by Article 56(1) of the Vienna convention which states[1267]:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty."[1268]

Therefore, in the circumstances, parties to the agreement are required to rebut the presumption within the chapeau of Article 56, considering the intention behind the constitution of the agreement, and if they are able to do so, then accordingly the conferral of power by the state may continue to be considered a delegation rather than a transfer of sovereign power.[1269]

Moreover, simultaneous sovereign powers further dilute the criticism regarding a conferral of sovereign powers. The usual instance of such an occurrence is when states confer some of their powers to international organisations. If a state confers some of its powers in light of an agreement but concurrently continues to hold the same powers without any limitations then such conferral cannot be considered a transfer. UN Member states confer treaty making powers to the UN without restricting their individual right to do the same. Ascension to the Organisation has in no way affected the sovereign powers of member states to continue seeking treaty relations outside the purview of the UN.[1270]

A transfer of sovereign power, however, is more debatable in terms of the criticisms levelled at the dilution of interdependent sovereignty in international agreements. Unless specifically mentioned as part of a withdrawal clause, a transfer of sovereign power, as mentioned above is subject to Article 56 of the Vienna convention. As before, unless an express provision is provided for the unilateral

[1267] Henry G. Schermers and Niels M Blokker, International Institutional Law, (Kluwer Law, 3rd edition 1997) 1132
[1268] The Vienna Convention 1969 Article 56(1) Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal
[1269] Sarooshi, (n 1249) 57
[1270] Sarooshi, (n 1249) 59

withdrawal of a state, a presumption of irrevocability is existent. This was highlighted in the European Court of Justice case of *Costa v ENEL* where the ECJ stated:

"By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. [...] The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."[1271]

This view of the ECJ, however was severely challenged by the Bundesverfassungsgericht (BVG) (The Constitutional Court of the Republic of Germany) which in its decision of the Maastricht case stated:

"[The Federal Republic of Germany] remains, even after the entry into force of the Union Treaty, a member of a union of States whose Community authority derives from the Member States and can have a binding effect on German sovereign territory only by virtue of the German implementing order. Germany is one of the 'masters of the Treaties', who have based their commitment to be bound by the Union Treaty, which is concluded 'for an unlimited period', on their intention to remain in long-term membership, but who could equally, in the final analysis, revoke that membership by adopting an act with the opposite effect. The validity and application of European law in Germany depend on the implementing order contained in the Law Approving the Treaty. Germany thus retains the quality of a sovereign State within the meaning of Article 2(1) of the Charter of the United Nations"[1272]

[1271] Flaminio Costa v E.N.E.L., ECR 1964 pg. 593 – 594
[1272]Maastricht case, para 439

Not only was this a direct assertion of sovereignty by Germany, it was also revealing of the fact that international agreements, treaties and charters between states, essentially derived their sovereign powers not only from member states but also at their behest. Thus, the actual possession of sovereignty continues to lie with States, should they wish it so.

This view reflects the view of the Permanent Court of International Justice in the earlier landmark judgement of the *Lotus* case[1273]. The court in its judgement states:

> *"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."*[1274]

The disallowing of the presumption of restrictions on a nation is known as the *Lotus* case principle[1275].

Such friction between States and inter-governmental authority is familiar to the largely discussed academic argument of internal vs. external sovereignty. Besson, argues that the concept of sovereignty has traditionally operated in these two directions. According to her, within a state, external sovereignty is the prerogative of the executive while the legislature is sovereign in internal affairs. However, one cannot exist without the other as she states:

"Without external sovereignty, indeed, the internal sovereign cannot define the latter and without internal sovereignty in the constitutional determination of competences, there cannot be an external sovereign and no human rights limitations in particular."[1276]

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[1273] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10
[1274] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 para 44
[1275] Sarooshi, (n 1249) 59

### 7.2.3 Kantian Middle Path: Cosmopolitan Law

As mentioned in the previous section, although MR and MRAs, as international instruments of co-operation, continue to be a strong subject of debate in the sovereignty-globalisation context, their characteristics prevent any sharp distinction between the degrees of sovereignty and level of enforcement of sovereign powers. Nicolaidis and Shaffer, argue that mutual recognition must instead be seen as a intermingling of "domestic laws to constitute the global".[1277] In terms of MRAs therefore, it is perhaps less a question of coexistence of either internal and external sovereignty or interdependent and domestic sovereignty, and more an intermingling of domestic and international laws.

Nicolaidis and Shaffer's 'middle-way' concept is based on a similar concept of 'cosmopolitan law' by Kant (as acknowledged by them). The essential element which stands out in Kant's legal construction is his negation of the subdivision of public law into state and international law. In *To Perpetual Peace* Kant mentions the tripartite division of public law:

"We now come to the essential question regarding the prospect of perpetual peace. What does nature do in relation to the end which man's own reason prescribes to him as duty i.e. how does nature help to promote his moral purpose? And how does nature guarantee that what man ought to do by the law of his freedom (but does not do) will in fact be done through nature's compulsion, without prejudice to the free agency of man? This question arises, moreover, in all three areas of public right – in public, international and cosmopolitan right."[1278]

According to Archibugi, current public law is based on the recognition of the dogma of sovereignty while simultaneously acknowledging the principle of non-intervention. In his opinion Kantian legal

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[1276] Besson (n 1250) pg 9

[1277] Nicolaidis and Shaffer (n 1243)

[1278] I. Kant, 'To Perpetual Peace: A Philosophical Project' (1795) pg. 112 in Bird G, *A Companion to Kant*, (Blackwell, 2006)

construction would help preserve the international principle of non-intervention without submitting to the dogmas associated with sovereignty[1279].

The Kantian philosophy of cosmopolitan law discusses heavily the obligation of states regarding the citizens of other states. According to Kleingeld, Kant felt this 'emphasis on the status of the individual' to be essential towards the creation of a global legal order[1280]. Cosmopolitan law, thus, concerns less with the functioning of the state itself and more on the repercussions of the said functioning on the citizens of a polity outside the state's jurisdiction[1281]. This is extremely important with regards to MR given the repercussion of globalisation *viz-a-viz* movement of goods and persons through international borders, and the already mentioned interdependent effects of national sovereignty.

Kantian philosophy on the deliberations of cosmopolitan law is based on Kant's idea of a right to 'hospitality'[1282], and is, as such, beyond the relevance of this discussion[1283]. However the underlying idea of a states right to enter into relationships with another state and its citizens and the concern and recognition of the effect of decision making outside a state's jurisdiction are inherent facets of the framework of MRAs. The reciprocal concepts of extraterritoriality and comity intrinsic to the concept of cosmopolitan law are crucial to the understanding and justification of MR in a globalized world.

The exclusivity of national and international public law is diluted with a somewhat reciprocal governance of one polity with regards to another[1284]. MR essentially falls within a separate category of transnational governance. According to Nicolaidis and Schaffer (2005), "While [MR] is an

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[1279] Danielle Archibugi, "*Immanuel Kant: Cosmopolitan Law and Peace*", 1995(1) European Journal of International Relations December 429 444

[1280] Pauline Kleingeld, "*Kant's Cosmopolitan Law: World Citizenship for a Global Order*", (1998) 2 Kantian Review 72

[1281] Kleingeld (1280) 72

[1282] Kleingeld (1280) 75

[1283] According to Kant, the right to hospitality is *'the right of a stranger not to be treated with hostility because of his arrival on someone else's soil'*. It also argues that states have the right to enter into relations with other countries and their citizens other than through a hostile entry into such sovereign territory. Such discussions are, essentially, relevant to a discussion on imperialist intrusions and the rights of refugees and thus would be beyond the perview of a discussion on MRAs. For further reading see Kleingeld, P "Kant's Cosmopoliton Law: World Citizenship for a Global Order".

[1284] Nicolaidis and Shaffer (n 1243) 266

expression of the broader category of 'extraterritoriality' it is not extraterritoriality of a 'unilateralist' (or 'imperialist') bent, but rather extraterritoriality applied in a consensual or at least bi- or plurilateral, 'other regarding' manner."[1285]

Therefore, although MR, like harmonization and standardization entails some degree of transfer of sovereignty (as do most supernational transactions) what must be realized is the degree to which such transfer is carried out and the resulting degree of trust required between the states involved. What remains to be seen is whether there is a direct correlation between a requirement for pre-negotiation trust in a politico-economic instrument of standards (especially environmental standards), and the potential for post-implementation political friction. Logically, the less cross-national trust required to implement an environmental instrument (assuming the lack of a requirement for trust derives from it being rendered unnecessary due to comprehensive negotiations or agreements), the less chances there are for dispute, post implementation[1286]. Instruments that do not require negotiations or agreements (e.g. Unilateralist instruments such as eco labels) may, using the same logical assumptions, have a greater potential for dispute.

One very good example to illustrate the above may be the unilateralist imposition of eco labels by the United States of America (US) in cases that have been subject to WTO dispute settlement, such as the *US – Shrimp*[1287] and the *US – Tuna/Dolphin*[1288] cases. The unilateralist imposition of environmental standards through environmental legislation, not only led India, Malaysia, Pakistan and Thailand (in *US – Shrimp*) and Mexico and the EEC (in the three *US – Tuna* cases) to request the Dispute Settlement Body of the WTO to establish a panel to settle these disputes, but also despite the prohibition of imports into the US being lifted afterwards, the post judgement use of eco labels

[1285] Nicolaidis and Shaffer (n 1243) 267

[1286] The assumption here is that an environmental instrument formulated through negotiation and agreement may not be implemented till such time the parties to the agreement are in concord with the terms.

[1287] US – Shrimp (AB*)*

[1288] US – Tuna I (Mexico); United States: US – Tuna (EEC)

to achieve their regulatory objectives, have greatly contributed to the already existent mistrust between developed and developing countries concerning environmental objectives[1289].

In contrast, MRAs are mutually negotiated, with an inherent element of reciprocity, and are institutionalized[1290]. Therefore, in terms of environmental standards, parties to the agreement are in constant knowledge of the extent to which they may be affected (raising of standards) and the reciprocal benefits they may hope to receive in exchange (market access), and yet in a controlled environment of negotiations. In this light, MR appears to be less of a transfer of sovereignty and more of a political and economic barter to achieve objectives desired by all parties. In the classic North-south divide in international trade, this may well be the method that finally bridges the gap between the desire of developed nations to raise standards, and the suspicion of protectionism such desires evoke in developing countries.

However, to declare MR to be a mere negotiation and compromise to achieve economic interests would be to over simplify a far more complex legal debate. In reality, MR entails the recognition of the rules of another state within its jurisdiction and that is clearly a horizontal transfer of sovereignty[1291]. Moreover, according to Maduro, MR may even entail a vertical transfer of sovereignty in certain aspects. This may occur either through the eventual harmonization of a negotiated and mutually recognized standard, or if such recognition is of an international standard. In such cases sovereignty is then transferred to technocratic international organisations beyond a state's sovereign control[1292].

Pelkmans, however, delivers an interesting view with regard to the doubts concerning a transfer of sovereignty. According to him, if the regulatory objectives of the parties involved are similar i.e. risk management (in case of this thesis environmental risk), then recognition of each other's standards is

[1289] See Chapter 3 Section 3.4.2 The Differing Interests of Developed and Developing Countries
[1290] Nicolaidis and Shaffer (n 1243) 275
[1291] Maduro, (n 1241) 819
[1292] Maduro, (n 1241) 819

hardly tantamount to a transfer of sovereignty[1293]. In fact, to not reciprocally recognize standards in this case, would be a strong instance of regulatory failure[1294].

According to Maduro, Pelkmans refers to only those instances where MR is equated to equivalence[1295]. However, in light of the earlier discussion of MR leading to an increase in standards, and the role MRAs play in convincing parties to come to the negotiating table after an ex- ante increase in standards driven by their desire for market access, it is suggested here that although the intention may not have been that of equivalence there is always a tendency to move towards it. This is similar to the ex- post tendency to harmonize. Therefore, not only does MR prove to be beneficial in terms of raising standards (environmental and otherwise) but also, it does so with minimal transfer of sovereignty.

Moreover the issue with the transfer of sovereignty is further diluted by the realization of mutual benefit through co-operation. For an MR regime to function effectively, both, the home nation as well as the host nation is subject to certain responsibilities towards the other. Home nations must consider the protection of consumers outside their jurisdiction, while host nations have to take into account the effect their decisions may have on home country producers and service providers[1296]. As mentioned earlier, this entails a substantial element of trust between parties when negotiating an MR regime. It is, of course, the prerogative of the individual sovereign nation to decide, however, whether a minimal transfer of sovereignty is comparatively acceptable in light of the already existent mutual trust and the economic benefits of such an agreement.

