

# **Free trade and environmental protection are wholly compatible concepts, fully embraced by the new concept of sustainable development**

Andreia Costa Vieira\*

## **Introduction**

The doctrine of free trade has been accepted as a maxim for most of the nations worldwide. For its policies of open markets, growing industrialization and competitiveness, free market may seem a threat to the global environment. Since the General Agreement on Tariffs and Trade (GATT) is one of the most important legal supports of free trade, its provisions have been accused of undermining environmental concerns. Among some of the theories that try to bring the free market policy and environmental protection as “whole compatible concepts” is the theory of sustainable development. However, sustainable does not put an “end” to such a “conflict”. The interpretations given to GATT provisions by the panel and, more recently, by the Appellate Body, appear to confirm that although being compatible concepts, free market and the environment are, in practice, in a sort of dispute.

This essay aims to explain the possible intersection between the doctrine of free market and environmental protections through, inter alia, the policy of sustainable development, without undermining the “not-environmentally friendly” interpretations of the GATT provisions. The first part of the essay will cover the introduction and establishment of the doctrine of free market. The second part will outline some of the main environmentalists’ concerns about free market and the possible linkages between those two concepts, explaining the feasibility of a “sustainable development”. Lastly, the essay considers some of the interpretations given to some of the GATT provisions, assuming that they do confirm a dispute between free trade and the environment.

## **I – Free Trade – promoting competitiveness and economic growth**

Throughout the last centuries of history the world economy has been shaped by two major policies: protectionism and free trade. Protectionism may be defined as the policy used by governments to control their internal and external trade relations in order to protect their markets from foreign competition and permit their economies to grow. On the other hand, free trade is the policy that requires the market to be free from any government intervention.

In the 19th century, David Ricardo advocated in favor of free trade through the doctrine of comparative advantage. According to Ricardo, if a country A could produce a product X in an efficient way and a product Y not so efficiently while country B is not very good in the production of X but is very efficient in the production of Y, countries A and B could simply get specialized in the product they have a comparative advantage in producing and buy the product they do not produce so efficiently. In other words, the global wealth is maximized by free trade when the global resources are used in the most efficient way. Moreover, once the market is not closed by protectionist measures, growing competitiveness is the key for industrial development. Thus, the consumer appears in the end of the chain as the one who can feel one of the greatest benefits of free trade: lower prices.

Between the 17th and the 19th century those who had already developed their

industries, such as France and the UK, were eager to put their goods in the foreign markets and therefore advocated the doctrine of free trade. By contrast, States such as the US and Germany, whose industries were in a developing stage, adopted very strict measures to protect their home industries.

The 20th century started with great changes in economic policies. Countries, such as the US, once industrialized, started to advocate free trade measures and to demand that protectionism should be given up by foreign countries.

On the other hand, industrialized countries that had advocated free trade for a long time, in a post-first war period, when their economies were getting into a deep crises, inverted their trade policies and adopted rigorous protectionist measures to protect their economies from foreign competition.

After the Second World War, the American power was simply overwhelming upon most of the Western European countries' economies. Not just the injection of US capital was a common policy accepted everywhere, but as well the American influence towards its free trade philosophy based on multilateral agreements was received as a maxim by every "helped" nation. The protectionist measures adopted during the inter war period were blamed as one of the causes of the Second World War.

In a conference held in 1944, so called the Bretton Conference, the International Monetary Fund (IMF) was established, with the aim of promoting monetary stability, and the International Bank for Reconstruction and Development (the World Bank) was created - whose aim was collecting money from private sources to finance the development and reconstruction of the countries weakened by the war.

In 1945 the United Nations was formed and in 1946 negotiations towards the creation of an international trade organization (ITO) commenced. The general clauses that became the basis of such organization were drafted into the form of a General Agreement on Tariffs and Trade (the GATT). In fact, the ITO never came into being mainly because the US Congress failed to approve it. Nevertheless, the GATT, which had been drafted with no aim of becoming an institution, became the main "organization" of international trade and remains as such up to the present day.

