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# The Question of Non-trade Issues in the WTO from a Developing Country Perspective

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THE QUESTION OF NON-TRADE ISSUES IN THE WTO FROM A DEVELOPING  
COUNTRY PERSPECTIVE

by

CECILIA ALZAMORA VIDAL

(Under the Direction of Gabriel Wilner)

ABSTRACT

Many developed countries have proposed enlarging the mandate of the WTO to protect the environment and labor rights. The idea was fiercely challenged by third-world countries becoming an unsurpassable obstacle in the negotiations. For supporters of a stronger WTO, the TRIPS Agreement is a good example that underscores the need to back up the trading system to enforce standards. This analysis attempts to demonstrate that there are less controversial alternatives to achieve environmental and social goals. The different nature of IPR and labor rights makes the TRIPS Agreement a weak example to prove the goodness of enforcing standards through the WTO. Moreover, certain gaps in this Agreement provide developing countries with enough reasons to believe that a broader WTO scope would serve to disguise protectionist measures. Overarching the WTO members with obligations other than those which led their incorporation would be an encroachment of national sovereignty. However, since trade affects other areas of international law greater coherence is necessary.

INDEX WORDS: International trade, Developing country, The World Trade Organization, Intellectual property rights, Minimum standards, Environmental standards, Environmental exceptions, International law.

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COUNTRY PERSPECTIVE

by

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**DEDICATION**

To My Three Mothers Yolanda, Zoila and Elena

Who unconditionally help me at every moment.

## **ACKNOWLEDGEMENTS**

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## ABBREVIATIONS

CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	Committee on Trade and Environment
ESCOR	Economic and Social Council
EU	European Union
GATT	General Agreement on Tariffs and Trade
ILO	International Labor Organization
IP	Intellectual Property
IPRS	Intellectual Property Rights
ITO	International Trade Organization
MEA	Multilateral Environmental Agreement
OECD	Organization for Economic Cooperation for Economic Cooperation and Development
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNDP	United Nations Development Program
WTO	World Trade Organization

## **CHAPTER 1**

### **INTRODUCTION**

Since its creation in 1994, the World Trade Organization has captured the attention not only of groups related to trade and economy but also of environmental groups, labor unions, human rights activists, and press people, among others. However this organization has been as much applauded as criticized. Many have blamed the WTO of no respecting other areas of international law, such as environmental regulation and the development of labor rights. Although we are firmly in favor of the necessity of greater coherence, this paper intends to analyze the disadvantages of incorporating rules belonging to other fields of international law into the international trading system, such as the so-called social clause.

Thus Chapter II explores the history and the nature of the WTO, whose objectives show that it was conceived as an economic organization, in which members assume commitments and grant concessions for the purpose of attaining development and economic growth. In our opinion, it would be illegitimate to overcharge the members with obligations totally contradictory to those that led them to their incorporation.

Chapter III analyzes the current position of the World Trade Organization with respect to the labor and environmental regimes. Also this section underlines the steps that members have taken within the trading system in order to achieve greater congruence with other areas of law. Meanwhile, Chapter IV deals with the potential implications of enlarging the mandate of the WTO as to regulate non-trade issues. This section also discusses some widely recognized reasons for which the addition of minimum standards for the protection of the environment or labor

rights could be dangerous and be perceived as an encroachment of national sovereignty. Finally, Chapter V presents other alternatives for making international trade more sensible to environmental and social goals without resorting to the application of trade sanctions.

Chapter VI analyzes the reasons for including minimum standards for the protection of intellectual property rights within the world trade arena. In addition, this section examines the gaps and impacts of the Agreement on Trade-Related Aspects of Intellectual Property Rights on developing countries.

The paper concludes that there are other less questionable means for procuring reconciliation between international trade objectives and the goals of international law in other fields than broadening and forcing the original objectives of the World Trade Organization.

**CHAPTER 2**  
**HISTORY, NATURE, AND OBJECTIVES OF THE WORLD TRADE**  
**ORGANIZATION**

Seeking to prevent catastrophic events, such as the World War II, and bearing in mind the decisive role the uncontrolled trade protectionism played in causing the above mentioned war,<sup>1</sup> a group of countries sought to create an international organization pledged to furthering economic development and prevent the introduction of restrictive measures among themselves<sup>2</sup>.

The International Trade Organization (ITO) was conceived, in conjunction with the World Bank and the International Monetary Fund, as a multinational organization that would regulate national practices affecting international trade. Until then, history had not been so kind to the method of bilateral treaties for regulating trade between states and the new multilateral trade arrangements promised to be a better solution in order to get stability and world peace.<sup>3</sup>

In 1946, a Preparatory Committee was set up under the auspices of the United Nations Economic and Social Council<sup>4</sup>, with the purpose of drafting a charter for ITO. Simultaneously, negotiations on different tariff concessions and free trade principles were taking place between country-supporters of the ITO. Thus, in 1947 the General Agreement on Tariffs and Trade

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<sup>1</sup> For a comprehensive analysis of the history of the World Trade Organization [WTO] see John H. Jackson & William J. Davey, *Legal Problems of International Economic Relations* 293 (3d ed. 2000).

<sup>2</sup> *An anatomy of the World Trade Organization 1* (Konstantinos Adamantopoulos ed., 1997).

<sup>3</sup> See Dr. Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* 4 (2002).

<sup>4</sup> United Nations Economic and Social Council (hereinafter ESCOR).

[GATT],<sup>5</sup> one of the most important multilateral treaties for commerce, was signed in Geneva by 23 countries.<sup>6</sup>

In the meantime, the draft charter of the ITO was completed and opened for signatures at Havana, Cuba in 1948. But the Havana Chapter would never enter into force due to the withdrawal of support from the United States, whose first initiatives were directed towards the development of an international trade organization.<sup>7</sup> This fact left the General Agreement on Tariffs and Trade as the central, albeit somewhat handicapped, device for trade negotiations at the international level.

The GATT was never conceived as an organization. Instead, its major purpose was to put into effect the commercial policy provisions of the ITO, an organization that would provide the institutional framework for the conduct of trade relations.<sup>8</sup> The General Agreement, intended to be in force just temporarily, would give contractual force to the negotiated tariff concessions and carry into effect the already initiated process of trade liberalization. It would act additionally as a bridging agreement between the former international economic order and the new rules-based system.<sup>9</sup>

Having been derived from Chapter IV of the Havana Chapter, the GATT would have been easily incorporated into the legal framework of the ITO; however, the ITO was never established. Different tensions between the United States and United Kingdom regarding the content of the charter, the Cold War, and an increasing socialism spread in Western Europe marked its fated history.<sup>10</sup>

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<sup>5</sup> See, generally, the General Agreement on Tariffs and Trade [GATT] Oct. 30, 1947, TIAS No. 1700, 55 U.N.T.S. 188.

<sup>6</sup> See, Konstantinos Adamantopoulos, *supra* note 2, at 1.

<sup>7</sup> See, John H. Jackson, *supra* note 1, at 295.

<sup>8</sup> See, Konstantinos Adamantopoulos, *supra* note 2, at 2.

<sup>9</sup> See, Rorden Wilkinson, *Multilateralism and the World Trade Organization*, 17 (2000).

<sup>10</sup> *Id.* at 16.

The different states had reached a consensus on the necessity for an international commercial policy and the establishment of a permanent body to administer the rules promoting non-discrimination. The ITO would not only have legal authority to interpret the multilaterally agreed rules but also to provide a mechanism for settling disputes. Nonetheless, despite the efforts, the United Kingdom struggled to incorporate clauses promoting full employment, whereas the United States remained reluctant to place the manage of domestic employment policies in the hands of an international body and focused its attention on the issue of tariff reduction.<sup>11</sup>

After the World War II, the enthusiasm decayed and the tendency of the United States Congress shifted to a less liberal attitude on trade matters.<sup>12</sup> For its part, the United Kingdom was undergoing an increasingly difficult economic situation, lowering its support for the ITO. In addition, the bad experience of the League of Nations, for which creation the United States put forth much effort but never joined, discouraged the other participants from ratifying the ITO charter.<sup>13</sup>

Given the circumstances, the GATT would act, by default, as an independent legal body and as the ill-adapted organization where the members would coordinate national policies affecting international trade.<sup>14</sup> The original three-year plan of GATT life was extended once it was clear that the ITO project was likely to fail.<sup>15</sup>

The success of the GATT survival was due to a general perception of the participants, who saw it as a less constraining agreement. In contrast to the ITO charter, the GATT did not

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<sup>11</sup> Id. As Roden Wilkison asserts the disagreements between the UK and US were reflected in the final charter , making it a contradictory document. Later, they proved irreconcilable as each sought to incorporate almost literally their favorite economic doctrines. Finally, the economic climate became markedly different from that envisaged by the wartime planners in addition to serious concerns about the content of the charter led to the US to refuse its ratification.

<sup>12</sup> John H Jackson, *supra* note 1, at 295.

<sup>13</sup> Roden Wilkison, *supra* note 9, at 17-8.

<sup>14</sup> See John H. Jackson, *supra* note 1, at 295.

<sup>15</sup> Wilkison, *supra* note 9, at 20.

formally commit its contracting parties to the maintenance of full employment. This made it more more acceptable for countries such as the United States, which saw their participation in the ITO as a threat to their sovereignty.<sup>16</sup>

Commentators, such as John H. Jackson, argued that GATT application was controversial, flawed and still provisional. Its rules were applied as a binding international treaty, although this treaty structure brought itself other new problems, such as the difficulty of the amendment process, its uncertain relationship to domestic laws, the lack of a unified dispute settlement procedure, questions of membership, and the ill-defined capacities of the contracting parties.<sup>17</sup>

The necessity of an institutional framework that would administer the numerous rules and concessions made by the GATT contracting parties could no longer wait. A small organization was established to operate GATT. Thus, for the ninth session, a draft charter for an Organization for Trade Cooperation was completed, though this charter met the same opposition and destiny as the ITO charter.<sup>18</sup>

Despite the GATT limitations there was not single motion during the 1980's until 1990, when the Canadian Government put forth a formal proposal. However, the negotiators did not reach an agreement until December 1993. In 1994, the charter proposal of the World Trade Organization was submitted for ratification.<sup>19</sup> Hence, the outcome of the eight-year old trade negotiations brought profound reform in the legal structures of the world trading system: the creation of the

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<sup>16</sup> The US refusal, followed by other states, to the ITO ratification; due primarily to the content of its charter, shows clearly the extent to which the majority of the countries were willing to sacrifice part of their sovereignty for their economic development. They saw this organization as part of a multilaterally agreed upon trade system in which ITO would play the main role and work in cooperation with the Bretton Woods institutions, the IMF and the World Bank. This point of view emphasizes the basically economic nature of the ITO since its origins as the WTO immediate predecessor. See Wilkinson, *supra* note 9 at 20-1.