Nicolaidis and Schaffer further the reasoning for mutual trust through the principle of 'comity'[1297]. The principle communicates 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty

[1293] Jaques Pelkmans, 'Mutual Recognition in Goods: On Promises and Disillusions' (2007) 14(5) Journal of European Public Policy 702
[1294] Maduro, (n 1241) 820
[1295] Maduro, (n 1241) 820
[1296] Nicolaidis and Shaffer (n 1243) 278
[1297] Nicolaidis and Shaffer (n 1243) 280

and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws"[1298]. The essence of MR is most definitively propagated through this principle.

## 7.3 MRAs: The WTO perspective

One of the primary principles of the WTO is that of the Most Favoured Nation (MFN) principle[1299]. Accordingly, Article I GATT states, "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

However, MR regimes are essentially an agreement of preferential treatment. Through a negotiatory process, parties to the agreement exclusively recognize the standard of the other for products and services that then may be marketed within their jurisdiction. Clearly, there is an element of preference meted out to one party with whom there is such a relationship, over another. This could have possibly been construed as an advantage as defined under Article I of GATT and thereby, to not forward the same advantage is potentially an infringement of the same.

This, however, cannot be the case by virtue of Article XXIV.5 of the GATT. The Chapeau of Article XXIV.5 states:

> *"Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area;[...]"*[1300]

Therefore, MRAs have been covered by the GATT through this provision. In terms of third parties, there is however a condition provided that must be met by contracting parties. Article XXIV.4

[1298] Black's Law Dictionary
[1299] GATT Article I General Most-Favoured-Nation Treatment
[1300] GATT Article XXIV.5

recognizes that although the intention behind such an agreement is to “facilitate trade” between contracting parties, this should “[not] raise barriers to the trade of other contracting parties with such territories” [1301].

The EU however, is of the opinion that satisfying the provisions of GATT Article XXIV.5-9 would automatically satisfy the requirements of Article XXIV.4. To not increase a level in protection as provided for in Article XXIV.5(a) would therefore not lead to any barriers to trade as envisaged in Article XXIV.4, thereby eliminating the any cause for action under Article XXIV.4[1302].

The contradictory argument to this opinion is that the formation of a custom union or free-trade area leading to a new trade measure is invariably an increase in trade barriers and therefore a cause for action under Article XXIV.4. The satisfaction of the provisions of Article XXIV.5-9 is immaterial in terms of a cause of action through Article XXIV.4[1303].

The GATS is more explicit in its acknowledgement of MR. Article VII.1 reads:

“For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorisation, licensing or certification of services suppliers, [...] a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.”[1304]

Similar to the Article XXIV of the GATT, GATS Article VII also safeguards the interests of third parties, in this case by providing an openness clause, which dictates that such MRAs should provide adequate opportunity for third party accession to the agreement[1305]. Cantore identifies this as a

[1301] GATT Article XXIV.4
[1302] Michio Matsushita, “*Legal Aspects of Free Trade Agreements: In the Context of ArticleXXIV of the GATT 1994*”, in M. Matshushita and D. Ahn (Eds.), “*WTO and East Asia, New Perspectives*” (2004) 503
[1303] Matsushita (n 1302) 504
[1304] GATT Article VII.1
[1305] GATT Article VII.2

'multilateral approach to mutual recognition' that keeps bi- and multilateral MRAs open to new members[1306]. Article VII.3 GATS further safeguards parties outside such agreement by stating:

> *"A member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorisation, licensing or certification of service suppliers, or a disguised restriction on trade in services."*[1307]

A secondary problem arises when Article XXIV GATT allows the mutual recognition between exclusive parties while other WTO documents forbid it. Trachtman (2002) has extensively deliberated on this subject especially regarding the interplay between Article XXIV and the SPS and TBT Agreements[1308]. An example of such conflict arises with Article 2.3 of SPS. Article 2.3 reads:

> *"Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."*[1309]

Trachtman asks the question whether, if two members have similar SPS standards and one of them has an agreement under Article XXIV of GATT with a third member, it would be possible for the third member to discriminate against the member which is not part of the agreement[1310].

Article 4 SPS does provide recognition provisions for SPS measures, similar to GATS VII. It states that:

[1306] Carlo Maria Cantore, 'How Does it Feel to be on Your Own? – Mutual Recognition Agreements and Non-Discrimination in the GATS: A Third Party Perspective' (2010) 11(8) German Law Journal 707, 710
[1307] GATT Article VII.3
[1308] Trachtman (n 1239) 12
[1309] SPS Agreement Article 2.3
[1310] Trachtman (n 1239) 12

*"[m]embers shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures."*[1311]

Therefore the SPS itself reconciles the idea of mutual recognition. However it is not clear how far the right to forming MRAs extends, in order to prevail over the right provided to third party members by Article 2.3 SPS. If mutual recognition permits the dilution of the right to Article 2.3 SPS then there appears no possibility of further academic argument. However, if it does not, then the initial question regarding the conflict between the GATT and other WTO Agreements must be answered.

The General Interpretive note to Annex 1A of the WTO Agreement provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organisation [...], the provision of the other agreement shall prevail to the extent of the conflict."[1312]

Trachtman however further questions whether an overlapping situation as the one envisaged here would be considered a 'conflict' under the Interpretive Note. He is of the opinion that a 'conflict' in terms of the Interpretive Note would occur if an agreement (WTO legal text) exclusively forbids another and that in this particular situation that is not the case[1313]. It is submitted here, however, that this merely a speculative interpretation and can possibly truly be answered only by further WTO jurisprudence.

However, the Panel report in *Turkey - Textiles* did provide a glimpse into their interpretation of a possible conflict between WTO Agreements by insisting that interpretations of other provisions of the WTO does not render Article XXVI.5(a) a 'nullity'[1314]. The Panel however, were deliberating on the conflict between provisions within the GATT and Article XXIV.5(a) GATT. Whether this

[1311] SPS Agreement Article 4.2 SPS
[1312] General Interpretive Note to Annex 1A of the WTO Agreement
[1313] Trachtman (n 1239) 14
[1314] The report of the Panel Turkey – Restrictions on Imports of Textiles and Clothing Products WT/DS34/R Para 9.96, 9.123 (Turkey – Textiles) (Panel); Also see Trachtman (n 1221) 13

deliberation of the Panel extends to other WTO legislations such as the SPS and TBT, is open to Interpretation. In Trachtman's opinion, the SPS and TBT may be seen as extensions of principles already prevalent within the GATT, and as such must be considered as part of the text identified within the chapeau of Article XXIV.5 stating, "*NOTHING* in this Agreement shall prevent […]" (*emphasis added*). Therefore according to him SPS and TBT obligations may not prevent the rights provided to Member States to form custom unions and free-trade agreements and – by extension of this logical interpretation – MRAs[1315]. Therefore, the WTO may be said to allow mutual recognition and thereby MRAs even in the face of a conflict with other WTO provisions.

## 7.4 Conclusion

The purpose of this penultimate chapter is to clarify two prominent issues concerning mutual recognition and MRAs. Firstly, recognition may be seen an acceptance of the standards of another jurisdiction and therefore may imply a direct or indirect transfer of sovereignty. To study the dynamics of mutual recognition and agreements based on a transfer of sovereignty, it was necessary to address the question of a transfer of sovereignty.

Secondly, within the context of the WTO, MRAs and agreements with elements of mutual recognition could be seen as agreements of preferential treatment. Therefore the potential for conflict between the core principle of Most Favoured Nation, and WTO provisions allowing mutual recognition had to be explored. This Chapter, therefore, was essential to address either concern in order to consider mutual recognition as a viable international environmental policy tool.

MR may be considered not so much a rule of governance in the normal sense, but a rule of choice of governance[1316]. In such a situation, the sovereignty of a nation is scarcely affected as firstly, national

[1315] Trachtman (n 1239) 14
[1316] Trachtman (n 1239) 783

regulations are not superimposed by a separate set of regulations. Secondly, the power allowing for the choice of governance is derived from the sovereignty of the nation[1317].

However, this may not be entirely accurate given the processes generated by MR and the social outcomes arising from MR regimes[1318]. In the circumstances MR may rather be considered to be a form of 'governance without government'[1319]. Nicolaidis and Schaffer tend to agree with this view of MR being a form of governance and conclude that it is a necessary manifestation of the chaotic and globalized nature of Word Trade[1320]. Unlike a vertical transfer of sovereignty to the 'supernational level' as in harmonization, in MR responsibility for the regulation of the chosen sectors is transferred to the home state[1321] and thereby may be a preferred instrument of economic integration[1322].

It is interesting to note that the inherent mutual negotiation, for the formation of MRAs between states is reflective of Interdependent Sovereignty which is concerned with the authority to regulate transborder movement of goods, persons, pollutants, diseases and ideas[1323]. Importantly, a loss of interdependent sovereignty reveals a characteristic erosion of control rather than actual authority[1324]. With the advent of globalisation, an increase in online internet transactions and because of the redundancy of national borders with regards to natural systems and environmental issues, control over a state's borders has systematically decreased. This, however, does not in any way imply a loss of authority as well.

Thus the question arises whether sovereignty, is seen as a dilution of authority or a dilution of control. This is important in the context of MRAs. If sovereignty is considered in terms of the authority that governments and states possess then MR cannot be considered an instrument for the weakening of sovereign powers as in MR there is no transfer or dilution of authority. However, if

[1317] Maastricht case para 439
[1318] Maduro (n 1241) 815
[1319] A concept propagated by Nicolaidis and Shaffer. See Nicolaidis and Shaffer (n 1243)
[1320] Nicolaidis and Shaffer (n 1243) 264
[1321] Schmidt, (n 1242).672
[1322] Maduro (n 1241) 818; see also Nicolaidis 2007 (n 1247) 686
[1323] Krasner (n 1253) 12
[1324] Thompson (n 1259) 216

sovereignty is considered as a measure of control then relinquishing interdependent sovereignty also affects domestic sovereignty considerably. As put forward by Krasner, “if a state cannot regulate what passes across its borders, it will not be able to control what happens within them.”[1325]

A parallel question that may be asked of MRAs is whether such an agreement results in the delegation of sovereign power or the transfer of it. The distinguishing factor between the two lies in the degree of revocability of the sovereign powers conferred by the state, in lieu of the agreement[1326]. In the case of the delegation of power, the state continues to have the power to revoke conferred rights at its own discretion[1327]. This is often highlighted in international agreements through the availability of a withdrawal clause. If a treaty contains an express withdrawal clause stipulating the time frame of withdrawal then it is quite clear that the sovereignty of the party in question has been temporarily delegated and is by no means absolute and irreversible[1328]. The Permanent Court of International Justice stated in the *Lotus* case that in international law the rules of law binding upon States are derive from their own free. Thus restrictions upon the independence of States ‘cannot therefore be presumed’.[1329]

MR may rather be seen as a intermingling of ‘domestic laws to constitute the global’ consisting of an intermingling of domestic and international laws.[1330] This is similar to the Kantian concept of ‘cosmopolitan law’, which discusses the obligation of states regarding the citizens of other states[1331].

The underlying idea of a states right to enter into relationships with another state and its citizens and the concern and recognition of the effect of decision making outside a state’s jurisdiction are inherent facets of the framework of MRAs. The reciprocal concepts of extraterritoriality and comity intrinsic to the concept of cosmopolitan law are crucial to the understanding and justification of MR in a globalized world.

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[1325] Krasner (n 1253) 13
[1326] Sarooshi, (n 1249) 55
[1327] Sarooshi, (n 1249) 55
[1328] Sarooshi, (n 1249) 55
[1329] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 para 44
[1330] Nicolaidis and Shaffer (n 1243) 266
[1331] Kleingeld (n 1280) 72

MRAs are mutually negotiated, with an inherent element of reciprocity, and are institutionalized[1332]. Therefore, in terms of environmental standards, parties to the agreement are in constant knowledge of the extent to which they may be affected (raising of standards) and the reciprocal benefits they may hope to receive in exchange (market access), and yet in a controlled environment of negotiations. The transfer of sovereignty is further diluted by the realization of mutual benefit through co-operation. For an MR regime to function effectively, both, the home nation as well as the host nation is subject to certain responsibilities towards the other. Home nations must consider the protection of consumers outside their jurisdiction, while host nations have to take into account the effect their decisions may have on home country producers and service providers[1333].

