Reconciling Trade and Environment: GATT Article XX Exceptions, the Chapeau, and the JPEPA

Pamela Joy L. Alquisada[*]

I. INTRODUCTION

Adam Smith, in his book *The Wealth of Nations* stated, "[i]f a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage."[1] A leading economic thinker of his time, Smith was known to be a great supporter of the free market and trade between and among domestic and international

* '09 J.D. cand., Ateneo de Manila University School of Law. Member, Board of Editors, *Ateneo Law Journal*. The author was the Lead Editor for Vol. 53, Issue No. 3.

Cite as 53 ATENEO L.J. 1027 (2009).

1. DAVID HUNTER, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1234 (3rd ed. 2007) (citing ADAM SMITH, THE WEALTH OF NATIONS (1776)).

producers and buyers.[2] While trade as a practice has been in existence since ancient times,[3] the first expressions of free trade as we know it to be today were made by Smith only in the 1700s.[4] Centuries later, more concrete steps to a freer system of world trade were taken with the participation of numerous countries through the creation of the General Agreements on Tariffs and Trade (GATT).[5] True enough, the world in the last 20th and in this 21st century has witnessed the growing exercise of international transactions to such extent that trade has become extremely important as a perpetuating and facilitating vehicle for international relations and cooperation.[6] As a result of increased global interaction, it was reported that in 2004, "world exports of goods and commercial services topped $8.9 trillion and $2.1 trillion respectively .... This rapid growth has been driven in large part by international efforts to remove barriers to the flow of goods, services and capital."[7] The removal of trade barriers or measures that restrain trade is one of the essential commitments made by sovereign States under the GATT pursuant to the established world trade regime.[8]

It is true that there have been great benefits to the opening up of the international world market and the removal of trade barriers by States. At the same time, however, it cannot be denied that free trade can conflict with

2. Adam Smith, The Concise Encyclopedia of Economics, *available at* http://www.econlib.org/library/Enc/bios/Smith.html (last accessed Feb. 18, 2009).

3. History World, History of Trade, *available at* http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ab72 (last accessed Feb. 22, 2009).

4. A Dictionary of World History, Free trade, *available at* http://www.encyclopedia.com/doc/1O48-freetrade.html (last accessed Feb. 22, 2009).

5. *Id.*

6. HUNTER, ET AL., *supra* note 1, at 1239.

7. *Id.* at 1234.

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. III, XI, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187; Laura Yavitz, *The WTO and the Environment: The Shrimp Case that Created a New World Order*, 16 J. NAT. RESOURCES & ENVTL. L. 203 (2002) (citing Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]); Catherine Jean Archibald, *Forbidden by the WTO? Discrimination Against a Product when its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RESOURCES J. 15 (2008) (citing JOHN JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 22-23 (1998)).

other practices under international law. One topic that dominates this realm of debate is the relationship between trade and the environment.[9]

Many believe that with the liberalization of trade, a conflict may result because the system under the GATT and international environmental law may have competing but admittedly equally important values.[10] A close examination of these two sub-systems of international law, however, will lead one to understand that this is not necessarily the case; although meritorious points exist both for and against free trade in relation to the environment.

This Note aims to delineate the existing trade and environment debate, recognizing the importance of both these regimes of International Law. At the same time, it shall also reconcile both, citing recent decisions of the World Trade Organization (WTO) Appellate Body and recent developments in this particular discussion. Reconciliation of these two seemingly conflicting sub-systems is most certainly possible, but only with resort to certain qualifications. As a practical application, this Note will also endeavor to see if it is possible to apply the foregoing principles, albeit under certain assumptions, to the recently concurred Japan Philippines Economic Partnership Agreement (JPEPA), specifically with regard to its controversial provisions on the trade of wastes.

II. THE TRADE-ENVIRONMENT DEBATE: CONFLICT OR RECONCILIATION?

The GATT was established soon after World War II at the Bretton Woods Conference in New Hampshire.[11] It was created mainly to focus on progressively reducing tariff rates and other trade barriers between party-States, but oddly, it first operated as a treaty that lacked an administrative body.[12] Thereafter, amendments were introduced, the most significant of which were those produced in the Uruguay Round. This Round led to the establishment of "a comprehensive legal and institutional structure" known as the WTO. It was through this structure that the GATT was given a medium to enforce the multilateral trading system as well as to resolve

9. MITSUO MATSUSHITA, ET AL., THE WTO LAW PRACTICE AND POLICY 786 (2d ed. 2006).

10. HUNTER, ET AL., *supra* note 1, at 1239.

11. *Id.* at 1255.