<sup>17</sup> John H. Jackson, *supra* note 1, at 296.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 301.

World Trade Organization. This accomplishment marked the establishment of a well-defined institutional base for international trade.

In contrast to the ITO Charter, the charter of the WTO does not contain substantive rules but, instead, institutional measures. Rules concerning international economic behavior have been incorporated in four annexes, making the system flexible enough since different texts can be added or removed over time in agreement with the evolution of institutions and policies.<sup>20</sup>

Contrary to the General Agreement, the WTO constitutes an international organization with legal personality. It is provided with privileges, immunities, and the ability to develop relations with other subjects of international law.<sup>21</sup> Thus, the original signatories of GATT's so-called contracting parties became members of an organization, which additionally provides a mechanism for accession of new nations.<sup>22</sup>

Although unsuccessful, the ITO was intended to be one of the three organizations conceived during the Second World War with the purpose of coherently conducting the global economy. This attempt was part of a post-First-World-War culture of organization building directed towards the creation of a series of international organizations to manage key aspects of global life.<sup>23</sup> Similarly, the WTO does not elude this practice. It represents the culmination, though not the end, of a political process stretching back to the wartime negotiations seeking to provide an organizational focal point for a liberal trade regime.<sup>24</sup>

True to its objectives, the World Trade Organization not only has directed the world's attention towards other fields of economic activity enlarging the trade regime beyond a

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<sup>20</sup> Id, at 302.

<sup>21</sup> Id, at 303.

<sup>22</sup> Due to the fact that the GATT was not an organization, its participating nations or customs territories were called contracting parties and not members. See Id at 306.

<sup>23</sup> See Wilkinson, *supra* note 9, at 2.

<sup>24</sup> Id.

traditional focus on trade in goods to include trade in services. But it also has, with the exception of labor, moved into the regulation of trade-related aspects, such as intellectual property rights and investment measures.<sup>25</sup>

In sum, the main functions thrust upon the WTO are to administer the Multilateral and Plurilateral Trade Agreements, included in its legal structure, and to further their principal objective, “to liberalize trade”.<sup>26</sup> The failure of the WTO’s predecessors was due essentially, as pointed out above, to the fears of its original supporters, who thought that the rules incorporated in their charters and their participation on such powerful organizations would mean, in one form or another, the excessive constraint of their domestic sovereignty.<sup>27</sup>

The path towards the origin of the World Trade Organization was not free of drawbacks, but the indispensable necessity of such an organization and all its implications for achieving developmental goals made its establishment possible. To borrow the words of professor Hans Van Ginkel, conducting world trade according to multilaterally agreed rules has been a major contributor not only to the enormous expansion of the world economy over the half-century but also to the avoidance of international conflict.<sup>28</sup>

The original participants of GATT and supporters of the creation of the ITO knew about its benefits. Nevertheless, they did not want to compromise their sovereignty more than they deemed strictly necessary for achieving purely economic objectives. Indeed, the reason for which the WTO Charter was ratified was its flexibility, or an elasticity that did not jeopardize the member states’ right to regulate and implement their own policies on domestic issues. Thus, any

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<sup>25</sup> Id.

<sup>26</sup> Konstantinos Adamantopolus, *supra* note 2, at 30.

<sup>27</sup> See Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 21 (2d ed. 1999).

<sup>28</sup> See Hans Van Ginkel, *Preface to the first edition of Gary P. Sampson, The Role of the World Trade Organization in Global Governance* (2001).

change of the current trading system should not alter both the many strengths of the system or the original will of its participants in order to respond to legitimate concerns.

Nowadays, there is a general consensus that the World Trade Organization is only one part of a system of global governance.<sup>29</sup> Nonetheless the new challenging tasks, such as the humanization of the globalization process, call for greater coherence on policy making at the international as much as the national level.

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<sup>29</sup> See, Gary P. Sampson, *supra* note 27 at 15.

## CHAPTER 3

### **THE CURRENT WTO POLICIES ON ENVIRONMENTAL AND LABOR MATTERS**

#### 3.1 Trade and Environment

The issue of the relationship between international trade and environmental protection was almost overlooked in the world trade arena during its early periods.<sup>30</sup> In 1971 a working Group on Environmental Measures and International Trade was established but its labor on the matter left much to be desired.<sup>31</sup> The following are some of the responses of the multilateral trading system to the necessity to conciliate two values “Trade and Environment”, requirement indispensable to the world sustainable development.

##### 3.1.1 The Committee on Trade and Environment

On April 14, 1994 after the Tuna/Dolphin I case,<sup>32</sup> which attracted the world attention and the awareness of the free trade impacts on the environment, the GATT contracting parties established the Committee on Trade and Environment.<sup>33</sup>

The committee’s principal tasks consist in identifying the relationship between trade and environmental measures for promoting sustainable development and making appropriate recommendations on whether modifications of the multilateral trade provisions are needed, as

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<sup>30</sup> See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, [91 A.J.I.L. 268] 268 (1997).

<sup>31</sup> Even though the GATT Council established the above-mentioned Working Group, it did not even meet for over twenty years. The real changes had to wait until the Tuna/Dolphin I case decision. See *Id.*

<sup>32</sup> See GATT Dispute Panel Report: *United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991), [hereinafter *Tuna/Dolphin I*]

<sup>33</sup> Committee on Trade and Environment [hereinafter CTE].

long as, these changes are compatible with the open, equitable and non-discriminatory nature of the system.<sup>34</sup>

Even though the CTE acts for the protection of the environment, it is not an organization created towards that aim. In other words, the committee's task should not exceed the competence of the multilateral trading system, which is limited to trade policies and trade-related aspects of environmental policies that may result in significant trade effects.<sup>35</sup>

In accordance with the Marrakesh decision, the CTE should address the following items<sup>36</sup>:

- The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements.
- The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system.
- The relationship between the provisions of the multilateral trading system and:
  - a. Charges and taxes for environmental purposes.
  - b. Requirements for environmental purposes related to products, including standards and technical regulations, packaging, labelling and recycling.
- The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects.

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<sup>34</sup> See Hakan Nordstrom & Scott Vaughan, Special studies 4 Trade and Environment, 72 (2000).

<sup>35</sup> The World Trade Organization and its Committee on Trade and Environment, available at [http://www.wto.org/english/tratop\\_e/envir\\_e/issu1\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/issu1_e.htm).

<sup>36</sup> Hakan Nordstrom and Scott Vaughan, *supra* note 34 at 72-3.

- The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements.
- The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions.
- The issue of exports of domestically prohibited goods.
- The relevant provisions of the agreement on Trade-Related Aspects of Intellectual Property Rights.
- Services and appropriate arrangements for relations with non-governmental organizations referred to in Article V of the WTO and transparency of documentation.

Unfortunately, the progress on satisfactorily addressing these matters has been much too slow.<sup>37</sup> The CTE has undergone serious difficulties in coming to a decision due to the exceedingly slow decision-making process of the WTO and its organs. This factor hinders the possibility of formulating concrete recommendations for reconciling free trade and environmental protection.

In Singapore, the CTE Report was adopted with the understanding that it would not modify the rights and obligations of any of the WTO members under the WTO Agreements. This condition was created to make it possible for a number of delegations to join the consensus and approve the report.<sup>38</sup>

The Increasing number of WTO members evidences the need to speed up the WTO decision-making process, perhaps, as Thomas Schoenbaum suggests, through the adoption of an executive

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<sup>37</sup> As noted by Thomas J. Schoenbaum, the report, drawn up by the CTE to the Singapore Ministerial Conference held in December 1996, shows very little analysis and evaluation and virtually no recommendations for specific actions. Thomas J. Schoenbaum, *supra* note 30, at 269.

<sup>38</sup> Report of the meetings held on 30 October and 6-8 November 1996, doc. WT/CTE/M/13 (22 November 1996).

committee structure that would be able to set deadlines for CTE recommendations. The same author asserts that even with that structure, the reconciliation of trade and environment questions could be illusory due to the complexity of issues involved and the multiplicity of viewpoints.<sup>39</sup>

### 3.1.2 Environmental exceptions in the WTO Regulation

Unlike the general agreements of the WTO, which cover trade in almost all their areas, there is not an internationally agreed upon legal framework on environment. On that ground, thus far, global problems stemming from the relationship between trade and environment have to be analyzed in light of the WTO commercial regulation. This paper will examine the pertinent environment-related exceptions referred to by Article XX, sections “b” and “g” of the GATT.<sup>40</sup>

Since 1982, there have been several actions brought before various GATT panels against trade-restricted measures justified on environmental grounds. These actions were invariably successful due to a traditional way of interpreting GATT Article XX.<sup>41</sup> The exceedingly strict way to construe the general exceptions allowed the least possible departure from the basic principles of free trade.<sup>42</sup>

However, the establishment of the WTO marked a period of significant changes in the interpretation of Article XX as well as in the refinement of WTO jurisprudence. Since 1994, the GATT nations recognized the World Trade Organization as the governing body for GATT and adopted a dispute settlement system to resolve international trade disputes. The new system has

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<sup>39</sup> Thomas J. Schoenbaum, *supra* note 29 at 270.