However, as many of the GATT provisions were set as a temporary agreement, it lacked an institutional structure. In 1994, at the end of the Uruguay Round, a new international trade institution was created: the World Trading System (WTO). In order to bring the WTO about a new set of rules, known as the GATT 1994, was set to replace the GATT 1947, although many of the GATT 1947 provisions were preserved in the GATT 1994.

The role of the GATT may have changed over the years, but its main goal is still to promote free trade. Its free trade speech aims the promotion of competitiveness, economic growth and industrial development, which, in the history of our planet, have not been positive at all. The adoption of such policies have caused drastic consequences to the global environment. Therefore, environmentalists are afraid that in a time where environmental protection should be regarded as a primary goal, the supportive measures of free trade enhance even more the need of damaging the environment in the name of progress and economic development. As one of the GATT's main goals is the promotion of free trade, GATT rules have been accused by environmentalists of being a powerful supporter of the destruction of the global environment.

Next section will deal with the concern about environmental protection and its

linkage to international free trade.

## **II – Environmental Protection v Free Trade – sustainable development?**

The natural resources of our planet have been devastated to sustain economic development. Nobody doubts that the protection of the global environment should be a supreme objective. Assuming that the protection of the environment and the policy of free trade are both ultimate truths, there should exist a point of intersection between them. Since free trade promotes maximization of the global wealth, it provides incentive to use the global natural resources efficiently. However free trade may promote competitiveness “towards less stringent environmental regulation and protection”. The consequence is that industries may migrate to countries that adopt lower environmental standards. Nevertheless, Carbough and Wassink remark that “empirical studies support the view that trade and relocation have not been greatly affected by the cost of environmental compliance for two reasons: (1) environmental compliance costs, in most countries, are a relatively small fraction of production costs; (2) environmental cost differences, especially among industrial countries, appear minor as countries have moved toward the adoption of similar environmental standards”.

On what exactly such empirical studies are based, Carbough and Wassink do not state. Summers, the chief economist of the World Bank, encouraged polluting industries to relocate to less-developed countries once, according to him, therein the costs of pollution are lowest and the demand for a clean environment has a high income elasticity. Such a speech makes clear that the concern about the relocation of polluting industries is not baseless.

Moreover, as free trade improves production and enhances consumption, the environment may be damaged without the consumer or producer being required to pay for it. In other words, “the private costs of production (or consumption) may be lower than the social cost because the cost of the ‘services of Nature’ is not reflected (...) in the prices that producers (or consumers) have to pay for their inputs and for their harmful byproducts”. As Faber points out, if prices are based on these “unpriced services of Nature” comparative advantage ceases to exist, but even so, international free trade would still be advantageous once the level of prosperity is higher than it would be in the absence of international trade “as long as there is government intervention to equalize private and social costs”.

Nowadays a doctrine so called sustainable development has been introduced to explain the feasibility of an intersection between trade and protection of the environment. The term sustainable development was first given prominence in the World Convention Strategy (WCS) published in 1980 by the World Conservation Union (IUCN), with the aim of publicizing the idea of a possible economic development through environment friendly method.

The doctrine of “sustainable development” suggests that qualitative as well as quantitative development can be achieved without undermining the necessity of environmental protection. It encompasses the idea of respect for the environment in order to achieve not just a current development but as well as to preserve the same conditions of life and development to future generations.

In the United Nations Conference on Environment and Development held in Rio

de Janeiro – the Earth Summit 1992 – one of the commitments made by the participating States was that they should cooperate to promote an international system capable of supporting economic growth and sustainable development in order to address the problems of environmental degradation. Such a declaration makes clear that sustainable development has become one of the big concerns of this end of century. Thus, it is important to understand what constitutes a sustainable development policy and the methods used to achieve its goals.