12. *Id.* at 1256.

disputes arising therefrom.[13] Essentially, WTO law — which includes the GATT — is simply another branch of public international law.[14]

International environmental law, meanwhile, is often described as a "'special field', a 'new branch of law' or an emergent 'autonomous special area' of international law."[15] This description notwithstanding, the application of international environmental law must be understood as not limited to public international law, contrary to what some may believe; it can also find equal application in private transactions.[16] It is thus seen as encompassing "the entire corpus of international law, public and private, relevant to environmental issues and problems."[17] Some of the issues that are tackled by this regime of international law include those relating to the atmosphere and outer space, ocean and freshwater resources, and biological resources and hazardous substances and activities.[18]

Having identified both systems, it can be easily seen that there exists a variance between their objectives. It is not always the case, however, that a conflict between these two will occur. It is perfectly possible for them to operate without ever having to clash with each other. Nevertheless, there are some international transactions wherein the application of both norms is inevitable and a question as to which has primary application may arise. Nothing manifests this more than a situation where one State institutes a trade barrier in the name of environmental protection which an affected State can argue as a violation of the tenets of free trade.

A. Protectionism v. Protecting the Environment

The debate regarding trade and environment has long been ongoing and both sides have equally meritorious points. In general, trade specialists support, while environmentalists oppose, the existence of a liberalized and free trade or, at least, reduced barriers to trade.

Those in favor of such a system claim numerous benefits such as:

1. Promotion of Sustainable Development;

---

13. *Id.* at 1257.

14. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW, HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 25 (2003).

15. DANIEL BODANSKY, ET AL., THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 30 (2007).

16. *Id.*

17. BODANSKY, ET AL., *supra* note 15, at 30 (citing PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 2 (2d ed. 2002)).

18. BODANSKY, ET AL., *supra* note 15, at 315-424.

2. Enhancement of Geopolitical Stability — liberalized trade fosters the peaceful settlement of disputes between countries that are interdependent or who have shared interests;

3. Efficient Use of Scarce Resources —

> Free trade can promote the efficient use of the world's scarce resources in three ways. First, liberalized trade encourages nations to specialize in their production of goods and services, thereby ensuring that goods and services are produced most efficiently .... Second, the benefits of specialization may be further enhanced by the 'economies of scale.' As the name suggests, 'economies of scale' allow goods to be more economically valuable when the scale of their production is increased .... By giving producers access to larger markets, international trade allows production to occur at a volume at which economies of scale are maximized. Third, exposing domestic companies to the discipline of international competition forces them to innovate, to upgrade and to anticipate demand .... The resulting efficiencies and cost-savings benefit consumers ...;[19]

4. Wealth Creation — greater wealth is generated by a more liberalized trade and as such, States, developing countries in particular, are taking initial steps in creating not only the political demand but also the capacity for environmental protection; and

5. Dissemination of Information and Technology — free trade acts as a catalyst in the sharing of experiences, policies, and ideas including environmentalism, and thus results in creating the means that can make such concepts into something real.[20]

On the other hand, environmentalists against the liberalization of trade have made arguments that are equally significant and meritorious. These include:

1. Environmentally Destructive Growth — liberalized trade, under the current models of development, has contributed in the increasing of industries which have consequently resulted in the increase of pollution sources;

2. Threats to Domestic Social Preferences — in essence, if a country decides to enter into trade agreements, national policies (which may include environmental priorities) may be compromised in the name of trade. One such example is the

19. HUNTER, ET AL., *supra* note 1, at 1237.

20. *Id.* at 1235-38.

possibility of increasing trade in dangerous products, such as hazardous wastes or toxic chemicals that endanger an importing country's human health and environment;

3. Pressure for Lower Environmental Standards — identified as the "race to the bottom," countries may find themselves relaxing, or worse, failing to strictly impose environmental standards to have a share in the competitive market. Additionally, even if no such race occurs, a "chilling effect" may occur in that new environmental law is, in a sense, put on hold in the name of being able to compete in the trading system;[21]

4. Protecting National Defense and Sovereignty — a liberalized free trading system may result in the increased dependence on outside sources of goods, so much so that these same sources find themselves in a position that it can dictate and influence domestic policy; and

5. Inequitable Distribution of Wealth and Unsustainable Ecological Scale — "continued economic growth is widening the gap between the rich and the poor"[22] and at the current scale, the amount of materials passing through the system cannot be sustained.[23]