<sup>40</sup> GATT, *supra* note 4.

<sup>41</sup> Lorenzo Schiano di Pepe, *The World Trade Organization and the Protection of the Natural Environment: Recent Trends in the Interpretation of GATT Article XX (b) and (g)*, [10 *Transnat'l L. & Contemp. Probs.* 271], 275 (2000).

<sup>42</sup> *Id.*, at 276.

provided a well-defined procedure ensuring more clarity, predictability and adherence to legal principles.<sup>43</sup>

Under the free trade regime administered by the WTO, nations can bring complaints against members applying policies limiting imports or constraining commerce. Usually, complaints cite the non-discrimination principles embodied by Articles I and III of the GATT. Nonetheless, the trade regime exempts nations from their GATT obligations under certain circumstances through the general exceptions of Article XX. Two of these exceptions, paragraphs (b) and (g), are related to environmental concerns and read as follows:

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

As noted by Carrie Wofford, the introductory clause or chapeau of Article XX, qualifies all the exceptions in paragraphs (a) to (j), preventing the abuse of the rules available in Article XX. In other words, the chapeau allows discrimination on the ground of environmental protection, as long as it is not arbitrary, unjustifiable, or used as a cover for disguised restrictions on international trade.<sup>44</sup>

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<sup>43</sup> Carrie Wofford, *A greener future at the WTO: The refinement of the WTO Jurisprudence on Environmental Exceptions to GATT*, [24 Harv. Envtl. L. Rev. 563], 567-68 (2000).

<sup>44</sup> Id. at 566.

On that ground, the party asserting the exception must show that it is legally applicable. This burden, however, has proven very difficult to surmount due to the strictness with which the previous panels used to interpret these provisions. For instance, in several cases the panels found that the measures did not qualify for an environmental exception because they were not consistent with GATT provisions.

Nowadays, it has been recognized that an exception is, by definition, likely to be inconsistent with GATT obligations. The chapeau clearly cautions that nothing in the agreement shall be construed to prevent the adoption of such measures so long as they meet with determined conditions.

Thus, the Appellate Body reversed the lower panel's decision in the *United States Gasoline Standards* case. It criticized the panel finding, which had concluded that the U.S. baseline regulations had not satisfied the test of Article XX (g). The panel, in the Appellate Body's opinion, did not give adequate consideration to the wording of the chapeau and determined that the U.S. baseline regulations met the requirements referred to by paragraph (g) for which the measure could be perfectly justified under this section. However, the measure was declared inconsistent with the non-discrimination portion of the chapeau.<sup>45</sup>

Another notable shift, that opens the door to environmental concerns, is the Appellate Body's more literal interpretation of Article XX. The Appellate Body has abandoned the rigid tests and requirements that previous panels had imposed on environmental policies seeking exception to GATT.

In this line, the Appellate Body has rejected the theory that the word "necessary", which qualified paragraph (b), implies that the policy seeking to be justified must be the least trade

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<sup>45</sup> See Gasoline Appellate Report: United States Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, AB-1996-1 (Apr. 29, 1996) 35 I.L.M. 603 (1996), at 23, 35 I.L.M. at 627. [Hereinafter Gasoline Appellate Report].

restrictive among the measures reasonably available. Prior panels have commonly held this interpretation as such in the *Thailand Cigarettes* case when a ban on imported cigarettes was found unjustifiable under Article XX.<sup>46</sup>

Another example took place in 1991 when a GATT panel invalidated a United States import ban on tuna caught in an unfriendly manner for dolphins. The measure demanded the use of a special device, which impeded dolphins from being casually captured, injured or killed.<sup>47</sup> The panel used the least trade restrictive interpretation, asserting that the U.S. did not exhaust all the options reasonably available to pursue its environmental objectives with the least degree of inconsistency with its GATT obligations.<sup>48</sup> Similarly, in *Canada's Landing Requirements for Salmon and Herring*, the panel concluded that the Canadian government, in demanding that fishermen bring their catches to landing stations to be counted, was violating unnecessarily its GATT duties.<sup>49</sup>

However, in 1996 the Appellate Body overturned the path followed in previous cases when in the *United States Gasoline Standards* case, it discarded the least restrictive requirement and rescued the true meaning of the introductory clause. Contrary to the previous cases, it interpreted the treaty provisions in accordance with its ordinary meaning in the light of its object and purpose according to the widely recognized Vienna Convention.<sup>50</sup> Indeed, the Appellate Body

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<sup>46</sup> See, *Thailand Restrictions on Importation of and Internal Taxes on Cigarettes*, November 7, 1990, GATTB.I.S.D. (37<sup>th</sup> Supp.) 200, para. 74 (1990), 30 ILM 1122 (1991).

<sup>47</sup> *Tuna/Dolphin I*, *Supra* note 32, para. 5.28.

<sup>48</sup> The panel considered that the United States could fulfill its dolphin protection objectives through other methods less restrictive such as the negotiation for international cooperation of the countries involved. *Id.*

<sup>49</sup> See *In Re Canada's Landing Requirements for Salmon and Herring*, 12 I.T.R.D. 1026, (Oct. 16, 1989), paras. 7.15 - 7.18. [Hereinafter *Salmon Panel Report*].

<sup>50</sup> Vienna Convention on the Law of the Treaties, opened for signature May 3, 1969, Article 31 (3), 1155 UNTS 331. The Article reads as follows:

“...In interpreting a treaty there shall be taken into account, together with the context: a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. c) Any relevant rules of international law applicable in the relations between the parties...”

asserted that the fundamental theme of the chapeau is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.<sup>51</sup>

Thomas J. Schoenbaum argues that the word “necessary” should not be taken as related to whether the measure is a necessary departure from the trade agreement. Contrary to that, this word should be construed as directed towards the protection of living things, which is the purpose and object of the measure.<sup>52</sup> He also asserts that any other interpretation of “necessary” is an amendment of the wording of Article XX (b); otherwise, the least restrictive requirement would of been literally included in that paragraph or the chapeau.<sup>53</sup>

In the *United States Gasoline Standards* case, the Appellate Body recognized that the United States had the legitimate right to choose a policy that lowered its costs and reduced its administrative difficulties rather than a less trade restrictive, but more expensive, measure. Thus, the U.S. gasoline standards could be legally imposed so long as the measure met the requirements set out in the chapeau.<sup>54</sup>

Lastly, the least restrictive test, states Professor Schoenbaum, exceedingly limits the sovereign powers of states to take decisions to solve problems and satisfy their constituents. The standard of review in the chapeau mentioned above contrarily provides a more deferential test, allowing some freedom of action to member states.<sup>55</sup>

In the same fashion of the least restrictive requirement, the lower panels imposed another harsh test on environmental policies seeking conformity with Article XX. This time the previous panels demanded that policies had to be “primarily aimed at” the conservation of natural

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<sup>51</sup> Carrie Wofford, *supra* note 43 at 576.

<sup>52</sup> Thomas J. Schoenbaum, *supra* note 30, at 276.

<sup>53</sup> *Id.*

<sup>54</sup> See Wofford, *supra* note 43 at 577.

<sup>55</sup> Schoenbaum, *supra* note 30 at 277.

resources. This interpretation meant that the measure would meet the test provided that it be adopted for conservation reasons alone.<sup>56</sup>

In the *Canada's Landing Requirements for Salmon and Herring* case, the panel used a cost-benefit analysis. From its point of view, the benefits obtained from the landing requirement were disproportionate to the time and effort requested. Thus, once again the panel's opinion seemed to be a departure from the rules of the Vienna Convention and an amendment to the wording of paragraph (g).<sup>57</sup>

In the *Tuna/Dolphin I* case, the panel invalidated the measure applied by the United States on the ground that it constituted a restriction on trade relying on unforeseeable conditions. Despite the fact that a ban on the importation of tuna in a non-dolphin-safe way was obviously a measure related to conservation of such species and therefore met the "relate to" requirement, the panel badly misinterpreted the content of paragraph (g).<sup>58</sup>

In the *Tuna/Dolphin II* case, it was said the measure was primarily aimed at controlling the trade behavior of others since the policy could not be effective in achieving its purpose if other countries did not change their tuna fishing practices.<sup>59</sup> And in the *United States Automobile Taxes* case as well as in the *United States Gasoline standards* case, the reason argued, was that the less favorable treatment did not conserve the resources; consequently, the measure did not comply with the "relating to" test.<sup>60</sup>

Nevertheless, in the latter case the Appellate Body took issue with the panel opinion, pointing out that the less favorable treatment was a consequence and not the measure at stake. The

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<sup>56</sup> Wofford, *supra* note 43 at 578.

<sup>57</sup> See Salmon Panel Report, *supra* note 50, para. 7.04.

<sup>58</sup> See Tuna/Dolphin I, *supra* note 32, [ para. 5.33, 30 I.L.M.] at 1621.

<sup>59</sup> GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) para. 5..27, 30 I.L.M. at 1620. [Hereinafter Tuna /Dolphin II].

<sup>60</sup> See United States Taxes on Automobiles, 33 ILM 1937 (1994) paras. 5.60 - 5.61.

Appellate Body argued that what really matters was whether the measure itself was related to the conservation.<sup>61</sup>

The change in the treatment of this exception can also be noticed in the *Shrimp/Turtle* case.<sup>62</sup> In earlier cases, panels focused on side aspects rather than on the conservation issue, such as the aim of the measure, its area of application, and the manner in which it must be applied, among others.<sup>63</sup> In contrast, in *Shrimp/Turtle* case the Appellate Body firmly took into account the language of paragraph (g) and examined the relationship between the measure seeking justification and the purpose of environmental protection, finding that the U.S. law was not disproportionately wide in scope or reach regarding the policy objective.<sup>64</sup>

It is worthy to note that in *Shrimp/Turtle* as well as in the U.S. Gasoline Standards case, the Appellate Body followed a more environmental and coherent approach with other areas of international law. It observed that the WTO agreement was not to be read in clinical isolation from public international law. Thus, reference was made to CITES and to the United Nations Convention on the Law of the Sea to establish the status of marine turtles.<sup>65</sup>

Another step in the evolution of the Article XX interpretation is the meaning, pointed out by the Appellate Body, of the “in conjunction with” requirement. It was recognized that even though this element requires certain evenhandedness it does not demand identity of treatment. In other words, restrictions on domestic production or consumption are enough to satisfy the test set out in the text of paragraph (g). The impacts or effects of the measure applied externally do not have to be equal to those stemming from its internal application.<sup>66</sup> This interpretation, as well as

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<sup>61</sup> Schoenbaum, *supra* note 30 at 278.