Thus, to see MRAs as a transfer and thus the loss of sovereignty may not be the most conducive way of looking at the concept of mutual recognition. Rather, MRAs as a tool of transnational governance provides for a convenient mode of governance with minimal dilution of sovereignty, and with mutual consideration given to extraterritoriality and comity.

The next section looked at the compatibility of MRAs with the WTO. MR regimes are essentially an agreement of preferential treatment and as such in infringement of Article I of GATT.

However, Article XXIV.5 of the GATT allows the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area[1334] thereby including MRAs within its fold.

Article XXIV.4 however, provides a condition to the formation of CUs and FTAs. Although such agreements facilitate trade between parties, contracting parties cannot raise barriers to the trade of other contracting parties with such territories[1335].

[1332] Nicolaidis and Shaffer (n 1243) 275
[1333] Nicolaidis and Shaffer (n 1243) 278
[1334] GATT Article XXIV.5
[1335] GATT Article XXIV.4

The intention to safeguard the rights of other Members to the WTO may also be found in other WTO legislation. Similar to the Article XXIV of the GATT, GATS Article VII safeguards the interests of third parties, by providing that such MRAs should provide adequate opportunity for third party accession to the agreement[1336]. Cantore identifies this as a 'multilateral approach to mutual recognition', which keeps MRAs open to new members[1337].

It may be the case that other WTO documents are in conflict with Article XXIV.4 of the GATT. Such a conflict arises with Article 2.3 of SPS which disallows Members from using their sanitary and phytosanitary measures to arbitrarily or unjustifiably discriminate against other Members[1338]. Thus if two members have similar SPS standards and one of them has an agreement under Article XXIV of GATT with a third member, it would be possible for the third member to discriminate against the member which is not part of the agreement[1339].

The General Interpretive note to Annex 1A of the WTO Agreement provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organisation [...], the provision of the other agreement shall prevail to the extent of the conflict."[1340]

The Panel report in *Turkey - Textiles* discusses the issue of a conflict between WTO Agreements by insisting that interpretations of other provisions of the WTO does not render Article XXVI.5(a) a 'nullity'[1341]. The Panel however, were deliberating on the conflict between provisions within the GATT and Article XXIV.5(a) GATT and the question remains whether the interpretation extends to other WTO legislation such as the SPS and TBT.

[1336] GATT Article VII.2
[1337] Cantore (n 1306).710
[1338] SPS Agreement Article 2.3 SPS
[1339] Trachtman (n 1239) 12
[1340] General Interpretive Note to Annex 1A of the WTO Agreement
[1341] Turkey –Textiles (Panel) Para 9.96, 9.123; Also see Trachtman (n 1221) 13

The SPS Agreement does provide recognition provisions for SPS measures in Article 4.2[1342], thereby reconciling to the idea of mutual recognition. However it is not clear how far the right to forming MRAs extends, in order to prevail over the right provided to third party members by Article 2.3 SPS.

Trachtman is of the opinion that the fact that the chapeau of Article XXIV.5 states, "*NOTHING* in this Agreement shall prevent […]" implies that the SPS and TBT may be seen as extensions of principles already prevalent within the GATT. Therefore SPS and TBT obligations may not prevent the rights provided to Member States to form custom unions and free-trade agreements and – by extension of this logical interpretation – MRAs[1343]. Therefore, the WTO may be said to allow mutual recognition and thereby MRAs even in the face of a conflict with other WTO provisions.

[1342] SPS Agreement Article 4.2 SPS
[1343] Trachtman (n 1239) 14

# 8. Conclusions

## 8.1 Introduction

This thesis sought to explore the trade related aspects of environmental standards[1344], including the analysis of 'environmental standard increasing' instruments affecting trade (specifically Unilateral Environmental Action and Mutual Recognition Agreements). The thesis used a "Black Letter" methodology of doctrinal analysis, concentrating on doctrinal principles associated with the transnational governance of environmental standards.

The thesis assessed the potential for trade related friction between developed and developing countries arising out of normative environmental processes implementing environmental standards such as Unilateral Environmental Action (UEA)[1345]. Considering this potential for friction and its effect on environmental standards, the thesis examined Mutual Recognition Agreements (MRAs) as a trade instrument with the potential to reduce such friction while implementing environmental standards[1346].

In terms of the novel approach found in this thesis - the thesis constructed a definition of standard through the works of Dworkin[1347], to create a broader scope of the analysis of standards in relation to MRAs, than may be found in existing literature.

Furthermore, as stated in the introduction to the thesis, available literature analyses the characteristics of MRAs and some literature is available on the relationship between environmental standards and MRAs. Where this thesis is different is in attempting to understand how the

[1344] See Chapter 3 Trade and Environment.
[1345] See Chapter 5.3 The Legality of UEAs
[1346] See Chapter 6 Mutual recognition and Mutual Recognition Agreements and Chapter 7 Mutual Recognition and International Law.
[1347] See discussion on the Dworkinian definition of standards in Chapter 2.3 Standards

characteristics of MRAs may potentially be utilized to combine a reduction in friction in international trade with the implementation of standards.

Environmental standards are a contentious issue in international trade. The very definition of environmental standards is ambiguous. Depending on the definition used for standards in general and environmental standards specifically, could lead to a varying scope as seen in Chapter 2 Section 2.3[1348]. Further, Section 2.3.1[1349] has shown that the difficulty in arriving at a consensual decision on international environmental standards is further complicated by environment and trade related political friction between sovereign states in trade.

Chapter 3 Section 3.4.2[1350] has shown that once the reasons behind such friction are identified, it then becomes possible to analyse policy instruments which propagate or encourage consensus in defining environmental standards, and assess and compare such instruments to highlight the characteristics that may be more conducive to reducing international trade related disputes in environmental matters and thereby more efficient in increasing environmental standards. As we saw in Section 3.4.2 an important assumption made here, of course, is that, given that environmental objectives remain the same, if an instrument is hindered by international opposition, it is detrimental to the efficiency of the instrument.

The two international environmental standards propagating instruments chosen for discussion in this thesis are UEAs, and MRAs[1351]. As we say in Chapter 5 Section 5.3[1352], UEAs being unilateral in nature, and thereby often an imposition of environmental standards of one jurisdiction/state on another, afford us the opportunity to identify certain characteristics that may create issues of sovereignty and compatibility with international law. The issue of sovereignty was looked at in

[1348] See Chapter 2 Section 2.3 Standards.
[1349] See Chapter 2 Section 2.3.1 Environmental Standards.
[1350] See Chapter 3 Section 3.4.2 The Differing Interests of Developed and Developing Countries.
[1351] The reader will recall from the discussion in Chapter 1 Section 1.3 Methodology and Research Themes that the instrument of Harmonization has been left from the purview of this study.
[1352] See Chapter 5 Section 5.3 The Legality of UEAs.

Section 5.3.1[1353]. We saw that sovereignty has several elements which influence the discussion on unilateral action including the sovereign right of a country to act unilaterally and the consequences if such a right is invasive to the interests of another country. There are of course situations where such unilateral action is justified by a state exercising its sovereign powers as discussed in Section 5.3.1.

Using examples of identified characteristics such as the lack of negotiations, and the suspicion of protectionism in multilateral agreements which lead to international friction or even disputes, the thesis then looked at the concept of mutual recognition (MR) and MRAs and analysed two specific agreements, Japan-US and the NAFTA[1354]. The intention of this part of the discussion in this thesis was to show how the MR provisions within each analysed agreement have been more beneficial in terms of agreeing environmental standards and balancing sovereignty than pure trade related DSB disputes (UEAs) such as *US - Shrimp* and *US – Tuna*.

The thesis then argued in Chapter 7 Section 7.3 that MR could be agreed as a form of preferential trade agreement but allowed as an exception under the GATT[1355]. MR therefore could be considered as a form of an exception under WTO rules. By observing this exception, the thesis implies that friction in environmental disputes arising through the DSB could then be avoided due to its WTO compatibility. Allowing for the previous assumption that an environmental instrument hindered due to international friction is detrimental to its own efficiency, a negotiated instrument like MR which reduces friction may potentially lead to more efficient standards.

In this concluding chapter we summarise the arguments made in the thesis assessing whether MRAs can indeed be substituted for UEAs in certain situations while maintaining the objectives of the environmental standard. Simultaneously, the thesis also assesses whether MRAs are able to avoid

[1353] See Chapter 5 Section 5.3.1 permanent Sovereignty.
[1354] See Chapter 6 Section 6.5 Analysing MRAs.
[1355] See Chapter 7 Section 7.3 MRAs: The WTO Perspective.

the imposition of host country standards on another jurisdiction/state, because of their inherent characteristic of negotiations and 'other-regarding'[1356] manner.

## 8.2 Standards as Defined in the Thesis

In Chapter 2 the thesis attempts to create a definition of the term 'standards' from the broad range of definitions available for consideration[1357]. The thesis then looks at 'environmental standards' in detail[1358]. In the following paragraphs we summarise the discussion surrounding the definition of the terms 'standards' followed by 'environmental standards'.

In Chapter 2 Section 2.3[1359], we look at the definition of standards as proposed by Dworkin[1360]. Dworkin's concept of 'standards' which includes principles, rules and policies allows a broad scope of the definition of standards. On the other hand the more functional definition provided by the ISO[1361] is excessively specific, and pertains to only certain forms of standards[1362]. Therefore certain provisions in International Law, such as Principle 4 of the Rio Declaration[1363] or Article 4(b) of UN Framework Convention on Climate Change (UNFCC)[1364] would fall within the Dworkinian definition of standards but not within the specific definition of the ISO.

The thesis has discussed these various definitions concluding that standards in this thesis will be considered to be a general assortment of rules, principles and policies in the 'Dworkinian' sense. This broad definition of standards does not limit environmental standards to legally enforceable limits,

[1356] Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' [2005] Law and Contemporary Problems 267.
[1357] See Chapter 2 Section 2.3 Standards.
[1358] See Chapter 2 Section 2.3.1 Environmental Standards.
[1359] See Chapter 2 Section 2.3 Standards.
[1360] Ronald Dworkin, *Taking Rights Seriously* (9th Impression, Duckworth 2005) 22
[1361] 'Standards' (ISO) <http://www.iso.org/iso/home/standards.htm> accessed 29 June 2015.
[1362] See Chapter 2 Section 2.3 Standards.
[1363] The Rio Declaration on Environment and Development (1992) (Rio Declaration) (U.N. Doc A/Conf.151/5/Rev.1) Principle 4
[1364] UN Framework Convention on Climate Change (adopted 21 March 1994) UN Doc. A/AC. 237/18 (Part II)/Add. 1, Article 4(b).

but rather extends the definition to certain principles found in environmental law, which due to the character of international environmental law, are often relegated to 'soft law'[1365].

Having looked at various approaches to defining the concept of 'standards', the thesis then looked in Chapter 2 Section 2.3.1[1366], at the specific category of environmental standards and their classification. One categorization of environmental standards can be found in the 21st Report of the Royal Commission on Environmental Pollution[1367]. The Report defines environmental standards as "any judgement about the acceptability of environmental modifications resulting from human activities which fulfil both the following conditions: (1) It is formally stated after some consideration and intended to apply generally to a defined class of cases and; (2) because of its relationship to certain sanctions, rewards or values, it can be expected to assert an influence, direct or indirect, on activities that affect the environment"[1368]

The use of the word 'judgement', rather than specifying a document (such as in the ISO definition of standards), illustrates a tendency, not dissimilar to this thesis, to broaden the scope of the definition of environmental standards in order to be inclusive of standards considered to be within the realm of 'soft law'[1369].

The forms of environmental standards are divided into standards related to 'pathway points' of a substance and their effect on contact with an 'entity susceptible to damage' at that point[1370], and standards indirectly related to environmental modification[1371]. Pathway point standards include

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[1365] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Ed, Oxford University Press, 2009) 25.
[1366] See Chapter 2 Section 2.3.1 Environmental Standards.
[1367] Royal Commission on Environmental Pollution, 21st Report: Setting Environmental Standards (Royal Commission on Environmental Pollution, 1998) (21st Royal Commission Report) <http://webarchive.nationalarchives.gov.uk/20110322143804/http://www.rcep.org.uk/reports/21-standards/documents/standards-full.pdf> accessed 14 June 2015.
[1368] 21st Royal Commission Report Para 1.16
[1369] 21st Royal Commission Report Para 1.15
[1370] 21st Royal Commission Report Para 1.18
[1371] 21st Royal Commission Report Para 1.18

Environmental quality standards, emission standards and product standards, while examples of indirect standards would include process standards and life-cycle analysis standards[1372].