A sustainable development policy considers first that both trade and environmental policies aim economic efficiency. On the one hand, environmental policy aims economic growth, which efficiently consumes fewer natural resources. On the other hand, through the doctrine of comparative advantage, trade policy supports competitive advantage of more efficient producers and suppliers whose benefits to economic growth is, *inter alia*, lower market prices. The intersection between these two different policies is that an efficient use of the global natural resources leads to lower prices and consequently to comparative advantage. At the same time, free trade is enhanced and the global environment is protected, both of which are achieved in an efficient way and respecting the rights of present and future generations.

There are distinct methods to introduce sustainable development policies. Governments can encourage individuals and enterprises to adopt sustainable development measures through the provision of mere information, “appealing to the people’s good will or sense of civic responsibility”. However provision of information may not be sufficient to promote sustainable development, mainly because it lacks enforcement of environmental measures. Other methods then have been used and most of them try to interconnect the protection of the environment with trade measures because of a more efficient enforcement brought from trade policies. Governments have used the law to promote environmental protection. Environmental regulation then can be seen in the fields of pollution control, such as, for example, specifying permitted omission levels of certain pollutants. The basis of enforcement may be the payment of fines or prohibitions or restrictions on trade. Other policy that can be used is that of price incentive, which is designed to ensure that environmentally friendly activities become relatively cheaper while environmentally damaging ones become more expensive. Price incentives may be adopted, *inter alia*, in the form of taxes and subsidies. This policy has proved to be more efficient than regulations in some situations. However, in certain cases, such as the protection of endangered species, price incentives may be of no use at all. Thus either regulation or price incentive will be efficient according to the subject of the policy. For reasons of transparency, taxes are accepted under the GATT subject to the Most Favored Nation principle. However, restrictions and prohibitions on trade and unjustifiable discriminatory regulation are generally outlawed by the GATT. Subsidies are accepted subject to limited circumstances.

One would say that the GATT is jeopardizing the methods used to achieve sustainable development. Nevertheless the GATT seems to accept that free trade is not a supreme and intangible goal. Art. XX (b) and (g), for example, consider that restrictions on trade are justified when necessary to protect human, animal or plant life or health, or when the measure restricting trade is related to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restriction on domestic production or consumption.

Since the GATT sets exceptions permitting the use of those methods that in other circumstances would constitute a breach of its provisions, sustainable development is protected under the GATT, and seems to be efficient in bringing together two different - and as it has been suggested, “almost irreconcilable” – approaches: free trade and environmental protection. At least under international agreements and theoretical discussions, free trade and environmental protection are “wholly compatible concepts”.

### **III - The real conflict**

In order to achieve the goal of free trade, there are five fundamental principles under the GATT. First, the principle of the Most Favored Nation Treatment (MFN), which dictates that once a member country offers trade concessions to another country, it must offer similar concessions to all other GATT members. This principle provides that trade must be conducted on the basis of nondiscrimination. Second, the principle of National Treatment ensures that once an imported product has entered a country it is subject to the same legislation and taxation of a domestic product. Third, protectionism should be banished from the GATT members’ policies, but when it does exist, it should be in the form of tariffs, in order to promote transparency among the member countries regulations.. Fourth, negotiations should be carried out on the basis of a tariff concession principle – that is, if a country wishes to become member of the GATT, it must submit negotiated tariff concession schedules, in form of tariff reductions or tariff elimination. Fifth, reciprocity should be used to balance rights and obligations as well as costs and benefits of the counties that are party to the GATT.

Art. XX of the GATT sets forth general exceptions to these principles as well as to the whole agreement provisions. Paragraphs (b) and (g), although not explicitly related to the protection of the environment, have been used as justification by member countries to adopt environmental policies through restrictions and prohibitions on trade. Regarding such “environmentally friendly” provisions of GATT, Shoenbaum remarks that there is not a fundamental conflict between the need to protect the environment and the GATT rules. He points out that free trade in fact helps the environmentalists’ cause by “1) fostering common standards for environmental protection that must be observed even by certain developing countries that currently ignore environmental concerns; 2) terminating subsidies, particularly in agriculture, that are environmentally destructive, as well as inefficient; and 3) ensuring economic growth, which will create the financial means, particularly for developing countries, to control pollution and protect the environment”.