<sup>62</sup> See United States Import Prohibitions on Shrimp and Shrimp Products, Panel’s report May 15, 1998, 37 I.L.M. 832, Appellate Body’s Report Oct. 12, 1998, 38 I.L.M. 118 [hereinafter *Shrimp/Turtle*]

<sup>63</sup> See Lorenzo Schiano di Pepe, *supra* note 41, at 286.

<sup>64</sup> See Wofford, *supra* note 43 at 580.

<sup>65</sup> Schiano di Pepe, *supra* note 41 at 286.

<sup>66</sup> See Schoenbaum, *supra* note 29 at 279.

those described above, clearly lowers the hurdle that environmental policies must meet in seeking justification under Article XX

The extraterritorial application of Article XX constitutes another progressive step in the defense of the adoption of environmental measures. In the beginning, previous panels to *Tuna/Dolphin II* reached the conclusion that these exceptions were applicable only to natural resources and living things within the territory of the country invoking the provision. However, the *Tuna/Dolphin II* panel distinguished between the exercise of jurisdiction of the members and the extraterritorial application of Article XX (b) and (g).

It is internationally recognized that states can extraterritorially exercise jurisdiction only with respect of their own nationals. A state can legitimately control the activities of its own citizens acting outside its territory, and the panel in *Tuna/Dolphin II* admitted this faculty. Thus, the panel ruled that the U.S. government could validly enforce an Article XX (g) restriction extraterritorially but only against their own nationals and vessels.<sup>67</sup>

However, despite that limitation, it was also recognized that under international law, the states have an obligation to prevent damage to the environment even beyond the borders of national jurisdiction; therefore, according to this reasoning, Article XX would have extraterritorial but not extra-jurisdictional application.

As noted by Schiano di Pepe, the depletion of a natural resource, especially of migratory animal species, is a global problem that cannot be solved by measures adopted on a national basis.<sup>68</sup> But, what does this new approach do in response to environmental concerns? The recognition of certain domestic policies, described in paragraphs (a) through (j) as exceptions to substantive obligations established in GATT, notes the general acceptance of their importance

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<sup>67</sup> *Tuna/Dolphin II*, *supra* note 60, para. 5.20.

<sup>68</sup> See Schiano di Pepe, *supra* note 41 at 298.

and legitimacy. Consequently, unilateral measures requiring other WTO members to adopt certain policies as a condition for its market accession can no longer be deemed a priori unjustifiable.

### 3.1.3 The Status of the Multilateral Environmental Agreements

Nowadays, it is more common to resort to multilateral environmental agreements [MEAS] to solve environmental problems. An examination of this area is of relevant importance since some of these agreements contain provisions related to trade, which can potentially conflict with the WTO/GATT system. So far, there exist approximately 200 MEAS, of which 20 contain provisions that can affect trade.<sup>69</sup>

Contrary to international trade agreements, which rarely address environmental matters, MEAS are more predisposed to contain measures involving trade restrictions. This happens due to the fact that the subjects of the MEAS tend to be internationally traded. As a result, certain regulations necessary to protect the environment are, under determined circumstances, indispensable.<sup>70</sup>

Notwithstanding such a necessity, the creation or existence of an MEA involving trade-related provisions implied a potential conflict with basic WTO rules. Not only could there be conflicts between the rights and obligations contained in an MEA and the WTO agreement, but there could also be conflicts of jurisdiction between two institutions or adjudicating bodies claiming the right to deal with a dispute with trade and environment dimensions.<sup>71</sup>

Gabrielle Marceau suggests that certain widely accepted rules of international law can potentially solve the first kind of conflicts, while a conflict of jurisdiction seems to be settled by

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<sup>69</sup> The committee on Trade and Environment, the Trade Legislation, the MEAS and the differences, available at [http://www.wto.org/english/tratop\\_e/envir\\_e/cte01\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/cte01_e.htm)

<sup>70</sup> Schoenbaum, *supra* note 30 at 282.

<sup>71</sup> See Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions-The relationship between the WTO Agreement and MEAs and other Treaties*, Journal of World Trade, December 2001 at 1082.

the WTO dispute settlement mechanism, which claims jurisdiction over all trade-related matters to the exclusion of other fora.<sup>72</sup>

*Lex posterior derogat priori* and *lex specialis derogat generali* are two principles of international law which play a crucial role in solving conflicts between treaty provisions. The earlier is embodied in Article 30 of the Vienna Convention, while the latter, although not mentioned in this convention, has been recognized by the jurisprudence and the doctrine.<sup>73</sup>

When two disputing states are parties to two treaties dealing with the same subject matter and there are not specific treaty provisions, an interpretation seeking a cumulative application of both treaties should be made. However, notwithstanding the possibility that both remain in force, by virtue of the principle of *Lex posterior derogat priori*, preference must be given to the provisions of the treaty that is later in time.<sup>74</sup> On the other hand, when the dispute is between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties will govern their rights and obligations.<sup>75</sup>

As Marceau describes, the rationale of the *Lex specialis derogat generali* principle is that when the rule-makers deal with a subject matter in specific terms they are implicitly expressing their will to set aside the general rule in favor of the specific one. Once again between parties of two treaties dealing with the same subject, unless the parties' intention provides otherwise, both treaties should be simultaneously applied to the greatest extent possible, even if the specific provisions of one supersede the general rules of the other. On the contrary, when a third state that

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<sup>72</sup> Id.

<sup>73</sup> Id. at 1090.

<sup>74</sup> See Vienna Convention, *supra* note 49, art. 30.3.

<sup>75</sup> Id. Article 30.4.

is a party to just one of the treaties is involved, any suspension or abrogation can be made without respecting its rights and obligations embodied in the superseded treaty.<sup>76</sup>

As should be noticed, it is more likely that problems arise between signatory countries of an MEA adopting measures that can affect rights and obligations of nonparties of the environmental treaty in question. A similar problem is caused by an MEA with extraterritorial application.<sup>77</sup> In this regard, some commentators have proposed a solution through the amendment of Article XX. Professor Hudec, for instance, advocates the addition of a provision on MEAS within Article XX of the GATT. This new section would follow the example of Section (h) of the above mentioned article, creating an exception for trade measures imposed pursuant to obligations in environmental agreements.<sup>78</sup>

In this way, Article XX (k) should also set out a method of approval. In the view of Professor Schoenbaum, for an MEA to satisfy the test of Article XX (k), it should meet the following requirements: (1) the agreement should be open to all parties having a legitimate interest in the environmental problem; (2) the restrictions adopted should be reasonably related to the problem addressed; and (3) the treaty should comply with the jurisdictional norms of international law.<sup>79</sup>

### 3.2 Trade and Labor Law

Regarding the law governing the treatment of workers, the WTO does not prescribe any obligation that WTO members have to fulfill. On the contrary, all of the members preserve their right to regulate labor practices and implement into their domestic law the policies and

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<sup>76</sup> See Gabrielle Marceau, *supra* note 72 at 1093

<sup>77</sup> The Committee on Trade and Environment, *supra* note 70.

<sup>78</sup> See Schoenbaum, *supra* note 30, at 284

<sup>79</sup> *Id.* at 284.

conventions they deem necessary.<sup>80</sup> In this context, Article XX, Section (e) becomes the sole provision related to labor and reads as follows:

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

(e) relating to the products of prison labor...

In contrast to the ITO Charter, except for this provision, the articles of GATT did not deal with labor standards. Article 7 of the ITO stated, “The members recognize that unfair labor conditions, particularly in the production for export, create difficulties in international trade, and accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory. However, as mentioned earlier, the ITO never came into being.”<sup>81</sup>

Thus, steps to improve working conditions have been taken, so far, through the voluntary adoption of a series of conventions, most of them under the auspices of the ILO’s wide-ranging coverage of issues in the world of work.<sup>82</sup> The success of the work of the International Labor Organization (ILO) relied largely on persuasion and the ratification and subsequent inclusion of labor standards into national legislation. Their compliance has been driven by ethical considerations.

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<sup>80</sup> Alice Enders, *The Role of the WTO in Minimum Standards*, Challenges to the New World Trade Organization, P. Van Dijck & G. Faber eds., 1996.

<sup>81</sup> T. N. Srinivasan *International Trade and Labor Standards from an Economic Perspective*, *supra* note 79, at 220.

<sup>82</sup> Srinivasan states that the achievements in the labor field have been attained largely through moral force. The author points out the fact that no explicit sanctions, particularly sanctions in the form of withdrawal of rights of access to international markets, were envisaged against countries that either do not ratify any of the conventions or do not in practice comply with those that they have ratified. See *Id.*

Nevertheless, free trade has always been considered a desirable objective. For many, it is not only compatible with social goals but can successfully collaborate with rising standards of living, including working conditions.

## **CHAPTER 4**

### **INTERNATIONAL TRADE AND THE ISSUE OF MINIMUM STANDARDS FOR THE PROTECTION OF THE ENVIRONMENT AND LABOR RIGHTS**

The reasons most commonly arguable in favor of the international unification of labor and environmental standards are: (1) the legitimate concerns for the conservation of the environment; (2) the humanitarian concern in industrialized countries about the poor working conditions or employment of children in developing countries; and (3) the deceptive idea that lower standards in a state, in comparison to its trading partners, confers on it an unfair competitive advantage.