## 8.3 Standards in International Trade

Having defined environmental standards in the context of the thesis, the next important issue in the trade related aspects of international environmental standards was to understand why the demand for higher environmental standards usually flows from developed to developing countries. It is important to note at this point that this thesis, for example as discussed in detail at Section 3.2, does not imply that developing countries do not demand high environmental standards themselves, but rather that the general trend is for a demand for higher standards from larger economies (States)[1373]. Thus through Section 3.2 we saw that to be able to correlate higher environmental standards with higher economic growth allows for an analysis of instruments propagating environmental standards while reducing North-South friction arising from this demand for higher standards[1374].

Chapter 3 started with the concept of the Environmental Kuznets Curve (EKC) which graphed a correlation between *per capita income* of a nation and environmental deterioration[1375]. The EKC includes a Turning Point Index (TPI) on the graph beyond which an increasing *per capita* income leads to a decrease in environmental degradation, thereby suggesting an increase in environmental standards. This implies that the demand for increased environmental standards is found more often in countries beyond the TPI (generally developed countries) with a higher economic growth scale (*per capita income*)[1376]. Section 3.2.1[1377] suggests an explanation to this phenomenon through

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[1372] This is discussed in Chapter 2 Section 2.3.2 Forms of Standards

[1373] See the discussion on the Environmental Kuznets Curve in Chapter 3 Section 3.2 and the discussion on the theory of Post-materialism in Chapter 3 Section 3.2.1

[1374] See Chapter 3 Section 3.2 The Environmental Kuznets Curve.

[1375] See Chapter 3 Section 3.2 The Environmental Kuznets Curve.

[1376] See Chapter 3 Section 3.2 The Environmental Kuznets Curve.

[1377] See Chapter 3 Section 3.2.1 Post-Materialism.

Inglehart's theory of '*post-materialism*'[1378]. According to the theory, as society evolves with rising *per capita* income, 'materialistic' values of economic and physical security are substituted by 'post-materialistic' values[1379] or "quality of life issues"[1380].

Section 3.2.2 however, finds certain academics to be sceptical of such a simplistic correlation between environmental standards and economic growth[1381]. Krutilla, for example, is of the opinion that an increased demand for environmental standards does not necessarily result in a higher standard of living[1382]. Esty[1383], Stern[1384] and Martinez-Alier[1385] argue that a more complex dynamic exists between trade and environmental standards which include the components of 'technique, composition and scale'[1386]. This thesis therefore argues that the relationship between environmental standards and economic growth exists in a model similar to the EKC if we superimpose the argument of the three additional components on the EKC. In other words technique composition and scale must be taken into consideration when considering the relationship between trade and environment[1387].

A further consideration made in the trade – environment context is the 'anthropocentric – ecocentric cleavage'[1388]. This cleavage relates to the basis of environmental concern from which arise environmental action and standards. Understanding these concepts allows an insight into the nature of environmental concern. An overtly anthropocentric outlook may lead to a prioritization of

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[1378] Ronald Inglehart, *The Silent Revolution: Changing Values and Political Styles among Western* Publics (Princeton, 1977) and Ronald Inglehart, 'Changing Values among Western Publics from 1970 to 2006' (2008) 31(1-2) West European Politics 130.
[1379] Inglehart 2008 (n 1378) 130
[1380] Joan Martinez-Alier, 'The Environment as a Luxury Good or "Too poor to be green"?' (1995) 13 Ecological Economics 1, 2
[1381] See Chapter 3 Section 3.2.2 Criticism of the EKC.
[1382] John V. Krutilla, 'Conservation Reconsidered' (1967) 57(4) The American Economic Review 777, 778.
[1383] Daniel C Esty, 'Bridging the Trade Environment Divide' (2001) 15 Journal of Economic Perspectives 113, 115
[1384] David I. Stern, 'The Rise and Fall of the Environmental Kuznets Curve' (2004) 32(8) World Development 1419, 1420.
[1385] Martinez-Alier (n 1380) 5
[1386] See Chapter 3 Section 3.2.3 Other Factors Affecting the Trade-Environment Relationship.
[1387] See Chapter 3 Section 3.2.3 Other Factors Affecting the Trade-Environment Relationship.
[1388] See Chapter 3 Section 3.3 Sustainable Development and the Trade-Environment Relationship; the term 'anthropocentric – ecocentric cleavage' is coined by Robyn Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (UCL 1992) See also Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movements: A Summary', in Nina Witoszek and Andrew Brennan (eds), *Philosophical Dialogue* (Rowman & Littlefield 1999).

trade over environmental concerns. It also provides an insight into the way trade related environmental issues may be addressed in international forums such as the WTO.

## 8.4 The WTO and Environmental Standards

It is important to illustrate first why the WTO is the primary international forum considered in this discussion of environmental standards and international instruments implementing such standards. The presence of the DSB provides the WTO with a strong dispute resolution mechanism, which makes it an important organisation in the trade – environment discussion. Compared to the UNEP, which also provides policy related to trade and environment, the WTO holds a distinct advantage because of its effective dispute settlement abilities. The relatively successful implementation of awards arising of DSB judgments provides the WTO an edge in effectiveness over other international dispute resolution bodies such as the ICJ[1389].

However, this thesis does highlight the drawbacks of considering the WTO as a forum to consider environmental policy[1390]. The most obvious drawback with the WTO is that is it primarily a trade organisation[1391]. The WTO prioritizes trade efficiency and therefore one may be cautious of their environmental inclinations. Due to the WTO's trade inclinations, Section 3.4.1 discusses the WTO regulations relevant to this topic[1392]. Another drawback is that within the WTO there is the dual committee structure addressing environmental standards – the CTE and the TBT Committee. The UNEP, in its 2005 study on eco labels, commented on the inefficiency of this structure as the CTE has no authority to implement changes while the TBT Committee is uninterested in the development of environmentally inclined standards (the report spoke specifically of ecolabels)[1393].

[1389] Aloysius P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', (2008) 18(5) The European Journal of International Law 819.
[1390] See Chapter 3 Section 3.4.1 Drawbacks of the WTO.
[1391] Humberto Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards*, (Kluwer Law International 2011) 18
[1392] See Chapter 3 Section 3.4.1 Drawbacks of the WTO
[1393] Tom Rotherham, 'The Trade and Environmental Effects of Ecolabels: Assessment and Response', (2005) United Nations Environmental Programme <http://www.unep.ch/etb/publications/ecolabelpap141005f.pdf> accessed 25 June 2015

However, notwithstanding such drawbacks, the influence and importance of jurisprudence surrounding WTO regulation related to environmental standards affecting trade, is substantial. Therefore, the relevant WTO regulations have been considered in this thesis.

Although the definition of standards has been considered earlier, given the importance of the WTO, a separate discussion analysis is made regarding the WTO definition of standards. As the WTO is not a standards setting body, but rather functions as a legal regime supervising their effects on trade, the WTO is dependent on listed international standardization bodies for its definition of 'international standards'. WTO case-law such as the *US – Tuna II (Mexico)* case acknowledges the standards of specific international standard setting bodies and organisations[1394]. Furthermore, the TBT and SPS Agreements of the WTO, also consider the standards formulated by the listed international standardization organisations as international standards[1395].

This necessitates an identification of relevant international standards organisations. The SPS Agreement endorses the use of international standards, guidelines or recommendations[1396] to harmonize sanitary and phytosanitary measures. These international standards organisations are listed in Annex A paragraph 3 of the SPS Agreement[1397] and as such are the Codex Alimentarius Commission (food safety), International Office of Epizootics (animal health and zoonoses), the Secretariat of the International Plant Protection Convention in cooperation with regional organisations operating within the framework of the International Plant Protection Convention (plant health), and other relevant international organisations for matters not covered by the above organisations.[1398]

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[1394] See for example the Panel's acknowledgement of the ISO/IEC Guide 2 definition of international standards in United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Report of the Appellate Body) (16 May 2012) WTO WT/DS381/AB/R (US – Tuna II (Mexico)) Para 7.663

[1395] See Chapter 3 Section 3.4.1 Drawbacks of the WTO.

[1396] The Agreement on the Application of Sanitary and Phytosanitary Measures (April 1994) LT/UR/A-1A/12 (SPS Agreement), Article 3.1

[1397] European Communities — Measures Concerning Meat and Meat Products (Hormones) (16 January 1998) (Appellate Body) WT/DS321/AB/R (EC – Hormones) (AB) Para 532.

[1398] SPS Agreement Annex A.3.

The TBT Agreement defines standards in terms of mandatory and voluntary. However, the terminology used in the TBT Agreement is slightly different. A mandatory standard within the TBT Agreement is referred to as a 'Technical regulation' whilst a voluntary standard is referred to as a 'Standard'[1399]: This connection has later been highlighted by the AB in *European Communities – Trade Description of Sardines*[1400].

As we saw in Chapter 2 Section 2.4 the TBT Agreement does not specify any standards setting organisations[1401]. However, documents such as the 'Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade'[1402], the 'List of International Standardizing Bodies for purposes of Articles 10.4 and 13.3 of the Agreement'[1403], the 'Information provided by bodies involved in the preparation of international standards'[1404] and the 'Second TBT Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade'[1405] do provide for such organisations in relation to the TBT Agreement. Section 2.4 listed the organisations most relevant to a discussion on environmental standards to be – the Food and Agriculture Organisation (FAO), ISO, the International Civil Aviation Organisation (ICAO), the International Maritime Organisation (IMO), the Codex Alimentarius Commission, the OECD, the World Organisation of Animal Health (OIE), the World Health Organisation (WHO) and the United Nations Economic Commission for Europe (UNECE)[1406].

Another relevant issue addressed in the thesis was the compatibility of environmental standards with the WTO regime. This was discussed at Chapter 2 Section 2.3.3.1[1407]. The compatibility issues

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[1399] Agreement on Technical Barriers to Trade (1 January 1980) BISD 26S/8 (TBT Agreement) Explanatory note Annex 1.2.

[1400] European Communities – Trade Description of Sardines (Report of the Panel) (28 May 2002) WT/DS231/R (EC – Sardines) (Panel) Para 224

[1401] See Chapter 2 Section 2.4 The WTO and Standards.

[1402] Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade (30 December 1971) GATT Doc, Spec (71) 143

[1403] List of International Standardizing Bodies for purposes of Articles 10.4 and 13.3 of the Agreement GATT (5 June 1980) Doc. TBT/W/8

[1404] Information provided by Bodies involved in the preparation of International Standards (26 March 1999) WTO Doc. G/TBT/W/106, Para 1

[1405] Second TBT Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade (13 November 2000) WTO Doc. G/TBT/9

[1406] See Chapter 2 Section 2.4 The WTO and Standards.

[1407] See Chapter 2 Section 2.3.3.1 The Compatibility of Standards with the WTO.

arise primarily due to GATT Article XI.1. A reading of various WTO jurisprudence revealed that standards may indeed be in violation of Article XI GATT, however, there is an exception for standards within Article XI.2(b). According to Article XI.2(b) the provisions of Article XI.1 do not extend to the "Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;"[1408] The subject matter of standards under the WTO regime, especially under the GATT may be deduced through the provisions of General Exceptions Article XX (GATT) as well.

Importantly, the level of standard, of course, may be determined by the Member State itself[1409]. Article 2.2 of the TBT Agreement "affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[1410] This is in line with the hypothesis of Lowest Common Standard (LCS) suggested in this thesis, which is often determined by negotiation in agreement containing environmental standards[1411].

However once such a level has been determined, Article 4 of the SPS Agreement[1412] and similarly Article 2.7 of the TBT Agreement[1413] encourage Members to acknowledge regulations of other Members as equivalent if the objectives of the regulations remain the same. This is indeed convenient for the dynamics of a MRA as equivalence in the face of similar objectives is the hallmark of mutual recognition and one that allows separate jurisdictions to consider domestic dynamics when formulating policy for similar objectives[1414].

Although Article XI does set an exception for standards, these standards are limited to 'the classification, grading or marketing of commodities in international trade'[1415]. Yet the AB decision of

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[1408] General Agreement on Tariffs and Trade (May 1952) BISD I/14-15 (GATT) Article XI.2

[1409] Australia – Measures Affecting Importation of Salmon (Report of the Appellate Body) (20 October 1998) WT/DS18/AB/R (Australia – Salmon) (AB) Para 205.

[1410] EC –Sardines (AB) Para 7.120.