Shoenbaum may be absolutely right in saying that there is no fundamental conflict between the GATT and environmental protection. Nowhere in the GATT is found any rule prohibiting the use of environmental protection regulations. In fact, the GATT sets exceptions to its fundamental principles to accommodate, inter alia, environmental policies. However, the same cannot be said in the light of the interpretations given to the GATT provisions. GATT rules have been interpreted in a way that make some environmental regulations “unjustifiable and arbitrary” restrictions on trade and, as such, the principle of unrestricted trade has been considered much more important than environmental protection

.

Environmental measures that have impact on international trade are likely to be

issues of discussion in a WTO panel. Many measures taken by some States to protect their environment have been objected by another GATT party and have been ruled against the GATT's obligations. Next section will examine two out of the most important cases that have involved the issue of interpreting environmental protection regulations within the GATT provisions.

#### The Tuna – Dolphin case

The United States based on the Marine Mammal Protection Act (hereafter, MMPA) imposed an embargo on imports of yellowfin tuna, and yellowfin tuna products, harvested with purse-seine nets in the ETP from countries that have a higher rate of dolphin mortality in the catching of tuna than 25% above the US level. Such embargo affected, inter alia, Mexico. Pursuant to a complaint filed by Mexico, the GATT panel found, inter alia, that: a) the internal regulations permitted under Art. III:4 of GATT does not apply to the means of production (such as the harvesting of tuna), but to the product itself – that is, products cannot be distinguished on the basis of the way they are produced to satisfy the rule of like products of Art. III ; b) the treatment the US had given to Mexican tuna was less favorable than US tuna; c) the embargo and the provisions of the MMPA were inconsistent with Art. XI:1. Therefore, the US measures were in breach of GATT rules.

The panel then went on to analyze the exceptions of Art. XX. The panel said the burden of proof should be on the party invoking Art. XX. to justify its measures. In relation to Art. XX (b) the panel found that the extrajurisdictional effect of the US measure could not be accommodated within Art. XX (b), since this provision had been drafted to apply only to domestic life of health, although the provision did not expressly stated so. Moreover, even if Art. XX could be interpreted to apply to extrajurisdictional protection of life and health, the US had not demonstrated the requirement of necessity set out in that provision since it had not exhausted all options available to it to protect dolphins, such as to reach an international agreement. Finally, in interpreting Art. XX (g) the panel found that the US measure was not primarily intended to protect dolphins, and that this was a requirement for applying that provision, as it had been found in an earlier case.

When environmentalists complained about this finding, the focus point was not on whether either Mexico or the US was right. The focus point was on the interpretations given by the panel to the GATT provisions “related” to environmental protection that seemed to cut off any possibility of protecting the environment through the GATT exceptions of Art. XX. First, from the perspective of environmentally sustainable development, the means by which products are produced is as important as the product itself. As Weiss remarks, “without the ability to ban products produced by environmentally unsustainable practices, countries will be lacking an essential measure for achieving environmentally sustainable developments, since the measure is precisely tailored to deterring the unwanted practice”.

Second, in accordance with the panel findings on this case, Art. 12 of the Rio Declaration on Environment and Development provides that no unilateral action should be taken to deal with environmental issues outside the jurisdiction of the importing country. Instead, international consensus should be the basis for addressing such issues.

This principle enhances the protection of the sovereign right of a state to

determine its own environmental policies. However it is difficult to deal with a situation where no international consensus has been reached on a issue that is a serious threat to the global environment. Charnovitz suggests that extrajurisdictional effect should be permitted within the limits set by the GATT itself - that is, in a non-discriminatory and non-protectionist manner.

Third, since sustainable development is the goal, why should the burden of proof be on the party invoking Art. XX to justify its measures? Such a finding clearly sets free trade above any environmental concern. Fourth, it seems that every time an environmental measure threatens a free trade measure, other alternatives to apply the environmental protection goal will be required and the environmental measure itself will not acquire the status of “necessary” to reach its goals.