Additionally, many see trade as a system that threatens to negatively influence the development and implementation of international environmental law. For example, there are those who perceive that

> [t]he WTO has been a disaster for the environment. Threats — often by industry but with government support — of WTO-illegality are being used to chill environmental innovation and to undermine multilateral environmental agreements. Already, WTO threats and challenges have undermined or threatened to interfere with U.S. Clean Air rules, the U.S. Endangered Species Act, Japan's [sic] Kyoto Protocol (global warming) Treaty implementation, a European toxics and recycling law, U.S. longhorned beetle infestation policy, EU ecolabels, U.S. dolphin protection legislation and an EU humane trapping law.
>
> Things only stand to get worse ....[24]

---

21. HUNTER, ET AL., *supra* note 1, at 1242 (citing Richard Revesz, *Rehabilitating Interstate Competition,* 67 N.Y.U. L. REV 1210, 1210).

22. HUNTER, ET AL., *supra* note 1, at 1243.

23. *Id.* at 1239-43.

24. MATSUSHITA, ET AL., *supra* note 9, at 786 (citing LORI WALLACH AND MICHELLE SFORZA, THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION 27 (1999)).

Again, the current GATT and WTO law generally requires a minimization of barriers to trade. Nevertheless, the system does recognize the existence of exceptions, including those imposed for the protection of the environment as embodied in paragraphs (b) and (g) of Article XX of the GATT.[25] This exception notwithstanding, a conflict was still possible and this was clearly manifested in the *Tuna-Dolphin I* case,[26] decided by the WTO's Dispute Settlement Body in 1991. The case was brought by Mexico against the United States of America (U.S.) as a result of a trade embargo imposed by the U.S. pursuant to a tuna fishing policy considered to be dolphin-friendly (known as the U.S. Marine Mammal Protection Act of 1972).[27] In effect, the U.S. prohibited the entry of yellowfin tuna caught with measures that were not dolphin-safe as well as yellowfin tuna products resulting from such fishing expeditions.[28] In deciding the case, the Dispute Settlement Body struck the measure down, claiming it to be inconsistent with the provisions of the GATT.[29] The U.S. claimed that the measure must be seen as an exception within the auspices of Article XX, paragraphs (b) and (g), but the Dispute Settlement Body did not agree.[30]

From this pronouncement many were outraged and enthusiastic environmentalists began identifying the international trade system as "GATTzilla," a monster determined to destroy the environment.[31] On the

25. GATT, *supra* note 8, art. XX, ¶¶ (b) and (g) state:

> 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 measures:
>
> . . .
>
> (b) necessary to protect human, animal or plant life or health;
>
> . . .
>
> (g) relating to the conservation of the exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

26. Panel Report, *United States — Restrictions on Imports of Tuna*, DS21/R (Sep. 3, 1991), *reprinted in* 30 I.L.M. 1594 (1991).

27. *Id.* at 1598.

28. *Id.* at 1600.

29. *Id.* at 1623.

30. *Id.*

31. Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L. ECON. L. 739, 752 (2001) (citing DANIEL ETSY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 34-36 (1994)) (the GATTzilla advertisement was reproduced in the publication of Daniel Etsy).

other hand, trade experts asserted that the decision would be enough to sway countries to adopt environmental trade restrictions, thus resulting in "green protectionism" that would set the world and its developed free trade system back to the time before the establishment of the GATT.[32]

It can be seen from the foregoing that "[w]hat makes the trade and environment debate so difficult is that trade restrictions can, *at the same time*, both protect the environment and be protectionist."[33] Obviously, this was true in the *Tuna-Dolphin I* case. Additionally, from a political perspective, the debate has often been polarized by both camps. On one hand are the passionate pro-trade parties who foster the position that protectionism must be avoided, and so, notwithstanding the fact that a barrier may be said to protect the environment, it must nevertheless be struck down for hindering trade. On the other hand, environmentalists argue that because of the protection such a measure can afford to the preservation of the environment, it must nevertheless be upheld, at the cost of trade.[34]

B. Understanding the Relationship between the WTO Law and International Environmental Law

As stated, trade and environment are considered to be independent sub-systems of international law, being established clearly for different reasons. However, as both operate within the same legal system, one can see why a conflict may arise between these two. This, however, is not an uncommon occurrence under international law. Although international law is a "normative process" rather than just a set of rules,[35] it can still be identified as a legal system composed of various norms. "The potential for conflict between norms seems inherent in *any* legal system .... As far as norms of *international law* are concerned, there are a number of variables that make conflict an even more inevitable occurrence."[36] As international law knows no centralized legislator or adjudicator,[37] conflict is thus expected in the operation and application of the various rules found therein, a case-in-point being the debate between trade and the environment.