[1411] See Chapter 6 Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

[1412] SPS Agreement Article 4.1

[1413] TBT Agreement Article 2.7.

[1414] See Chapter 2 Section 2.3.3.1 The Compatibility of Standards with the WTO and Chapter 6 Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements.

[1415] GATT Article XI.2(b); See discussion in Chapter 2 Section 2.3.3.1The Compatibility of Standards with the WTO.

*Australia – Salmon*[1416] and the Panel decision of *EC – Sardines*[1417] note the prerogative given to member states, to determine their chosen level of environmental protection through policy objectives, in the SPS and TBT Agreement respectively. Therefore, it stands to reason, that policy objectives which do not fall under the exceptions of Article XI.2(b) would need to be excepted elsewhere through a legislative mandate.

The GATT provides for such an exception through its General Exceptions clause in Article XX. The provisions relevant to environmental standards particularly are Article XX(b), (g) and the Chapeau. These three provisions[1418], when analysed in the various disputes, reveal several principles that determine the justifiability of a standard.

In the analysis of UEIs and MRAs one of the predominant discussions has been that of the question of sovereignty arising from extraterritorial application of a State's environmental standards. Standards condition access to a Member State's market by imposing conditions on Member States wishing to access these markets. The DSB does address the issue of 'extraterritoriality' in United States — Import Prohibition of Certain Shrimp and Shrimp Products stating that the conditioning of access to a Member's domestic market may be a common aspect of measures invoking Article XX[1419]. In such circumstances imposing policies that set a certain level of standards for imported goods may be justified under Article XX of the GATT. In other words, extraterritorial application of environmental standards may not be an issue as long as the standard can be justified under the provisions of Article XX.

Justifying a measure under Article XX is a two-tiered procedure subject to the tests of a specific provision followed by justification under the Chapeau of Article XX as stated by the AB in *US* -

[1416] Australia – Salmon (AB) Para 205
[1417] EC – Sardines (AB) Para 7.120
[1418] As mentioned earlier the term 'provisions' is used loosely here to include the Chapeau, which is not a provision of Article XX in the strictest sense, but an inherent part of its application.
[1419] United States — Import Prohibition of Certain Shrimp and Shrimp Products (Report of the Appellate Body) (12 October 1998) WT/DS58/AB/R (US – Shrimp) (AB)

*Shrimp*[1420] and *United States — Standards for Reformulated and Conventional Gasoline (Report of the Appellate Body)* [1421].

Other than a justification under the Chapeau, a measure invoking Article XX(b) must demonstrate that the policy objective of the measures is designed to protect human, animal or plant life or health and that it is necessary to fulfil the policy objective[1422].

Whether a measure is designed to protect human, animal or plant health is determined by the DSB according to the facts of each individual case and may include the design, architecture and structure of the measure[1423] and the policy goal it purports to serve[1424].

In terms of necessity, it is not the necessity of the policy goal that is required to be examined but the necessity of the particular measure to achieve such policy goal[1425]. This ensures the earlier discussed point that the level of environmental protection is determined by the State while the instrument of protection is examined for validity under WTO provisions.

Once the measure to be examined has been isolated, its necessity is determined, by three factors – its 'indispensability', its 'restrictive effect on international trade' and the availability of 'alternative measures'. 'Indispensability' dictates that the greater the contribution of the measure to its objectives, the more easily might it be considered to be 'necessary'[1426].

A severe 'restrictive effects on international trade' would make the justification of 'necessity' difficult, and it would have to be satisfactorily shown to make a material contribution to the

[1420] US – Shrimp (AB) Para 117
[1421] United States — Standards for Reformulated and Conventional Gasoline (Report of the Appellate Body) (29 April 1996) WT/DS2/AB/R (US – Gasoline) (AB) 22
[1422] United States — Standards for Reformulated and Conventional Gasoline (Report of the Panel) (29 January 1996) WT/DS2/R (US – Gasoline) (Panel) Para 6.20
[1423] European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (Report of the Panel) (1 December 2003) WT/DS246/R (EC – Tariff Preferences) Para 7.201
[1424] United States — Import Prohibition of Certain Shrimp and Shrimp Products (Report of the Panel) (15 May 1998) WT/DS58/R Para 137 and US – Gasoline (77) Para 6.21
[1425] US – Gasoline (AB) 16
[1426] Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Report of the Appellate Body) (31 July 2000) WT/DS/161R (Korea – Various Measures on Beef) (AB) Para 163.

achievement of the objective[1427]. This illustrates the inclination of the WTO to prioritize trade over environmental issues as discussed under the drawbacks of considering WTO for environmental policy.

In terms of the availability of 'alternative measures' a measure is 'necessary', if an alternative measure not 'reasonably available'. However, if an alternative GATT consistent measure is not available, a Member State is obliged to use a measure which entails the least degree of inconsistency with other GATT provisions'[1428]. On the other hand, a Member State cannot be expected to use an alternative measure if that measure would allow the continuation of the risk that the environmental objective seeks to address[1429]. Such an alternative measure would prevent a Member State from achieving its chosen level of protection[1430].

The two questions asked of an analysis of Article XX(g) are the scope of the terms 'exhaustible natural resources' and 'relating to'. The term 'exhaustible natural resources', includes living resources[1431] which allows environmental standards related to conservation efforts and those ensuring the safety and sustainability of species, to be analysed under the provision[1432].

The term 'relating to' broadens the scope of Article XX(g) even further. By virtue of the term, not only are 'necessary' measures covered by the provision, but a much wider range of measures which are 'primarily aimed at' the conservation of an exhaustible natural resource[1433].

The purpose and object of the Chapeau is to prevent the abuse of the provisions[1434] by guarding against 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade'.

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[1427] Brazil — Measures Affecting Imports of Retreaded Tyres (Report of the Appellate Body) (03 December 2007) WT/DS/332/AB/R (Brazil – Retreaded Tyres) (AB) Para 150.
[1428] Korea – Beef (AB) Para 165.
[1429] European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Report of the Appellate Body) (12 March 2001) WT/DS/135/AB/R (EC – Asbestos) (AB) Para 174.
[1430] Brazil – Re-treaded Tyres (AB) Para 170
[1431] US – Shrimp (AB) Para 131
[1432] See Chapter 4 Section 4.4.1 Article XX(g): Exhaustible Natural Resources.
[1433] Canada — Measures Affecting Exports of Unprocessed Herring and Salmon (Report of the Panel) (20 November 1987) BISD 35S/98 (Canada – Salmon and Herring) Para 4.6
[1434] US – Gasoline (AB) Page 22

The analysis of what constitutes 'arbitrary or unjustifiable discrimination' and 'disguised restriction' also highlights certain important factors required in international trade important for the reduction of international friction. In the further analysis of instruments implementing environmental standards, UEIs and MRAs are scrutinized especially to observe the degree to which these factors are available.

Negotiation is an important indicator of arbitrary or unjustified discrimination. The failure to cooperate with the governments of effected Member States and to not consider the cost of a measure on parties affected by such measure would indicate arbitrary or unjustified discrimination[1435].

The consideration for the domestic conditions of third parties is another factor. Although it has been determined above that WTO provisions allow the extraterritorial effect of measures there are limits to such permission. As we saw in the discussion of Chapter 4 Section 4.5.1[1436] of this thesis, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, without taking into consideration different conditions which may occur in the territories of those other Members[1437].

Lastly, another factor determining the conditions of arbitrary or unjustified discrimination is the similar criteria applied to all effected Member states. Member States are required to provide objective criteria for any discrimination.[1438] Discrimination due to obligations to an international body cannot be counted as 'objective criteria and would be considered 'arbitrary or unjustifiable discrimination'[1439]. This is reminiscent of the MFN principle of the WTO, which calls for equal treatment of all its members. Keeping the above factors determining the compatibility of standards

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[1435] US – Gasoline (AB) Page 29
[1436] Chapter 4 Section 4.5.1 Article XX Chapeau: 'arbitrary or unjustifiable discrimination' and 'disguised restriction on international trade'.
[1437] US – Shrimp (AB) Para 164
[1438] EC – Tariff Preferences (AB) Para 7.194
[1439] Brazil – Re-treaded Tyres (AB) Para 229.

with the WTO in mind, this thesis then looked at UEIs and MRAs; assessing them against WTO compatibility and efficiency in addressing environmental issues.

## 8.5 Unilateral Environmental Action

A common feature of UEAs is the aspect of independent action, disassociated from the actions or interests of other involved or concerned parties. The nature of unilateral action implies that States may consult and may even consider the interests of these other nation states but this creates no obligations for the fulfilment of such considerations.

However, as seen above due to the requirement of 'necessity' in WTO law there is an actual obligation to consult with all interested parties before any policy implementation[1440]. Therefore, any action not taken with collective will is generally looked upon suspiciously[1441].

As we saw in Chapter 5 Section 5.3[1442], Reisman observed that, often such an action, is justified (or attempted to be justified) through a claim of legality whereby, the pertinent legal system allows such unilateral acts in certain circumstances or on condition that substantive tests of lawfulness are met, where the circumstances for the particular unilateral act are claimed to be appropriate and the act, despite its procedural irregularities, has purportedly complied with the relevant substantive requirements of lawfulness[1443].

The question of substance carries far more weight than the procedural aspect in the case of unilateral action[1444]. This may be a convenient characteristic of standard raising instruments when one considers the global urgency to raise environmental standards. The factor of time necessitates quick action that may otherwise be hindered with procedural pedantry. MRAs especially in the form

[1440] See Section 5.3.3 The Requirement of Necessity in WTO Jurisprudence in Chapter 5 Unilateral Environmental Action.
[1441] Daniel Bodansky, 'Rules Versus Standards in International Environmental Law' 98 Am. Soc'y Int'l. L. Proc. 275 (2004) 276, 339.
[1442] See Chapter 5 Section 5.3 The Legality of UEAs.
[1443] W. Michael Reisman, 'Unilateral Action and the Transformations of the World Constitution Process: The Special Problem of Humanitarian Intervention' (2000) 11 European Journal of International Law 3, 4.
[1444] Reisman (n 1443) 5

of the New Approach too, allow for flexibility regarding procedural differences, by considering the objective of a regulation[1445]. This allows for differences in national laws and regulations as long as their objectives are similar in substance. The difference of course is that MRAs do not impose standards unilaterally. However, this also means that the procedural delays that unilateral action avoids are unavoidable in MRAs due to the necessity of negotiations.

Yet an attempt to justify unilateral action may not always be successful for the very existence of procedural irregularities. This thesis gave the example of the *US – Tuna/Dolphin I* dispute where in the face of increasing Dolphin mortality rates, as a consequence of certain identified methods of Tuna fishing, the actions of the US government certainly could not be said to be inappropriate. However, after the US government labelling requirements were instituted, it was procedural irregularities (extra-jurisdictional regulation) that eventually led the DSB to strike down the disputed US federal laws[1446].

There are of course, instances where states may be allowed unilateral action. The dictates of Permanent Sovereignty allow State's the right to utilize and exploit resources and such rights are owned in perpetuity by the state in which such natural resources are found[1447]. However, such a right leads to certain issues involving the rights of other states.

The ICJ, in the *Corfu Channel Case*, states that it is, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[1448]. The ICJ also recognizes this international obligation in the earlier *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* case, and states that such obligation can only be ignored by invoking 'necessity' in the face of 'grave and

[1445] See Chapter 6 Section 6.3.1 The New Approach.
[1446] United States – Restrictions on Imports of Tuna (Report of the Panel) (3 September 1991) GATT DS21/R-39S/155 (US – Tuna (Mexico)) Para 5.31
[1447] Subrata Roy Chowdhury, 'Permanent Sovereignty over Natural Resources' in Kamal Hossain and Subrata Roy Chowdhury (eds.), Permanent Sovereignty over Natural Resources in International Law: Principle and Practice, (Palgrave Macmillan, 1984) 1; See also Right to exploit freely natural wealth and resources, UNGA Resolution 626 (VII) (21 December 1952).
[1448] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Judgement) [1949] ICJ.

imminent peril'[1449]. ILC's draft articles on 'Prevention of Transboundary Harm from Hazardous Activities' provide that 'the state of origin' shall be the one to take appropriate action to prevent transboundary harm[1450]. Similar principles have also been expressed in the Rio Declaration on Environment and Development[1451] and the Convention on Biological Diversity (CBD)[1452].