#### **The Gasoline Case**

This is the first ruling by the WTO Appellate Body. The dispute between US and Venezuela & Brazil was related to the implementation of the US Clean Air Act 1990 (the CAA) and a correlated regulation to control pollution caused by combustion of gasoline. This regulation set two kinds of baselines for establishing purity levels of gasoline in the US that clearly discriminated between the methods to be used by domestic and foreign suppliers. Acting on a complaint filed by Venezuela and Brazil, the panel found that the baseline methods were inconsistent with Art. III:4 and could not be justified under paragraphs (b) and (d) of Art. XX of the GATT because it had not fulfilled the requirement of necessity; nor could it be justified under para. (g) since it was not a measure primarily aimed at the conservation of exhaustible natural resources. The US then appeals to the WTO Appellate Body which concluded that the panel had erred its findings – the measure was indeed related to the conservation of exhaustible natural resources and the term “primarily aimed at” was not treaty language. Nevertheless, the Appellate Body concluded that the US measure could not be accommodated within the chapeau of Art. XX – the baseline rules constitute “unjustifiable discrimination” and a “disguised restriction on international trade”.

#### **Conclusion**

In interpreting the Chapeau of Art. XX, the Appellate Body made more difficult the acceptance of environmental exceptions, saying that a “disguised restriction” within the chapeau was set to avoid abuse or illegitimate use of Art. XX exceptions. As McRae remarks, “the Appellate Body has come...close to saying that all environmental measures that discriminate have to be shown to be ‘necessary’...The Appellate Body may have established a standard that makes it next to impossible for environmental measures ever to meet the requirements of Art. XX”. To say otherwise is almost to say against evidence.

#### **Bibliography**

A. Cassese. International law in a divided world. (Oxford: Clarendon Press) (1st. ed.:

1986), 318.

B. Hoekman and M. Kostecki. *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: Oxford Press) (1st. ed.: 1995), at 12 - 20.

D. Anderson, 'The Green Guide to GATT' ( July, 1992) *Green Magazine*, 38.

United States – Restrictions on Imports of tuna, Report of the GATT Panel (Aug. 16, 1991), reprinted in 30 *ILM* (1991), 1594.

D. Reid, *Sustainable Development: an introductory guide*. (London: Earthscan) (1st. ed.: 1995).

E. B. Weiss, Environment and Trade as partness in sustainable development: a comentary. (1992) 86:4 *American Journal of International Law*, 728, 729.

*Ibid.*, at 729.

G. Faber, International Trade and Environemntal Policies, in A. Blowers and P. Glasbergen (eds.), *Environmental Policy in an International Context: Prospects for Environemntal Change* (1996).

J. N. Jackson, *The World Trading System. Law and Policy of International Economic Relations*. (Massachussets: the MTI Press) (2nd. ed.: 1997), 14.

K. Moltke, Must Environmental Policy be Protectionist? (1993) *NY University Journal of International Law and Politics*, 323, 327.

M. Jacobs. *Sustainable Development: greening the economy*. (London: The Fabian Society) (1st. ed.: 1995), 02.

R. Carbough & D. Wassink. Environmental Standards and International Competitiveness. (1992) 16:1 *World Competiton* 81, 89.

T. J. Shoenbaum, "Free International Trade and Protection of the Environment: Irreconcilable Conflict? (1992) 86:4 *AJIL* 700, 701.

Panel report on "Canada – Measures Affecting Exports of Unprocessed herring and Salmon", adopted 22 March 1988, *BISD* 35S/98, 114, para. 4.6.

Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, *GATT Doc. DS 10/R* (1990) (adopted by GATT Council Nov. 7, 1990).

United States – Standards for Reformulated and conventional Gasoline, Report of the Appellate body of 29 April 1996, *WT/DS2/AB/R*, at 603.

\*L.L.M in International Commercial Law,  
University of Nottingham, Nottingham, UK