Nonetheless, despite the good intentions of most of the supporters in enlarging the WTO mandate, the formal inclusion of environmental standards, or the so-called social clause, within the WTO scope entails a real danger that can unnecessarily risk the development of poor countries. This section critically analyzes the arguments in favor of establishing a link between labor or environmental standards and trade.

As Pitou Van Dijck and Gerrit Faber note, the inclusion of labor and environmental standards and their corresponding enforcement mechanisms in the WTO constitution is controversial, and its disputability can be summarized in four reasons. First, the universality of labor and environmental standards is questionable. Second, the efficiency and effectiveness of trade-related measures are doubtful. Third, standards and trade-related enforcement mechanisms affect international competitiveness and are capable of being abused for protectionist reasons. Fourth,

the logic of including standards, measures and enforcement mechanisms in WTO rules rather than other multilateral agreements is disputable.<sup>83</sup>

#### 4.1 The Universality of Labor and Environmental Standards

Regarding labor standards, the notion that they are based in human rights and, therefore, should be universally recognized is strongly criticized by many commentators.<sup>84</sup> The demand for the incorporation of a social clause in the WTO regime based on an imprecise idea of universality of labor rights is not legitimate at all. Indeed, differences between countries are justified since there are culture-specific labor standards.

Professor Srinivasan highlights the fact that ILO has not yet reached a consensus among its constituents regarding the identification of a core group of labor rights that can work as minimum standards and be included in a social clause.<sup>85</sup> Thus, it is not surprising that the enforcement of a set of core standards through the threat of trade sanctions on which there is no political consensus is perceived by developing countries as driven by protectionist motives.<sup>86</sup>

Similarly, in the environmental field, scholars such as Verbruggen and Kuik argue that principles of environmental policy should be universal but that standards may differ in determined cases.<sup>87</sup> Thus, differential standards would be allowed to deal with local environmental problems, while harmonization of minimum protection levels would be required in order to deal with international environmental problems.<sup>88</sup>

However, the development of international environmental principles is fairly recent and may not always present binding obligations capable of resolving controversial disputes. One of the

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<sup>83</sup> See Pitou Van dick & Gerrit Faber, *Summary and Conclusions*, *supra* note 79 at 321.

<sup>84</sup> *Id.* at 322.

<sup>85</sup> See T. N. Srinivasan, *supra* Note 79 at 222.

<sup>86</sup> *Id.*

<sup>87</sup> See, Pitou Van dick & Gerrit Faber, *Summary and Conclusions*, *supra* note 79, at 322.

<sup>88</sup> *Id.* at 323.

challenges of the post-Uruguay era will be to develop these international environmental principles and integrate them in trade rules.<sup>89</sup> This merging should be founded on the concept of sustainable development, an objective shared by the trade and environmental regimes, which can be found in the UN Conference on Environment and Development [Rio Declaration]<sup>90</sup> as well as in the preamble of the agreement establishing the WTO.

The best alternative to making trade and environment regulation mutually supportive is the establishment of a set of international agreements on the basis of commonly agreed upon principles and norms which would guarantee the participation of the parties concerned, the implementation of the agreements and their enforcement.<sup>91</sup> Once again, consensus is an indispensable requirement in order to avoid the negative perception of the trade measures as an illegal interference in the national sovereignty and a means to serve protectionist interests.

#### 4.2 Effectiveness of Trade-Related Measures

The second point questions the effectiveness of trade measures. Srinivasan, among other commentators, refers to trade sanctions as an indirect and sometimes ineffective means.<sup>92</sup> He states that it is not inconceivable that a country threatened with trade measures for failure to raise its labor standards might not respond by raising them but instead choosing to forego gains from trade.<sup>93</sup>

Srinivassan argues that rather than introducing minimum labor standards in WTO trade rules, developed countries can resort to more effective and direct measures. For instance, these countries may liberalize their immigration policies, support abolishment or reduction of child

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<sup>89</sup> See Harmen Verbruggen & Onno Kuik, *Environmental Standards in International Trade*, *supra* note 79, at 271.

<sup>90</sup> See UNCED (1992) Article 12 of The Rio Declaration on Environment and Development, Rio de Janeiro: "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."

<sup>91</sup> Verbruggen & Kuik, *supra* note 79 at 274.

<sup>92</sup> T.N. Srinivasan, *supra* note 79 at 223.

<sup>93</sup> *Id.*

labor by means of income transfers to the parents of child workers, or making known their preferences on the market by refraining from consuming goods produced by unacceptable means.<sup>94</sup>

In the same vein, Wouter Tims declines the effectiveness of linking trade with enforcing labor standards. He asserts that trade measures with a focus on exports only against an exploitative country would have limited effects, inducing a change of technology or labor conditions in production earmarked for export and leaving the rest of the industry untouched.<sup>95</sup>

Studies carried out in India regarding child labor reveal that a large number of children are invisible workers who do unpaid work and who find no market outlet, such as work within the household. The number of children who are neither working nor going to school is many times larger than children who are working. Most of these children are girls who are looking after siblings.<sup>96</sup> This confirms the hypothesis that trade sanctions are not the most adequate alternative for raising living or working standards and that their action is limited and one-dimensional.

Moreover, the sanctions that critics of the WTO system advocate not only are inefficient but also can harm developing-country workers, who ironically are rarely consulted about the application of those measures.<sup>97</sup> Thus, the central point of the North-South debate is the developed country preference for unilateral trade restrictions against developing-country imports rather than a more efficient remedy, such as negotiated agreements involving financial and technical assistance.<sup>98</sup>

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<sup>94</sup> Id at 221-22, 228.

<sup>95</sup> See Wouter Tims, *New Standards in World Trade Agreements: Two Bridges Too Far*, *supra* note 79, at 309.

<sup>96</sup> Somesh K Mathur, Child Labour: Some Issues, Correlates and Cures, available at <http://www.cid.harvard.edu/cidtrade/Papers/Mathurlabor.pdf>, 2000.

<sup>97</sup> See Gregory Shaffer, *WTO Blue-Green Blues; The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, [24 Fordham Int'l L.J. 608] 609 (2000).

<sup>98</sup> Id. at 610.

The truth is that development and economic growth have long been the major contributors to rising living standards. This has led commentators, such as economist Paul Krugman, to assert: “[E]very successful example of economic development this past century - every case of a poor nation that worked its way up to a more or less decent, or at least dramatically better, standard of living - has taken place via globalization; that is, by producing for the world market”...<sup>99</sup>

In the same way, with respect to the environment, it is evident that trade sanctions can deal only with one part of the industry. Restricting measures would leave unscathed the sector where other producers in the same branch, who happen not to export, operate. Moreover it also permits other products, to be exported without punishment because the violations take place at an earlier stage in the production process. Thus the environmental objectives would be achieved to a marginal extent only.<sup>100</sup>

Thus, trade-positive measures have proved more effective than questionable trade restrictions; however the latter are more facile to approve than serious but more costly commitments, the *Shrimp/Turtle* case is a good example.<sup>101</sup> The U.S. legislation imposing an import ban on shrimp products was easier to pass than financing serious environmental studies of the local sea turtle problems in developing countries because the ban satisfied the U.S. shrimp industry interests. Positive measures, the most effective way to address the environmental issue without negative consequences for developing-country industry, were laid aside.<sup>102</sup>

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<sup>99</sup> Id. at 618-19.

<sup>100</sup> Wouter Tims, *supra* note 96 at 309.

<sup>101</sup> See *Shrimp/Turtle case*, *supra* note 63.

<sup>102</sup> Gregory Shaffer, *supra* note 98, at 628-29.

To borrow the words of Gregory Shaffer, the result is developed country legislation that triggers controversial disputes brought before the WTO, ensuing challenges to WTO legitimacy, and “largely ineffective” environmental protection.<sup>103</sup>

#### 4.3 The danger of protectionist abuse

The third premise, which questions the future incorporation of minimum standards and trade-related enforcement mechanisms is the high probabilities that imposition of sanctions is abused for protectionist reasons. This view is not strange considering the suspicious behavior of its principal supporters.

In 1999, a high and rising account deficit in the United States and persistent unemployment in the large European Union economies contributed to an anti-free bias and exacerbation of protectionist pressures. Over the years, the idea that trade with low-wage countries was depressing United States incomes attracted more supporters. The general opinion was that the United States must not trade with such countries. While in the European Union the idea of unjust foreign competition was the perfect excuse to disguise dysfunctional domestic policies that produced chronically high unemployment.<sup>104</sup>

The proposal to further empower the WTO by introducing new areas such as investment, competition, government procurement, and labor and environmental standards seems to be an insurmountable disagreement between developed and developing countries.<sup>105</sup> In a context where the United States and the European Union insisted on linking trade with labor and environmental rights while tariff barriers on textiles, apparel, steel, dairy and agricultural products remained stubbornly high, standards were perceived as a new pretext for rich country protectionism.<sup>106</sup>

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<sup>103</sup> Id. at 630.

<sup>104</sup> Dilip K. Das, *Debate at Seattle*, *Journal of world trade*, 182, No. 5 (2000).

<sup>105</sup> See Id at 186-87.

<sup>106</sup> See Id at 187-88.

The suspicion is strongly confirmed in the observation of the conduct of industrialized countries vis-à-vis the fulfillment of environmental or labor commitments. The United States has not only failed to pay US\$1,700,000,000 in United Nations dues, it has successfully pressured the UN to reduce the amount of its allotment, even though it was based on a smaller contribution in terms of the United States per capita wealth than for any other developed country.<sup>107</sup>

Moreover, contrary to Seattle, there has been no mass protest against the United States' refusal to take domestic measures to reduce its contribution to global warming. Ironically, the U.S. is responsible for over one third of all green house emissions. Another example is the willingness of developed countries to join multilateral efforts to solve environmental problems. Under pressure from U.S. pharmaceutical and petroleum interests, the United States refused to ratify the UN Convention on Bio-Diversity or the Kyoto Protocol on Global Warming.<sup>108</sup>

In the labor field, the United States, despite its position as a leading proponent of a social clause in the WTO, has vigorously opposed external scrutiny of its own human rights record through existing mechanisms. Given these inconsistencies between its claims and practice, developing countries are in a reasonable position as to argue that proposed standardization of labor rights is not more than an excuse to protect the jobs of American workers.<sup>109</sup>

Indeed, an empirical study carried out by the Organization of Economic Co-operation and Development (OECD) found little evidence of a linkage between abuse of labor standards and the establishment of a competitive trade advantage. The survey found that any resulting economic benefits were minor and short-lived. Moreover, respect for, or denial of, core labor

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<sup>107</sup> Gregory Shaffer, *supra* note 98 at 626.