The question of 'necessity' as stipulated by the *Gabcikovo-Nagymaros* case, of course leads us again to the principle of necessity found in WTO jurisprudence. The several WTO case-law provided in this thesis relate to the discussion of necessity arising from unilateral action which were forthwith disputed by other Member States and are indicative of the grievances arising from such unilateral imposition of standards[1453]. The lack of necessity in several of the cases analysed also indicate the 'arbitrary or unjustifiable discrimination' and a 'disguised restriction on trade' as stipulated by the Chapeau to Article XX. This implies a lack of negotiations or even consultation. This requirement for the judicial services of the Dispute Settlement Body also indicates international friction and therefore validates the previously discussed connection between negotiations and international friction[1454].

Furthermore, these cases also indicate the reduced market access as a result of unilateral action. They are a direct result of barriers to international trade. Such barriers result in the economic grievances of other Member states to the WTO. Market access, is a necessary factor, as firstly, barriers to such access exacerbates the problems of international friction. Secondly, trade obligations of WTO members and the presence of a strong trade dispute settlement mechanism, coupled with weak, confusing and segregated international environmental accountability mechanisms often results in a greater position of trade issues over environmental issues. Therefore,

[1449] Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) (Judgement) [1997] ICJ.
[1450] Prevention of Transboundary Harm from Hazardous Activities (adopted by the International Law Commission), UNGA Official Records 56th Session, Supplement No. 10 (A/56/10), Article 3.
[1451] UNGA 'Report of the United Nations Conference on Environment and Development' (3-14 June 1992), A/CONF.151/26 (Vol. I), Annex I; Rio Declaration, Principle 2.
[1452] The Convention on Biological Diversity, (29 December 1993) Article 3.
[1453] See Chapter 4 Section 4.3.2 Article XX(b): 'necessity' and Chapter 5 Section 5.3.3 The Requirement of Necessity in WTO Jurisprudence.
[1454] See Chapter 3 Trade and Environment.

an instrument increasing environmental standards, which becomes a barrier to trade, will often be afforded a lesser priority over market access obligations and may be struck down or weakened.

This therefore requires an alternative measure that is less trade restrictive. In light of this requirement the thesis looks at MRAs as one such alternative which may contain the characteristics to both propagate environmental standards while allowing states to consider a flexible approach to environmental objectives which are less disruptive of domestic needs. This latter facet would in turn reduce environment related trade disputes.

## 8.6 Mutual Recognition Agreements

In order to look at mutual recognition in the international context the thesis in Section 6.3[1455], looked most closely at the categorization set by Pelkmans where he divides mutual recognition into what he calls "Judicial MR" as well as the Old Approach and the New Approach, which he calls 'Regulatory MR'[1456]. The thesis concentrates most on the concept of New Approach due to the flexibility it affords towards meeting environmental objective while keeping domestic conditions in mind – a facet convenient to international trade as it may reduce international disputes arising from an otherwise requirement of strict adherence to environmental standards.

In the Old Approach, MR is achieved by a strict *harmonization* of the regulations of the participating countries[1457]. It is inflexible and impractical in the International sense given the myriad of variables and permutations to be considered. The New Approach, alternatively, considers the *equivalence* of the regulatory objectives of the participating countries rather than the actual regulatory instruments[1458]. If the comparative regulatory instruments have the same regulatory objective then mutual recognition can be achieved. It is this flexible form of mutual recognition that is important in

[1455] See Chapter 6 Section 6.3 Forms of Mutual Recognition.
[1456] Pelkmans argues, most safety, health, environment and consumer protection (SHEC) regulations are 'risk regulation'. Jacques Pelkmans, 'Mutual Recognition in Goods: On Promises and Disillusions' (2007) 14(5) Journal of European Public Policy 699, 702
[1457] Pelkmans 2007 (n 1456) 702
[1458] Pelkmans 2007 (n 1456) 702

the international context primarily because of the previously mentioned four factors. The thesis then looked towards actual mutual recognition agreements in the backdrop of these factors to analyse whether it is the optimal instrument necessary to increase Environmental Standards[1459].

The increase of environmental standards through mutual recognition agreements may occur in two identifiable areas of the negotiated instrument. These are either in the pre-agreement negotiations or in the negotiated text of the agreement. Often, the text of the agreement will reflect the intention of the parties, pre-agreement. An example provided in the thesis of this above point is the pre-NAFTA negotiations, where the apprehension of Mexico's lower standards entering the US-Canada Free Trade Agreement (the predecessor to the NAFTA), led to the parties deciding on the NAFTA side agreements on labour and environmental standards (such as the NAAEC)[1460]. Similarly, the 2002 equivalence recognition agreement between the US and Japan sought to ban the use of certain substances in organic in organic food products to be imported into Japan due to Japan's higher standards of organic food products[1461]. The US even considered a general ban on the substances in order to have one set of rules for their domestic producers[1462].

Furthermore both sets of agreement show the potential for mutual recognition in the international context lies in designing 'managed' MRAs – a concept propagated by Nicolaidis[1463]. We discuss 'managed' MRAs in Section 6.3.2[1464]. By formulating managed agreements, the parties are allowed to withhold certain host country sovereignty by determining the minimal level of standards required for import. Not only does this allay fears of diluting sovereignty through extraterritorial home

[1459] See Chapter 6 Section 6.5 Analysing MRAs.
[1460] See Chapter 6 Section 6.5.1 The US-Japan Mutual Recognition Agreement on Organic Products.
[1461] See Chapter 6 Section 6.5.1.1.1 Changes between the 2002 Equivalence Recognition Agreement and the 2013 Mutual Recognition Agreement.
[1462] Frode Veggeland and Christel Elvestad, 'Equivalence and Mutual Recognition in Trade Arrangements: Relevance for the WTO and the Codex Alimentarius Commission' (2004) Norwegian Agricultural Economics Research Institute Report 2004-9, 40 <https://www.regjeringen.no/globalassets/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_s.pdf> accessed 28 June 2015.
[1463] Kalypso Nicolaidis, 'Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services', in *Liberalization of Trade in Professional Services*, (OECD Publications 1997)
[1464] See Chapter 6 Section 6.3.2 Managed MRAs.

country rules, but also, the minimal standard determination increases the lowest common standards (LCS) between the parties.

The thesis considers the issue of sovereignty and MRAs in Section 7.2[1465]. It is important to assess whether MR may be considered not so much a rule of governance in the normal sense, but a rule of *choice* of governance. Trachtman is of the opinion that MR is more a choice of governance[1466]. In such a situation, the sovereignty of a nation is scarcely affected as firstly, national regulations are not superimposed by a separate set of regulations. Secondly, the power allowing for the choice of governance is derived from the sovereignty of the nation[1467].

Maduro[1468] and Nicolaidis and Schaffer[1469] however disagree given the processes generated by MR and the social outcomes arising from MR regimes. In the circumstances, MR may rather be considered to be a form of 'governance without government'. Schmidt points out that unlike a vertical transfer of sovereignty to the 'supernational level', in MR responsibility for the regulation of the chosen sectors is transferred to the home state[1470].

However, if such a transfer of sovereignty is seen in the light of interdependent sovereignty, which is concerned with the authority to regulate transborder movement of goods, persons, pollutants, diseases and ideas[1471], there appears to be an erosion of control rather than actual authority[1472]. The thesis therefore explored the question whether the transfer of sovereignty in the context of MRAs, is seen as a dilution of authority or a dilution of control[1473].

[1465] See Chapter 7 Section 7.2 Mutual Recognition and the Transfer of Sovereignty.
[1466] Joel P. Trachtman, 'Embedding mutual Recognition at the WTO' (2007) 14 Journal of European Public Policy 780, 783.
[1467] Maastricht, German Constitutional Court decision from 12 October 1993, BVerfGE 89, 155 para 439
[1468] Miguel P. Maduro, 'The Paradoxes of Mutual Recognition' (2007) 14(5) Journal of European Public Policy 814, 815
[1469] Nicolaidis and Shaffer (n 1356) 264
[1470] S.K. Schmidt, 'Mutual Recognition as a new mode of Governance' (2007) 14(5) Journal of European Public Policy 667, 672
[1471] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton University Press, 1999) 12.
[1472] Janice E. Thompson, 'State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research' (1995) 39(2) International Studies Quarterly 213, 216.
[1473] See Chapter 7 Section 7.2.1 Mutual Recognition and Interdependent Sovereignty.

If sovereignty is considered in terms of the authority that governments and states possess then MR cannot be considered an instrument for the weakening of sovereign powers as, in MR there is no transfer or dilution of authority. However, if sovereignty is considered as a measure of control then relinquishing interdependent sovereignty also affects domestic sovereignty considerably because to not be able to regulate what passes across borders may lead to a dilution of the control over what happens within borders[1474].

Another pertinent way of looking at the issue of the transfer of sovereignty in the context of MRAs is whether such an agreement results in the delegation of sovereign power or the transfer of it. The distinguishing factor between the two lies in the degree of revocability of the sovereign powers conferred by the state, in lieu of the agreement. In the case of the delegation of power, the state continues to have the power to revoke conferred rights at its own discretion[1475]. Thus restrictions upon the independence of States 'cannot therefore be presumed'.[1476]

MR may rather be seen in light of the Kantian concept of 'cosmopolitan law', which discusses the obligation of states regarding the citizens of other states[1477]. The framework of MRAs allows the idea of a state's right to enter into relationships with another state and to consider the effect of decision making outside a state's jurisdiction.

The reciprocal concepts of extraterritoriality and comity intrinsic to the concept of cosmopolitan law are crucial to the understanding and justification of MR in a globalized world. MRAs are mutually negotiated, with an inherent element of reciprocity, and are institutionalized[1478]. Therefore, in terms of environmental standards, parties to the agreement are in constant knowledge of the extent to which they may be affected (raising of standards) and the reciprocal benefits they may hope to receive in exchange (market access), and yet in a controlled environment of negotiations.

[1474] Krasner (n 1471) 13
[1475] Dan Sarooshi, *International Organisations and Their Exercise of Sovereign Powers*, (Oxford University Press 2005) 55
[1476] The Case of the S.S. Lotus (France vs Turkey), 1927 P.C.I.J. (ser. A) No. 10 Para 44
[1477] Pauline Kleingeld, 'Kant's Cosmopolitan Law: World Citizenship for a Global Order' (1998) 2 Kantian Review 72; see also Nicolaidis and Shaffer (n 1356) 266
[1478] Nicolaidis and Shaffer (n 1356) 275

The transfer of sovereignty is further diluted by the realization of mutual benefit through co-operation. For an MR regime to function effectively, both, the home nation as well as the host nation is subject to certain responsibilities towards the other. Home nations must consider the protection of consumers outside their jurisdiction, while host nations have to take into account the effect their decisions may have on home country producers and service providers[1479].

The potential of MRAs in raising standards is therefore aided by a globalized interconnected market. Global market links and lucrative markets create incentives to join agreements that reduce market barriers to trade. MRAs are such agreements reducing trade barriers. As mentioned before, MRAs also have consequential increase in environmental standards. Therefore, a third party wishing to join such an agreement is obliged to increase their standards. As mentioned above, negotiation power may be a factor in the level of LCS, which may be significantly higher if the market that a country wants to join is already bigger due to a pre-existing agreement.

This was the case with Mexico wanting to join the Canada-US Free Trade Agreement. In order for NAFTA to be agreed to, Mexico was pressed into agree to the NAFTA side-agreements of labour and environmental standards as well. The barriers still prevalent in such international trade agreements do, however, serve to safeguard the legitimate environmental interests of parties to agreements. The diverse levels of environmental standards in international trade necessitate so. The barriers also serve the purpose of incentivising countries to raise their level of standards in order to enter markets with higher standards, thereby continuously increasing the LCS as more trade agreements are formulated amongst nations and country groupings.

The thesis shows how the Organic products chain also has the potential to create such dynamics[1480]. Consider the example of India in the Organic production chain. India has the largest number of

[1479] Nicolaidis and Shaffer (n 1356) 278
[1480] See Chapter 6 Section 6.6 Conclusions

organic producers in the world[1481]. Its organic regulations are formulated by the Ministry of Commerce and Industry through the National Programme for Organic Production (NPOP)[1482]. India and the US have an MRA on certifying agents of Organic food products thereby allowing easier access to each other's markets[1483].

Therefore both Japanese and Indian organic products have a common market in the US. Indian organic products entering the US market through mutual recognition of standards would theoretically be of equivalent levels to Japanese standards or at the very least compatible to the US import requirements. However, India and Japan do not yet have such an agreement between themselves. If the MRA between the US and Japan was a 'pure' MR[1484], instead of the current 'managed' one, products entering one market would have to be allowed into the other[1485]. The other alternative of course is also a 'managed' MR between India and Japan (similar to the US – Japan agreement).