The debate based on the existence of these seemingly conflicting realms of international law must, however, not be deemed as a hindrance to any form of harmonization. On the contrary, it is asserted that despite the

32. Gaines, *supra* note 31, at 752 (citing GATT SECRETARIAT, TRADE AND ENVIRONMENT 6 (1992)).

33. HUNTER, ET AL., *supra* note 1, at 1247 (emphasis supplied).

34. *Id.* at 1248.

35. PAUWELYN, *supra* note 14, at 7 (citing Rosalyn Higgins, *General Course on Public International Law*, 230 RECUEIL DES COURS 23 (1991)).

36. *Id.* at 12 (emphasis supplied).

37. PAUWELYN, *supra* note 14, at 16.

possibility for conflict between these two, recent developments — both in terms of trade law and environmental law — have shown that reconciliation between them is possible.

Because both are subsumed by the system of international law which boasts of a "unitary view," it may be said that either sub-system cannot be deemed as absolutely independent of other rules established and consented to by States; neither should these sub-systems be viewed as mutually exclusive.[38] As such, this understanding "is crucial to avoiding situations where a particular regime of international law, say the WTO, becomes a safe haven, either for States to escape obligations entered into elsewhere ... by insulating their particular interests in a trade-only cocoon."[39] It is true, however, that in the system of international law, parties may contract out specific obligations through treaties which may derogate from established rules.[40] The exception to this is what is known as *jus cogens* norms as defined in Article 53 of the Vienna Convention on the Law of Treaties,[41] which essentially declares that certain international law norms cannot be derogated from.[42] This discussion, however, on the interplay between custom, treaty, and *jus cogens* norms shall be limited to this portion of this Note and only to illustrate that within the system of international law, harmonization is possible.

Focusing now on trade and the environment, a perusal of the WTO law will lead one to the conclusion that the same cannot be applied without reference to other rules of international law. The WTO Appellate Body in

38. PAUWELYN, *supra* note 14, at 38.

39. *Id.*

40. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 37 (2006).

41. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331.

42. Gennady M. Danilenko, *International Jus Cogens: Issues of Law Making*, 2 E.J.I.L. 42 (1991), *available at* http://www.207.57.29.226/journal/Vol2/No1/art3-01.html#topofpage (last accessed Mar. 6, 2009) (citing CH. L. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES 78 (1976)); L.A. ALEZIDIZE, SOME THEORETICAL PROBLEMS OF INTERNATIONAL LAW: PEREMPTORY NORM JUS COGENS 178 (1982); Hanspeter Neuhold, *Volkerrechtlicher Vertrag und 'Drittstaaten'*, 28 BERICHTE DE DEUTSCHEN GESELSCHAFT FUR VOLKERRECHT 51, 63 (1988); G. Gaja, *Jus Cogens Beyond the Vienna Convetion*, 172 R.D.C. 271, 283 (1981); R.S.J. MacDonald, *The Character of the United Nations and the Development of Fundamental Principles of International Law in* CONTEMPORARY PROBLEM OF INTERNATIONAL LAW: ESSAYS IN HONOR OF GEORGE SCHWARZENBERGER, 196, 199 (Bin Cheng & E.D. Brown eds., 1988); MARTIN DIXON & ROBERT MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 42 (2003).

the *U.S.-Gasoline* case[43] declared that the interpretation of WTO law provisions must be done in accord with international law and cannot be made with an isolationist perspective.[44] "Article 3.2 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) explicitly directs panels to 'clarify the existing provisions of [the covered WTO] agreements in accordance with rules of public international law.'"[45] From this alone, it can be seen that the operation of free trade does not necessarily function to exclude existing international environmental obligations.