<sup>108</sup> *Id.* at 627-28.

<sup>109</sup> Conor Foley, *Global Trade, Labor and Human Rights*, 43 (2000).

standards has never been an important determinant of investment decisions by foreign investors.<sup>110</sup>

Serious violations of core labor rights really occur because the systems of sub-contracting and out-sourcing, by which many multinational companies organize their production, are associated with human rights abuses. According to Kearney, retailers are paying such low prices that the supplying companies are forced to exploit their workforce, pay low wages, insist on long working hours and often include the employment of children. Child labor has everything to do with the European and United States multinational companies, merchandisers, and retailers. They are as guilty, if not more guilty, than local employers who beat, abuse and enslave children as young as four years old.<sup>111</sup>

Given this dichotomy, the fierce opposition of developing countries before any attempt for linking labor or environmental standards to trade, to the extent of rejecting even the incorporation of the issue in the WTO agenda cannot be unexpected. The point of view of these countries can be well expressed by opinions as radical as that of the Malaysian government, when its delegate stated that the WTO's position on a social clause was "[N]o way, no discussions, no continuing work."<sup>112</sup>

#### 4.4 Disputability of the Legitimacy of the Role of the WTO in Setting and Enforcing Standards

The last point is the disputability of the logic of including standards, measures and enforcement mechanisms in WTO rules rather than other multilateral agreements or specialized agencies. Until recently, the WTO did not give an explicit mandate either with respect to labor standards and social development nor to environmental standards. Article XX comprises general exceptions to WTO's rules and principles under special circumstances but does not determine the

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<sup>110</sup> See Id. at 44.

<sup>111</sup> See Id. at 44-6.

<sup>112</sup> See Id at 42.

role that the WTO should play in these areas. Due to that fact, commentators such as Pitou Van Dijck have argued that the WTO should not itself be involved in standard setting.<sup>113</sup>

Srinivasan, among others, maintains that the consensus through specialized agencies such as ILO should be pursued in setting standards. However, the functions of the existing multilateral institutions need to be clearly defined, and policy-making at both the national and international levels calls for greater coherence.<sup>114</sup>

Those who see merit in addressing non-trade issues, such as human rights labor standards, and environmental protection in existing institutions other than the WTO, propose that the United Nations and its specialized agencies be strengthened and provided with the necessary resources to carry out their tasks successfully.<sup>115</sup> In their view the expanding missions of the international economic organizations are resulting in the centralization of power and resources in the WTO, the World Bank and the International Monetary Found in detriment of other specialized institutions and the United Nations system as a whole.<sup>116</sup>

This opinion is founded upon different studies which have provided evidence of the adverse results developing nations have experienced as a result of overlapping functions exercised by economic institutions. Those affected countries are the consumers of these organizations' services.<sup>117</sup>

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<sup>113</sup> Van Dijck & Faber, in *supra* note 84 at 326.

<sup>114</sup> Gary p. Sampson, *supra* note 29 at 15.

<sup>115</sup> Id.

<sup>116</sup> See Daniel D. Bradlow, *Global Trade Issues in the New Millenium: Some Preliminary Thoughts on Developing Countries, NGOS and the Reform of the WTO*, [33 Geo. Wash. Int'l L. Rev. 503] 532 (2001).

<sup>117</sup> Bradlow highlights the result of a series of studies that provide evidence that the involvement of economic organizations such as the WTO in more issues is very troubling to the developing countries. Thus, the United Nations Commission on Human Rights revealed the difficulties the Uruguay Round of negotiations caused for the developing countries. The recent external evaluations of IMF surveillance and its old Enhanced Structural Adjustment Facility (actually the Poverty Reduction and Growth Facility) criticized the rigidity the IMF shows in its negotiations with those member states that use its services. Moreover, a recent press report revealed the disastrous policies for the cashew industry that the Bank was able to impose on Mozambique. See Id.

## **CHAPTER 5**

### **INTELLECTUAL PROPERTY RIGHTS WITHIN THE WTO SCOPE: A GOOD OR BAD EXAMPLE FOR ENLARGING THE WTO MANDATE**

#### **5.1 Reasons for the IPRs Incorporation within the WTO System**

On repeated occasion, the critics of the trading system have asserted that the WTO's treatment of intellectual property rights should be emulated with environmental or social purposes. This criticism is due to the fact that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) mandates harmonized recognition and enforcement of patents, copyright and other intellectual property rights.<sup>118</sup>

Indeed, by virtue of the TRIPS Agreement, a WTO member may impose import restrictions on products and services entirely unrelated to the violated property right in question. All this has led to social activists and environmental groups to argue that there is no valid reason why the WTO should not enforce core labor standards and environmental norms if it can protect Madonna's, Puff Daddy's, and Eli Lilly's royalties.<sup>119</sup>

The starting point of this analysis is the concept of intellectual property [IP] itself. IP can be defined as creations of the human mind, these creations translated into inventive works such as books, paintings, and inventions, including designs and trademarks. Contrary to the nature of labor rights or environmentally inspired rules, IP rules are susceptible to trade and exploitation in order to obtain economic gains. In other words they are objects of commerce.

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<sup>118</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round, April 15, 1994, 33 I.L.M. 1125, Annex 1C [hereinafter TRIPS Agreement].

<sup>119</sup> Gregory Shaffer, *supra* note 98 at 622-23.

Intellectual property rights [IPRS] then are legal rights governing the use of such creations. There is a wide array of rights, such as patents, trade-marks or copyrights, with a different purpose and effect; however, as a general rule, all of them exclude third parties from exploiting protected subject matter, without explicit authorization of the right holder, for a determined time period.<sup>120</sup> This allows IPRS owners to exploit their creations without fear of losing control over their use which, in turn, would presumably help in their dissemination.

The exploitative potential of these creations has produced a big change in the developed countries' economies. These changes has been experienced by the economy of the United States, where, in the early 1980's, began a gradual but fundamental transformation from a manufacturing to an information-based economy.<sup>121</sup> As a result, the need for a set of rules which govern the new trade in information goods while encompassing the protection of new technologies became indispensable.<sup>122</sup>

The problems occur because domestic legislation is addressed towards the pursuance of a balance between the economic interest of the IP right holders and the public interest in having access to new knowledge, while the TRIPS Agreement is focused on the capture of economic gains from the exploitation of Intellectual property. This inconsistency benefits developed countries, which are technology exporters, while developing countries remain in the periphery, bearing the burden of new and costly obligations in exchange of nothing.<sup>123</sup>

Thus, developing countries on the cusp of development, such as Brazil and India, whose markets represent a wide range of possibilities to foreign investors and increasing levels of

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<sup>120</sup> See Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, 1 (2001).

<sup>121</sup> Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, [29 Vand. J. Transnat'l L. 735] 741 (1996).

<sup>122</sup> According to Gana, the TRIPS agreement is all about a reorganization driven by the Western Hemisphere to re-order the basis of economic relationships in order to make it responsive to trade in information goods. She argues that the ease with which these goods are duplicated necessitated a restructuring of rules, which govern international economic conduct. See *Id.*

<sup>123</sup> *Id.* at 740-42.

technology, have become, according to Ruth L. Gana decisive factors for the merging of trade and intellectual property rights.<sup>124</sup>

## 5.2 Gaps in the WTO Regime for IPRs Protection: Does the System Work for Everybody?

The intellectual property rights system has been largely unable to recognize or value non-western forms of knowledge generation like those of the existing indigenous and local communities. This knowledge is unsuitable with the dominant culture's concept of "scientific" and so remains unprotected and free to outside appropriation.<sup>125</sup>

This problem occurs because conditions for protection are also based on culturally determined definitions that respond to developed countries' economic interests. Moreover, terminology and concepts embodied in IPRS legislation favor the appropriation of local knowledge. Definitions of what is wild as opposed to cultivated, what is knowledge, who can possess it, and what can be considered innovations or inventions are exclusively directed to the protection of western forms of knowledge, ignoring the interests of local communities whose knowledge, resources and informal system of knowledge-transmission cannot satisfy the foreign requirements. Therefore, traditional knowledge is confined to the field of public domain.<sup>126</sup>

The area of traditional medicine is a prime example of this problem. Common remedies used today were first developed by healers before there was any contact with industrial societies.<sup>127</sup> For example, the most effective treatment for post-therapeutic neuralgia is hot pepper utilized as a component of modern pain relievers. It was discovered after scientists observed its use by South American indigenous tribes. Pilocarpine, used to treat glaucoma, was first used by

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<sup>124</sup> Id at 740-41.

<sup>125</sup> Naomi Roht-Arriaza, *The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, [17 Mich. J. Int'l L. 919] 920 (1996).

<sup>126</sup> Id at 921.