## 8.7 Recommendations

As mentioned previously in this thesis, the objective was to find an 'environmental standard implementing' instrument which may help in reducing friction arising between trading nations, due to a difference in environmental standards. As mentioned in Chapter 1, a limitation to this thesis is that it does not seek a more efficient environmental standard but rather looks at the method of implementation and the consequences of the instruments used on the relationship between developed and developing countries[1486]. Although the thesis does address the reasons for friction

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[1481] FiBL and IFOAM, 'The World of Organic Agriculture; Statistics and emerging trends 2013' (14th ed FiBL and IFOAM 2013) < https://www.fibl.org/fileadmin/documents/shop/1606-organic-world-2013.pdf> accessed 29 June 2015

[1482] National Programme for Organic Production <http://www.apeda.gov.in/apedawebsite/organic/> accessed 26 June 2015

[1483] National Organic Program, 'International Trade Policies: India' <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=NOPTradeIndia> accessed 26 June 2015

[1484] See Section 6.2 Defining Mutual Recognition and Mutual Recognition Agreements

[1485] See Chapter 6 Section 6.6 Conclusions

[1486] See Chapter 1 Section 1.3 Methodology and Research Themes

between countries, its primary aim is to analyse certain trade instruments that may alleviate such friction between developed and developing countries while propagating environmental standards.

In that regard, the thesis has analysed both UEAs and MRAs to highlight the advantages and disadvantages of either instrument. The thesis now recommends a combination of 'managed' MR and 'regulatory' MR as such an instrument which is conducive to international trade related environmental standards and the dynamics surrounding such a relationship. The 'managed' MR dimension allows for the host country to set its standards pre-negotiation. The 'regulatory' MR dimension allows for the flexibility in international standard setting agreements where the objective of the parties is given importance, thus providing regulatory space for domestic conditions of the standard implementing country[1487]. It is this combination of Pelkman's 'regulatory' MR and Nicolaidis' 'managed MR' which is hypothesised in this thesis to be most conducive to international MRAs. We highlight certain factors previously discussed within this chapter to illustrate the propensity of such a combined form of MRA to allow for certain conditions to prevail.

The primary reason for MRAs causing less friction amongst countries is the negotiatory nature of MRAs. UEAs on the other hand are invasive and impose standards extra jurisdictionally. The nature of unilateral action implies that States may consult and may even consider the interests of these other nation states but this creates no obligations for the fulfilment of such considerations.

However, there does exist a WTO obligation to negotiate between countries and this stems from the requirement of 'necessity' found in Article XX(b)[1488]. Furthermore, the failure to cooperate with the governments of effected Member States and to not consider the cost of a measure on parties affected by such measure would indicate arbitrary or unjustified discrimination. An MRA negotiated to be compatible with such WTO conditions would be 'managed' according to the definition of the term.

[1487] The reader is reminded that the "managed – pure" and "regulatory – judicial – old approach" dimensions are separate methods of categorization with different sets of criteria, with the possibility of an overlap. Thus an MRA may be both 'regulatory' as well as 'managed' at the same time. See Chapter 6 Section 6.3 Forms of MRA
[1488] See discussion on 'necessity' in Chapter 4 Section 4.3.2 Article XX(b): 'necessity'

Pre-agreement negotiations allow host countries to set their own level of standards. This is also in line with WTO legislation and jurisprudence. Article 2.2 of the TBT Agreement "affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them" and the AB confirms this in *Australia – Salmon*[1489]. The concept of Lowest Common Standard (LCS) suggested in this thesis, is determined by negotiation in agreement containing environmental standards.

Another probable reason for a combined MRA to be successful is the 'regulatory' MR characteristic of giving importance to the objective of the standard rather than the procedural aspect. This allows for flexibility in international trade relations where an environmental objective may be achieved keeping home state conditions and circumstances in mind.

Furthermore, Article 4 of the SPS Agreement and Article 2.7 of the TBT Agreement encourage Members to acknowledge regulations of other Members as equivalent if the objectives of the regulations remain the same.

Thus this penchant for the combined form of MRAs to consider the host nation level of standards and the home nation environmental circumstances when achieving them is reminiscent of the Kantian cosmopolitan law as suggested by Nicolaidis.

Being instruments of trade and due to the constant vigilance towards WTO compatibility it is only natural for the thesis to further recommend that the ideal forum for introducing and negotiating such MRAs would be the WTO. As has been discussed in this thesis, the presence of the DSB provides the WTO with a strong dispute resolution mechanism. Furthermore, MRAs have been covered by the GATT through Article XXIV.5[1490]. The thesis of course merely looks at the WTO compatibility of MRAs and does not discuss the WTO as the ideal forum under which to negotiate agreement. This is a greater research topic ideal for further research.

[1489] Australia – Salmon (AB) Para 205

[1490] See Chapter 7 Section 7.2 MRAs: The WTO Perspective

The thesis does, however, recommend the combined form of 'managed' and 'regulatory' MRAs as a policy instrument in international trade. It encourages a further review of this form of MRA which may help in propagating environmental standards while alleviating fears of protectionism (due to the negotiatory nature of the instrument) and thereby aiding in the reduction of developed and developing country friction in environmental standard related aspects of trade.

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# ANNEX I

1. Set of Correspondence between the United States and Japan regarding the The US-Japan Mutual Recognition Agreement on Organic Products Including the Text of the Agreement

Ministry of Agriculture, Forestry and Fisheries
Japanese Government

(Provisional Translation)

Mr. A.J.Yates
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture

February 6, 2001

Dear Mr. Yates,

I appreciate your cooperation in examining equivalency of organic products grading system in the U.S. to that in Japan.
The Ministry of Agriculture, Forestry and Fisheries in Japan (hereinafter referred to as "MAFF") recognizes that the grading system of organic agricultural products and organic agricultural products processed food (hereinafter referred to as "organic products") in the U.S., which is stipulated in *National Organic Program*, is equivalent to the grading system of organic products under the Japanese Agricultural Standard stipulated in Articles 15-7 and 19-6-4 of the Law Concerning Standardization and Proper Labeling of Agricultural and Forestry Products.

In order to maintain equivalency and ensure consumers' confidence in organic products sold in Japan, the MAFF would like to confirm that the competent authorities of the U.S. Government have the following intentions:

1 In case the U.S. side amends the above-mentioned Program, to notify the Japanese side of the contents of the amendment in advance;

2 To provide the Japanese side, upon request, with as much information as practicable including that related to whether the inspection and certification system on organic products is properly implemented in the U.S.;

3 In case the Japanese side notifies in advance the U.S. side of its inspection plan on the Registered Foreign Certification Organizations in the U.S., to cooperate in such inspection, as much as practicable; and

4 To take necessary action to prevent the use of the following substances in organic products which will be exported to Japan.

(1) Alkali Extracted Humic Acid

(2) Lignin Sulfonate

(3) Potassium bicarbonate

Sincerely,

Kyuzo SAITO
Director-General of General Food Policy Bureau,
Ministry of Agriculture, Forestry & Fisheries
Tokyo, Japan

United States Department of Agriculture

Agricultural Marketing Service

STOP 0201 – Room 3071-S
1400 Independence Avenue, SW.
Washington, D.C. 20250-0201

MAY 19 2008

Yutaka Arai, Director
Labeling and Standards Division
Food safety and Consumer Affairs Bureau
Ministry of Agriculture, Forestry and Fisheries of Japan
1-2-1 Kasumigaseki chiyoda-ku Tokyo
100+8950 Tokyo
JAPAN

Dear Ms. Arai:

The Department of Agriculture (USDA), Agricultural Marketing Service (AMS) is pleased to inform you that the conformity assessment system used by the Labeling and Standards Division (LSD), Food Safety and Consumer Affairs Bureau, Ministry of Agriculture, Forestry and Fisheries (MAFF), to accredit organic certification organizations has been determined by USDA, AMS to be sufficient to ensure conformity with the technical standards of USDA's National Organic Program (NOP), pending successful completion of an on-site visit. In the interim and upon effective date of this letter, this determination allows the application of the USDA organic seal on Japanese agricultural products when all applicable NOP regulations have been met. The Continuation of Recognition is subject to terms below.

To ensure conformity with the technical standards of the NOP, USDA requests MAFF through LSD to agree to the following provisions:

1. To notify AMS of any legislative or administrative changes to the LSD, MAFF conformity assessment system;

2. To allow USDA representatives to conduct on-site audits and reviews of the LSD, MAFF conformity assessment system when properly notified of such reviews by USDA;

3. To immediately report to AMS any non-compliance regarding the application of the NOP regulations to Japanese organic agricultural products when exported to the United States;

4. To provide to USDA annually a report which contains information regarding the types and quantities of Japanese organic agricultural products exported under this determination.

5. To provide to USDA annually a report which contains the types of non-compliances found by LSD during any oversight reviews or audits, and steps taken by LSD to ensure that non-compliances were corrected.

6. To provide to USDA annually a list of all certifying bodies accredited by LSD, MAFF to perform NOP certifications and their respective operations granted certification to produce products to the NOP standards.

Should you have further questions regarding this determination, I encourage you to contact Mark Bradley at 202-720-3252 or by email at mark.bradley@usda.gov or Barbara C. Robinson at Barbara.robinson2@usda.gov.

Sincerely,

Lloyd C. Day
Administrator

# MAFF

**Ministry of Agriculture, Forestry and Fisheries**

September 20, 2013

Ms. Anne L. Alonzo
Administrator,
Agricultural Marketing Service
U.S. Department of Agriculture

Mr. Islam A. Siddiqui
Ambassador,
Office of Agricultural Affairs
Office of the U.S. Trade Representative

Dear Ms. Alonzo, Mr. Siddiqui,

The Ministry of Agriculture, Forestry and Fisheries in Japan (MAFF) has concluded that the grading system on organic products (organic agricultural products and organic agricultural product processed food) in United States is equivalent to the system under the Law concerning Standardization and Proper Labeling of Agricultural and Forestry Products (the JAS Law), after examining the equivalence in United States in March 13, 2002. Also, MAFF has changed the part of conditions in October 10, 2008.

Based on the review, with a view to ensuring the future equivalence in United States and to maintaining the public confidence to the graded organic products, MAFF will replace the previous conditions with the ones set forth in section II of Appendix 1 of this letter, effective January 1, 2014.

Japan welcomes the United States' recognition of the Japan's organic system. MAFF is committed to working with The United States Department of Agriculture and the United States Trade Representative to implement the terms of the determination as stipulated in this cover letter and section II of Appendix 1 and the arrangement regarding an Organics Working Group described in Appendix 2.

Sincerely,

小林 裕幸

Hiroyuki Kobayashi
Director General,
Food Safety and Consumer Affairs Bureau
Ministry of Agriculture, Forestry and Fisheries
Tokyo, JAPAN

## Appendix 1

The United States Department of Agriculture (USDA) and Japan's Ministry of Agriculture, Forestry, and Fisheries (MAFF) have reached the following arrangement:

### I. Japan's Organic Products to the United States

A. This arrangement covers Japanese Agricultural Standard (JAS) certified organic plants, including fungi, and organic processed foods of plant origin that are either grown, produced, or where the final processing or packaging occurs in Japan (hereinafter "Japanese organic product").

B. A Japanese organic product for export to the United States is expected to be labeled according to USDA-NOP organic labeling requirements.

C. Any export to the United States of a Japanese organic product pursuant to this arrangement is expected to be accompanied by an NOP Import Certificate, Form NOP 2110, from a MAFF-accredited or USDA-accredited certification body in Japan that attests to compliance with the terms of this arrangement.

D. The MAFF is expected to notify USDA and USTR in a timely manner of any instances of the following:

1. Changes with respect to the accreditation status of MAFF-accredited certification bodies; and
2. Proposed regulations in Japan that may modify any JAS regulations.

E. Following advance notice from the United States, the MAFF intends to permit USDA officials to conduct on site evaluations in Japan to verify that the relevant regulatory authorities and certification bodies of Japan's organic program are carrying out the requirements of that program. The MAFF should cooperate and assist USDA, to the extent permitted, in carrying out these on-site evaluations, which include visits to offices of relevant regulatory authorities, certification body offices, production facilities, and farms that certification bodies have certified in Japan.

F. MAFF is expected to provide to USDA's Agricultural Marketing Service (AMS) the following documents on an annual basis:

1. A report that contains information regarding the types and quantities of Japanese organic products exported under this arrangement;
2. A report that contains the types of non-compliances identified by the MAFF during any oversight reviews or audits, and steps taken by the MAFF to ensure that non-compliances were corrected; and

3. A list of certification bodies of Japan's organic system accredited to JAS.

## II. U.S. Organic Products to Japan

A. This arrangement covers USDA-National Organic Program (NOP) certified organic plants, including fungi, and organic processed foods of plant origin that are either grown, produced, or where the final processing or packaging occurs in the United States (hereinafter "U.S. product") and non-regulated organic products, such as organic meat, dairy, honey, and alcoholic beverages as specified under Section II.E and the accompanying footnote.

B. For a U.S. product for export to Japan that is produced or handled by a certified organic operation that is certified by a USDA-NOP accredited certifier, the following applies:

1. A completed USDA Form TM-11 is expected to accompany export of the U.S. product to Japan;

2. The U.S. product may display the USDA organic seal if it is compliant with USDA organic labeling requirements; and

3. The U.S. product is expected to be imported by a JAS-certified importer into Japan, where the JAS seal is applied.

C. For a U.S. product for export to Japan that is produced or handled by a USDA-NOP certified organic operation that has a JAS-labeling contract with a JAS-certified importer; and certified by USDA-NOP accredited certifier, the following applies:

1. A completed USDA Form TM-11 is expected to accompany export of the U.S. product to Japan;

2. The JAS seal may be displayed on the U.S. product by a USDA-NOP certified organic operation that has a JAS-labeling contract if the U.S. product is compliant with JAS organic labeling requirements;

3. The U.S. product may display the USDA organic seal in Japan; and

4. The U.S. product is expected to be imported into Japan by a JAS-certified importer.

D. For a U.S. product for export to Japan that is certified to the JAS standard by a MAFF-accredited certifier, the following applies:

1. USDA Form TM-11 is not required for export of the U.S. product to Japan;

2. The U.S. product may display the USDA organic seal if it is compliant with USDA organic labeling requirements; and

3. The U.S. product may display the JAS organic seal if compliant with JAS organic labeling requirements.

E. In addition, a non-regulated organic product, such as organic meat, dairy, and honey, with the exception of alcoholic beverages,[1] for export to Japan, certified by a USDA-NOP accredited certifier would continue to have access to Japan's market under the following conditions:

1. USDA Form TM-11 is not required for export of the non-regulated organic product to Japan;

2. A non-regulated organic product may display the USDA seal if it is compliant with USDA organic labeling requirements; and

3. A non-regulated organic product may be labeled with the word "organic" in the English or Japanese language.

F. USDA or USTR intend to notify the MAFF in a timely manner of any instances of the following:

1. Changes with respect to the accreditation status of USDA-accredited certification bodies; and

2. Proposed U.S. regulations that may modify any of the NOP regulations referred to in this arrangement.

G. Following advance notice from Japan, USDA intends to permit MAFF officials to conduct on site evaluations in the United States to verify that the relevant regulatory authorities and certification bodies of the U.S. organic program are carrying out the requirements of that program. USDA should cooperate and assist MAFF, to the extent permitted, in carrying out these on-site evaluations, which includes visits to offices of relevant regulatory authorities, certification body offices, production facilities, and farms that certification bodies have certified in the United States.

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[1] In addition, alcoholic beverages, including but not limited to wine, beer, and distilled spirits, for export to Japan certified by a USDA-NOP accredited certifier would continue to have access to the Japanese market under the following conditions:

1. If the alcoholic beverage is labeled with the word "organic" in the Japanese language, then a certificate that includes the name of the certified alcoholic beverage, the name and the address of the certified farm or brewery, the number and date of certification, the address and name of the operator, the country of origin, and the address and name of the certifying body should accompany export. The certificate should be issued by a USDA-NOP accredited certifier; and

2. The alcoholic beverage may display the USDA organic seal if it is compliant with USDA organic labeling requirements.

H. USDA and USTR intend to provide to MAFF the following documents on an annual basis:

1. A report that contains information regarding the types and quantities of U.S. product exported under this arrangement;

2. A report that contains the types of non-compliances identified by the USDA during any oversight reviews or audits, and steps taken by USDA to ensure that non-compliances were corrected; and

3. A list of certification bodies of the U.S. organic system accredited to the NOP.

**Appendix 2**

1. The United States and Japan intend to work together in an Organics Working Group consisting of representatives of USDA and USTR on behalf of the United States and representatives of MAFF on behalf of Japan.

2. The Organics Working Group expects to meet as needed in any manner that the representatives of the United States and Japan decide.

3. The objective of the Organics Working Group is to enhance regulatory and standards cooperation between Japan and the United States on issues related to organics, including reviewing the operation of the Organics Working Group and the operation of this arrangement, no later than January 1, 2018.

United States
Trade Representative

United States
Department of Agriculture

September 26, 2013

Hiroyuki Kobayashi
Director General,
Food Safety and Consumer Affairs Bureau
Ministry of Agriculture, Forestry and Fisheries
1-2-1 Kasumigaseki, Chiyoda-ku
Tokyo, 100-8950 Japan

Dear Mr. Kobayashi:

The United States Department of Agriculture (USDA), in coordination with the United States Trade Representative (USTR), has reviewed Japan's program for certification of organic agricultural products produced and handled in accordance with the Japanese Agricultural Standard (JAS) for Organic Plants (Notification No. 1605 of 2005) and the Japanese Agricultural Standard for Organic Processed Foods (Notification No. 1606 of 2005). Based on that review, USDA has determined pursuant to the Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. Sec. 6501 et seq.), under authority delegated to the Secretary of Agriculture by the President, that certain agricultural products produced and handled in accordance with Japan's organic certification program, as in effect on January 1, 2014, are produced and handled under an organic certification program that provides safeguards and guidelines governing the production and handling of such products that are at least equivalent to the requirements of OFPA.

Accordingly, subject to the conditions set forth in Section I of Appendix 1 of this letter, certain agricultural products produced and handled in conformity with Japan's organic certification program, as in effect on January 1, 2014, are deemed by USDA to have been produced and handled in accordance with the OFPA and USDA's organic regulations under the National Organic Program (NOP) (7 CFR part 205). These products may be sold, labeled, or represented in the United States as organically produced, including by display of the USDA organic seal as well as the JAS organic logo, under the conditions set forth in Section I of Appendix 1.

The United States is also pleased to acknowledge Japan's recognition of the organic certification program of the United States. USDA's Agricultural Marketing Service and Foreign Agricultural Service and USTR are committed to working with the Japanese Ministry of Agriculture, Forestry and Fisheries to carry out the terms of the arrangement as described in this cover letter and in Section I of Appendix 1 and the arrangement regarding an Organics Working Group in Appendix 2.

Sincerely,

Anne L. Alonzo
Administrator, Agricultural Marketing Service
U.S. Department of Agriculture

Islam Siddiqui
Chief Agricultural Negotiator
Office of the U.S. Trade Representative

## Appendix 1

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C. Any export to the United States of a Japanese organic product pursuant to this arrangement is expected to be accompanied by an NOP Import Certificate, Form NOP 2110, from a MAFF-accredited or USDA-accredited certification body in Japan that attests to compliance with the terms of this arrangement.

D. The MAFF is expected to notify USDA and USTR in a timely manner of any instances of the following:

1. Changes with respect to the accreditation status of MAFF-accredited certification bodies; and

2. Proposed regulations in Japan that may modify any JAS regulations.

E. Following advance notice from the United States, the MAFF intends to permit USDA officials to conduct on site evaluations in Japan to verify that the relevant regulatory authorities and certification bodies of Japan's organic program are carrying out the requirements of that program. The MAFF should cooperate and assist USDA, to the extent permitted, in carrying out these on-site evaluations, which include visits to offices of relevant regulatory authorities, certification body offices, production facilities, and farms that certification bodies have certified in Japan.

F. MAFF is expected to provide to USDA's Agricultural Marketing Service (AMS) the following documents on an annual basis:

1. A report that contains information regarding the types and quantities of Japanese organic products exported under this arrangement;

2. A report that contains the types of non-compliances identified by the MAFF during any oversight reviews or audits, and steps taken by the MAFF to ensure that non-compliances were corrected; and

3. A list of certification bodies of Japan's organic system accredited to JAS.

## II. U.S. Organic Products to Japan

A. This arrangement covers USDA-National Organic Program (NOP) certified organic plants, including fungi, and organic processed foods of plant origin that are either grown, produced, or where the final processing or packaging occurs in the United States (hereinafter "U.S. product") and non-regulated organic products, such as organic meat, dairy, honey, and alcoholic beverages as specified under Section II.E and the accompanying footnote.

B. For a U.S. product for export to Japan that is produced or handled by a certified organic operation that is certified by a USDA-NOP accredited certifier, the following applies:

1. A completed USDA Form TM-11 is expected to accompany export of the U.S. product to Japan;

2. The U.S. product may display the USDA organic seal if it is compliant with USDA organic labeling requirements; and

3. The U.S. product is expected to be imported by a JAS-certified importer into Japan, where the JAS seal is applied.

C. For a U.S. product for export to Japan that is produced or handled by a USDA-NOP certified organic operation that has a JAS-labeling contract with a JAS-certified importer; and certified by USDA-NOP accredited certifier, the following applies:

1. A completed USDA Form TM-11 is expected to accompany export of the U.S. product to Japan;

2. The JAS seal may be displayed on the U.S. product by a USDA-NOP certified organic operation that has a JAS-labeling contract if the U.S. product is compliant with JAS organic labeling requirements;

3. The U.S. product may display the USDA organic seal in Japan; and

4. The U.S. product is expected to be imported into Japan by a JAS-certified importer.

D. For a U.S. product for export to Japan that is certified to the JAS standard by a MAFF-accredited certifier, the following applies:

1. USDA Form TM-11 is not required for export of the U.S. product to Japan;

2. The U.S. product may display the USDA organic seal if it is compliant with USDA organic labeling requirements; and

3. The U.S. product may display the JAS organic seal if compliant with JAS organic labeling requirements.

E. In addition, a non-regulated organic product, such as organic meat, dairy, and honey, with the exception of alcoholic beverages,[1] for export to Japan, certified by a USDA-NOP accredited certifier would continue to have access to Japan's market under the following conditions:

1. USDA Form TM-11 is not required for export of the non-regulated organic product to Japan;

2. A non-regulated organic product may display the USDA seal if it is compliant with USDA organic labeling requirements; and

3. A non-regulated organic product may be labeled with the word "organic" in the English or Japanese language.

F. USDA or USTR intend to notify the MAFF in a timely manner of any instances of the following:

1. Changes with respect to the accreditation status of USDA-accredited certification bodies; and

2. Proposed U.S. regulations that may modify any of the NOP regulations referred to in this arrangement.

G. Following advance notice from Japan, USDA intends to permit MAFF officials to conduct on site evaluations in the United States to verify that the relevant regulatory authorities and certification bodies of the U.S. organic program are carrying out the requirements of that program. USDA should cooperate and assist MAFF, to the extent permitted, in carrying out these on-site evaluations, which includes visits to offices of relevant regulatory authorities, certification body offices, production facilities, and farms that certification bodies have certified in the United States.

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[1] In addition, alcoholic beverages, including but not limited to wine, beer, and distilled spirits, for export to Japan certified by a USDA-NOP accredited certifier would continue to have access to the Japanese market under the following conditions:

1. If the alcoholic beverage is labeled with the word "organic" in the Japanese language, then a certificate that includes the name of the certified alcoholic beverage, the name and the address of the certified farm or brewery, the number and date of certification, the address and name of the operator, the country of origin, and the address and name of the certifying body should accompany export. The certificate should be issued by a USDA-NOP accredited certifier; and

2. The alcoholic beverage may display the USDA organic seal if it is compliant with USDA organic labeling requirements.

H. USDA and USTR intend to provide to MAFF the following documents on an annual basis:

1. A report that contains information regarding the types and quantities of U.S. product exported under this arrangement;

2. A report that contains the types of non-compliances identified by the USDA during any oversight reviews or audits, and steps taken by USDA to ensure that non-compliances were corrected; and

3. A list of certification bodies of the U.S. organic system accredited to the NOP.

## Appendix 2

1. The United States and Japan intend to work together in an Organics Working Group consisting of representatives of USDA and USTR on behalf of the United States and representatives of MAFF on behalf of Japan.

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3. The objective of the Organics Working Group is to enhance regulatory and standards cooperation between Japan and the United States on issues related to organics, including reviewing the operation of the Organics Working Group and the operation of this arrangement, no later than January 1, 2018.