<sup>127</sup> Id at 922.

indigenous peoples in Brazil. And D-tubocurarine, a skeletal muscle relaxant used in anesthesiology, was derived from a concoction of arrow poison used by Amazonian Indians.<sup>128</sup>

The question that arises is whether a developing country's court can refuse to grant a patent for a particular drug based on its lack of originality if native healers have been using its component in more rudimentary forms. And even more important, can a developing country patentee attempt to patent traditional medicine in a developed country? The obstacles would likely be impossible to overcome since industrialized nations usually treat traditional medicine or native knowledge as a product of nature and, therefore do not satisfy novelty requirements.<sup>129</sup>

Another inconvenience for native communities in the path towards the recognition of their IP rights is the fact that the system recognizes IPRS only as private rights on an individual basis. Collective rights belonging to a community are unsuitable under this conception.<sup>130</sup> Moreover, traditional knowledge is transmitted from one generation to another. This method does not meet the novelty requirement that patent law demands.<sup>131</sup>

The condition of non-obviousness, which requires that an invention not be merely the next logical step after prior knowledge, also deprives the indigenous communities' inventions or discoveries of the necessary characteristics for their patentability. For instance, the prior knowledge of a plant's effect would invalidate any unprocessed indigenous use of the plant.<sup>132</sup> Roht Arriaza notes the irrelevance for indigenous people of showing unexpectedly improved properties, taking into account that local community's discoveries, products and innovations are largely used for local consumption, which responds to their concrete necessities.

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<sup>128</sup> Ruth L. Gana, *supra* note 122 at 751-52.

<sup>129</sup> *Id.* 749-50.

<sup>130</sup> Roht-Arriaza, *supra* note 126, at 936.

<sup>131</sup> *See Id.*

<sup>132</sup> *Id.* at 938.

Patent law, in addition, requires that the subject matter of a patent is not the discovery of some natural phenomenon or a product of nature. This impedes the possibility of patenting a medicinal plant. However, if in using the same plant a scientist isolates the active substance, the product obtained becomes patentable. The knowledge of the substance properties may have been widely known by indigenous communities, but the IP system recognizes neither the discovery of the beneficial uses nor the efforts involved in selecting and preserving the same genetic qualities.<sup>133</sup>

The purposes driving the inventiveness and knowledge-seeking of indigenous people give rise to another dissociation with respect to the IP system. The TRIPS Agreement, the nuclear set of IP rules, makes it evident that the western view of the aims of intellectual investigation bows to economic motives. From the TRIPS perspective, an inventor produces in order to trade the product of her/his invention. To the contrary, inventions of local communities are produced mainly to satisfy their needs. This does not fit within the TRIPS logic.<sup>134</sup>

### 5.3 Impacts of the TRIPS Agreement on Developing Countries

#### 5.3.1 On Development and Technology Access

The role that intellectual property rights has played in development with respect to the third world has been so indecisive that some commentators, such as Penrose, have asserted the view that third-world countries should be exempt from any international patent arrangement. After all, they argue, foreign patents tend more to restrict than to advance their industrial technique. Furthermore, there is the desirability of encouraging the development of these countries.<sup>135</sup>

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<sup>133</sup> Id at 938-39.

<sup>134</sup> The very name of TRIPS, Trade Related Aspects of Intellectual Property Rights, indicates its application to goods potentially involved in international trade, excluding those created for local or national consumption. See Id. at 939-40.

<sup>135</sup> Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, [1987 Duke L.J. 831] 842 (1987).

IPRS are supposedly granted as a means of fostering the production of inventions that in turn promote society's development. The rights concession is a reward granted to the patentee in exchange for a developmental benefit associated with his/her particular invention. The patent system, for instance, is designed to induce such inventions that otherwise would not be available.

In this way, the right holder is the only one capable of exploiting the patented invention, precluding domestic competition. Thus, local enterprises cannot sell the invention within their home country, compete in the export market or even import from countries where the invention may be legally produced.<sup>136</sup>

However, at least for developing countries, the concession of IPRS, in particular for patents, does not necessarily lead to development. In contrast to what happens in developed societies, the majority of patents granted by developing countries are conferred to foreigners. Explanation can be found in the fact that inventions are induced by domestic patent systems of countries with significant markets. It is not surprising, then, that the primary markets of the patent owners are in the markets of developed countries.<sup>137</sup>

There are very few inventions made by foreign enterprises in developing countries on the grounds of the existence of a patent system. Therefore, the most effective way for a developing country to obtain benefits from inventions is to be free of any restraints.<sup>138</sup> The case of Tagament, an ulcer-treating medication, illustrates this assertion. SmithKline-Beckman alleged having lost one-half of the market, or a loss of \$50 million in revenue, due to an Argentinian patent law that excluded pharmaceuticals from patent protection. A generic producer in that country duplicated the unpatented compound and put it in the market competing with Tagamet.

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<sup>136</sup> See *Id.* at 847.

<sup>137</sup> See *Id.* at 844

<sup>138</sup> The existence of a patent system encourages the creation of inventions only in countries with large populations or special needs, namely developing countries with considerable markets. *Id.* at 844-45.

This benefited the development of local enterprises and facilitated resource retention and consumer savings in Argentina.<sup>139</sup>

In sum, it is clear that by protecting non-patent induced inventions, particularly foreign inventions, developing countries neither would attain major benefits nor could assure more development. On the contrary, since a patent holder can utilize the period of monopoly restriction to prevent competition, create dependencies, or make windfall profits at the right moment, such protection can have serious consequences hindering the realization of the rights to health, food, education, and access to information, among others.<sup>140</sup>

Indeed, the TRIPS stipulation that patent protection should cover both imported products as well as those manufactured locally has allowed patent owners to reach the conclusion that there is no need to work on the patented product within the country granting the right. Thus, the company that controls the patent can export the finished product rather than transfer technology or make direct foreign investments in that country.<sup>141</sup>

A WTO dispute between the United States and Brazil, with Brazil seeking to incorporate a so-called local working clause in its national legislation, can better illustrate the issue in question. The Brazilian government wanted to impose the requirement that a product had to be produced locally as a precondition to granting a patent. This requirement was in line with its country's necessity to accede to the new technologies. In the end, the dispute was withdrawn but the issue was left unresolved without any authoritative interpretation and with the constant danger of possible U.S. recourse to the WTO for the enforcement of the TRIPS.<sup>142</sup>

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<sup>139</sup> See *Id.* at 845-46.

<sup>140</sup> U.N. ESCOR Sub-Comm. on the Promotion and Protection of Human Rights, 53<sup>rd</sup> Sess., Agenda Item 4, at 10 para. 20, U.N.Doc. E/CN.4/Sub.2/2001/10, (2001). J. Oloka-Onyango and Deepika Udagama, Progress Report submitted in accordance with Sub-Commission resolution 1999/8 and Commission on Human Rights decision 2000/102, "Globalization and its Impact on the Full Enjoyment of Human Rights".

<sup>141</sup> *Id.* at 11, para. 22.

<sup>142</sup> *Id.* at 11-2.

In other words, different realities make developing countries extremely sensible to the consequences of unlimited IPRS protection. A balance between private and public competing interests must be urgently sought. Oloka-Onyango and Deepika Udagama refer to this issue, pointing out that in contrast to the rest of the Uruguay Round's agenda, negotiations over TRIPS ironically were not about freeing trade. Rather, they were about more protection and tighter control. The concentration of ownership of IPRS in developed countries and powerful non-state actors, has made the prevailing definitions of IPRS take more account of the interests of the producers of knowledge than they do the users.<sup>143</sup>

### 5.3.2 On the Realization of the Right to Health

Distinct actors of international law, in particular the World Trade Organization, have manifested their concerns about the catastrophic consequences that can take place in a health market in which the motive of profit is paramount, especially in poor countries.<sup>144</sup> The United Nations Commission on Human Rights recognized in the resolution 2000/7 that the TRIPS Agreement could severely affect the enjoyment of the right to health in particular through its effect on access to pharmaceuticals.<sup>145</sup>

While the IP legislation has been designed to act as an incentive for the innovation of new and more effective medicines, in practice, the strict implementation of increased standards for intellectual property rights protection may not necessarily improve the observance of the right to health. Indeed, if protection purely serves to the materialization of the interests of those who control the market instead of broader social goals, IPRS can provide a basis for increased cost of medicines, hospitals and other forms of health care.

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<sup>143</sup> See Id. at 10, para. 20.

<sup>144</sup> Id. at 12, para. 23.

<sup>145</sup> U. N. ESCOR Sub-Comm. on the Promotion and Protection of Human Rights, 52<sup>nd</sup> Sess., Agenda Item 4, at 3 para. 2, U.N.Doc. E/CN.4/Sub.2/2001/13, (2001). Report of the High Commissioner, "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights."

IPRS can be abused in a manner that can prevent the distribution of new medicines helpful to poor countries whose population cannot afford the prices charged by patent owners.<sup>146</sup> Moreover, the fact that right holders can obtain major benefits in countries with strong markets has led pharmaceuticals and researchers to deviate their attention away from the so-called “unprofitable diseases.” For instance, between 1975 and 1996 only 11 of the 1,223 new chemical entities in the market were for the treatment of tropical diseases. Afflictions that predominantly affect poor countries’ populations, especially tuberculosis and malaria, still remain relatively under-researched.<sup>147</sup>

The situation can get worse considering the pressure that is being exerted in bilateral contexts to force developing countries to undertake major obligations other than those stipulated in TRIPS. This has become known as “TRIPS plus,” which comprises everything from efforts to extend patent life beyond the 20-year minimum to attempts to limit the use of exceptions such as compulsory licensing in ways not required by TRIPS.<sup>148</sup>

Thus, many developing and less developed countries have resorted to mechanisms such as parallel importation or compulsory licensing to face the aforementioned inconveniences. The former allows for improving access to cheaper drugs by importing the products legally marketed in another country at a cheaper price, irrespective of the consent of the patent holder. Meanwhile, the latter encourages the local production of generic substitutes by issuing a non-exclusive license to a third party produce similar compounds of a patented drug. This authorization is granted by a government authority regardless of the approbation of the patent owner and before the patent expires.

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<sup>146</sup> See *Id.* at 13.

<sup>147</sup> See *Id.* at 12.

<sup>148</sup> See *Id.* at 9.

However, despite the fact that these mechanisms are generally granted on the ground of the public interest or in cases of national emergency, they could eventually be considered as more restrictive than the TRIPS Agreement allows. Their utilization by developing countries increases the possibilities of being challenged before the WTO.

The UNDP Human Development Report shows how the generic production can help developing countries' populations to gain access to treatments. In India, Flucanazole, a costly drug used in the HIV treatment, is generically produced at a price of \$55 for 150 milligrams, a price much too reasonable in comparison with \$697 in Malaysia, \$703 in Indonesia and \$817 in the Philippines.<sup>149</sup> Likewise, a report of the Committee on Economic Social and Cultural Rights noted that the AZT treatment is produced at \$239 in the United States while the price of the generic is \$48 in India.<sup>150</sup>

Only a fraction of the affected people, approximately 400,000, who live mainly in Europe and North America have access to patented anti-retroviral therapy. For the great majority of these people, the production and distribution of generic to a more affordable price is a question of life or death.<sup>151</sup>

The TRIPS Agreement embraces a public health protection provision through which members may exclude from patentability determined inventions necessary to protect public order or morality, including human, animal or plant life or health. Under this provision a country may deny a patent to a particular drug or to all drugs as long as it has a legitimate health reason to

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<sup>149</sup> See, UNDP, Human Development Report 2000, [Oxford University Press, New York] 84 (2000).

<sup>150</sup> See, *Supra* note 144 at 14, para. 44.

<sup>151</sup> James Orbinski, *Health, Equity, and Trade: A Failure in Global Governance*, in *supra* note 27 at 225. The case is critical considering that an estimated 34 million people worldwide have died of AIDS, and 5.4 million are newly infected every year.

prevent their commercialization. Nevertheless, this provision comes along with a prohibition of commercial exploitation of the invention by the country applying the exception.<sup>152</sup>

This prohibition considerably limits the scope of the public health provision. For instance, it does not allow for either a non-patent system without restrictions to produce and sell generic products or a compulsory licensing mechanism which favors the local generic drugs' production and the development of domestic industry. Both of the methods contemplate a future commercial exploitation of generic products.<sup>153</sup>

For similar reasons, the provision in question does not provide support for alternatives which speed generic production or encourage technology transfer, such as shortening patent terms and the local working clause. In applying this provision, third-world countries denying patentability for essential drugs would have only one way to fulfill their health goals: the free distribution of medicines through a state-owned marketing board, quasi-state entity or non-profit manufacturers.<sup>154</sup>

In addition to the requirement examined above, a nation seeking to implement the public health provision will have to surpass another more difficult obstacle: the measure adopted must be deemed necessary. In this matter, relevant precedent, applied by GATT dispute settlement panels in interpreting GATT Article XX, will play a central role due to the similarity in language and purpose. Prior cases could help to avoid the least trade-restrictive alternative test, which constitutes a questioned encroachment on national sovereignty.<sup>155</sup>

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<sup>152</sup> See TRIPS Agreement, *supra* note 119, Article 27, para. 2.

<sup>153</sup> Robert Weissman, *A Long Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, [17 U. Pa. J. Int'l Econ. L. 1069] 1100 (1996).

<sup>154</sup> See *Id.*

<sup>155</sup> Weissman contends that if the Article XX (b) decisions are to stand as a precedent for Article 27, a country seeking to invoke this provision would have to be prepared to argue that there was no means less inconsistent with the TRIPS Agreement available to achieve its public health goals of providing affordable essential drugs to its population. See *Id.* at 1106.

In sum, states should face what seem to be irreconcilable obligations under international law. On one hand, there is the duty to protect human life and dignity, while on the other hand, there is obligation to confer full IPRS protection. Until now, the balance had been tilted on the IPRS side because the respect for the rights comprised in the TRIPS Agreement is backed by the WTO, one of the most powerful international organizations in the world.<sup>156</sup>

### 5.3.3 On the Accessibility to IPRs Systems of Developed Countries and Costs to Developing Countries of Granting IP Protection

The costs to obtain intellectual property protection in a developed country is, for a third-world inventor, as much prohibitively expensive as it is for their governments to grant IP rights to foreigners. For instance, the patent application process in most developed countries is usually very costly and the complexity of legal requirements that an applicant must know and manage makes the way particularly adverse for developing country applicants.<sup>157</sup>

On the other hand, the costs of implementing a patent system that adjusts to the characteristics that the TRIPS Agreement comprises demands a high percentage of a country's resources be employed in covering administrative expenditures. For instance, only the supply of an efficient trained technical personnel for the administration of a patent-granting agency is a need considerably more difficult to afford for developing countries.<sup>158</sup> To borrow the words of Samuel Oddi, in a cost-benefit analysis related to the application of the TRIPS Agreement, the wide range of obstacles that developing have to face, place these countries to the cost side.

However, the TRIPS Agreement offers some flexibility, which could allow underdeveloped societies to benefit from the TRIPS Agreement regime. Their success depends on how the agreement is construed and implemented. Thus, the agreement must be interpreted in such a way

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<sup>156</sup> James Orbinski, *supra* note 150 at 240.

<sup>157</sup> Ruth L. Gana, *supra* note 120 at 758-59.

<sup>158</sup> Samuel Oddi, *supra* note 134 at 846.

as to permit third world countries to develop domestic laws that conform to specific national concerns and to use intellectual property to further development goals.<sup>159</sup>

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<sup>159</sup> Ruth L. Gana, *supra* note 120 at 744.

## **CHAPTER 6**

### **CONCLUSIONS AND REMARKS**

The first initiatives toward the creation of the World Trade Organization were carried out within the context of World War II. The adverse repercussion that strict protectionist policies had on external trade relations led the nations to pursue the establishment of a post-World War system to regulate world trade. They were aware that a multilateral, rules-based system would attain stability and certainty for international transactions.

However, different attempts to constitute what was called the International Trade Organization (ITO) failed after various attempts. The failures were due in great part to the reticence of the leading trading nations that did not want to leave key aspects of domestic life in hands of an international institution. Creating such a powerful organization was seen as a threat to their sovereignty. The ITO never came into existence, but the General Agreement on Tariffs and Trade became the central organization for coordinating national policies affecting international trade.

All troubled history shows the true will of the actual members of the WTO in ratifying its charter. Since the very beginning, nations sought an institution for international trade cooperation which administers the enacted agreements and provides a forum for negotiations and an impartial and specialized dispute settlement system instead of a universal authority governing all aspects of the members life.

The main objective of the members participation in the multilateral system has been to benefit from new and improved concessions in areas that confer upon them a comparative advantage at

the end of the negotiation process.<sup>160</sup> Thus, enlarging the mandate of the WTO to such an extent as to cover aspects belonging to domestic spheres is logically perceived as an illegitimate intrusion and a deviation of original targets.

Nevertheless, although impingement on the states' sovereignty is by no means desired, the WTO regime, as an integral part of an emerging global governance architecture, must be coherent with other areas comprising international law. Until recently, the WTO rules had not compelled its members to follow determined standards in their domestic law with regard to the protection of their own environment or the regulation of labor practices. But the respect of nations' sovereignty doesn't mean that the trade regime should hinder environmental or social goals.

The central WTO agreements contemplate exceptions on environmental and labor grounds, which permit the members to depart from their trading obligations under determined circumstances and conditions. The success of these measures will depend in large part on the interpretation adopted by the dispute settlement bodies. So far, the outcome of the WTO decisions has not favored the application of unilateral measures or the imposition of trade sanctions with environmental or social aims. However, there has been great improvement regarding the construction given to the exceptions of GATT Article XX. This new interpretation could open the doors to measures adopted for social and environmental concerns.

Chapter Three advanced some purposes to allow a larger application of environmental or social-friendly measures. Nevertheless, multilaterally adopted policies are preferred for solving global problems. Within this background, multinational environmental agreements and agreements under the auspices of ILO must be pursued.

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<sup>160</sup> Ruth L. Gana, *Supra* note 120 at 739.

It is clear that supporters of the incorporation of labor and environmental standards and their enforcement through the WTO, mainly developed countries, have not yet succeeded in proving its legitimacy. On the contrary, there is a founded fear that the addition of minimum standards in these matters would be used to satisfy protectionist interests.

The developed countries' lack of involvement in environmental or social aims has contributed in giving founded reasons for third world countries to be suspicious from their good intentions. As argued above, the WTO should coordinate its work with specialized agencies and take into account environmental and social objectives in implementing trade policies but should not constitute itself in the regulating entity in these matters.

One of the most solid arguments against linkage is the existence of other methods of responding to social or environmental concerns. These methods would not entail the use of trade sanctions for which imply less danger and broader acceptance. Scholars as Srinivasan firmly maintain the adequacy of resorting to these less controversial mechanisms. He advances a series of more effective and direct measures to improve working conditions in poor countries without resorting to the incorporation of minimum standards. Mechanisms, such as lifting immigration restrictions in developed countries or taking into account citizens' actions with market's repercussions, can better serve in the task of achieving legitimate goals.<sup>161</sup>

Also, some of the impacts of the Agreement on Trade-Related Aspects of Intellectual Property Rights on third world countries has been examined and the conclusion is clear. This agreement, repeatedly cited as an example of the WTO extending its arms to protect rights other than trade, is not always suitable for other sorts of rights and objectives.

IPRS are rights that, due to their own nature, are susceptible to trade. The subject matter of the rights, namely the innovations, can also be considered objects of commerce that can be

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<sup>161</sup> T.N. Srinivasan, in *Supra* note 79, at 224.

bought and sold in the market. The TRIPS Agreement is primarily concerned with restructuring and setting the trade rules to prepare the market for this new trade in information goods and technology.

It is certainly true that trade can affect other areas, such as labor rights and the environment. However, these areas are not intimately related to commerce like intellectual property. As a result, their incorporation in the trade arena could be antagonistic precisely to those for whom its attempts to help. Indeed, it is worthy to highlight how the addition of IP standards within the WTO regulation still presents some gaps which keeps developing countries in the periphery, preventing them from benefitting from the Agreement.

In sum, there are considerable advantages of being part of the multilateral trading system and freer trade can be beneficial and profitable. Nevertheless, a balance between private and public interest, as well as a more socially-sensible economic regime are indispensable for the system to work the way it purports to work.

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