Additionally, other reasons have been advanced to foster the contention that the enforcement of trade law does not necessarily exclude the application of environmental law, nor does its existence result in destroying the same altogether. First, it is clear that international trade and environmental protection are equally important for man's welfare and, as such, must be seen as "mutually supportive" of each other.[46] In fact, this principle of mutual support is likewise espoused by environmental law itself, as can be seen in Agenda 21[47] which declares that "[a]n open multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment."[48] Second, it must be remembered that the main objective of the WTO law is to administer the agreements that constitute it. It does not have, as a primary objective, the protection of the environment.[49] As such, the WTO law applies only to the extent that environmental measures affect trade and it can hardly be gainsaid that the entire gamut of environmental law falls within this extent.[50] Third, the WTO agreements are bereft of any indication that the pursuit of free trade must take precedence over the protection of the environment.[51] On the contrary, its Preamble has declared that in pursuing the expansion of

43. Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996) [hereinafter *U.S.-Gasoline*].

44. *Id.* at 17; PAUWELYN, *supra* note 14, at 29 (citing Jack Johnson, *Comments on Shrimp/Turtle and the Product/Process Law Generally*, 11 E.J.I.L. 303, 305 (2000)).

45. PAUWELYN, *supra* note 14, at 29.

46. MATSUSHITA, ET AL., *supra* note 9, at 786.

47. Report of the U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26/Vol. I/Annex II (Aug. 12, 1992).

48. *Id.* § 2.19.

49. MATSUSHITA, ET AL., *supra* note 9, at 787.

50. *Id.* (citing WTO Agreement, *supra* note 8, at III:1).

51. MATSUSHITA, ET AL., *supra* note 9, at 787.

production and trade, the same must ensure "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[52]

More importantly, numerous agreements[53] under the WTO law have espoused conditional exceptions in favor of protecting the environment.[54] One conditional exception that has generated extended discussions is that available under Article XX of the GATT. Through its interpretation of Article XX, the WTO has taken some tentative steps towards the creation of a framework that can help resolve whatever conflict that may arise between liberalized trade and the environment, notwithstanding the fact that the protection of the environment is not its primary objective.[55] This, then, is clearly one of the more principled means by which a balance between the objectives of trade and environmental protection may be sought.[56]

III. BALANCING OF INTERESTS: ARTICLE XX OF THE GATT

As mentioned, parties to the GATT and the WTO have agreed to reduce tariff rates, and, generally, not to impose barriers to trade. Essentially, what the whole system tries to avoid is for States to become protectionists of their own industries to the extent that international trading is detrimentally affected. Exceptions to this practice which are deemed to address various issues are, however, acknowledged in the GATT itself. A number of exceptions that pertain to the environment and its protection are found in Article XX, which reads:

> 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

52. *Id.* (citing WTO Agreement, *supra* note 8, Preamble).

53. General Agreement on Trade in Services, Apr. 15, 1994, art. XIV(b), Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 27.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 8.2 (c), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, 1867 U.N.T.S. 187; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, art. 2.2., Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.

54. MATSUSHITA, ET AL., *supra* note 9, at 787.

55. Gaines, *supra* note 31, at 740.

56. *See generally* MATSUSHITA, ET AL., *supra* note 9, at 787.

> construed to prevent the adoption or enforcement by any contracting party measures:
>
> ...
>
> (b) necessary to protect human, animal or plant life or health;
>
> ...
>
> (g) relating to the conservation of the exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[57]

This provision has been considered by the WTO Appellate Body to be an independent provision, capable of being interpreted on its own.[58] This pronouncement is even hoped to have the effect of quelling any claims that such provisions may not be "'read so expansively so as to subvert [other WTO provisions]."[59]

Essentially, a country that may have transgressed a particular GATT-related obligation may put up as a legal defense Article XX because this provision operates as a general exception to GATT itself.[60] It exists to allow concerns regarding national security, health, morals and, of course, the environment, to be accommodated through actions that a State is otherwise constrained to do pursuant to its other obligations under the GATT.[61]

As regards environmental protection in the GATT/WTO system, much focus has been directed towards an interpretation of Article XX;[62] and as a result, a "multi-step framework" has been established and doubts with regard to a proper interpretation and application of the Article and its exceptions have been greatly resolved.[63] In establishing this "mutli-step framework" "[through the reversal of] the *U.S.-Gasoline*, *U.S.-Shrimp/Turtle*, and *EC-Asbestos* panels, the Appellate Body not only corrected errant holdings,[64] but

---

57. GATT, *supra* note 8, art. XX.

58. Steve Charnovitz, *The WTO's Environmental Progress*, 10 J. INT'L ECON. L. 685, 696 (2007) (citing Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 115 (Apr. 5, 2001) [hereinafter *EC-Asbestos*]).

59. Charnovitz, *supra* note 58 (citing *U.S.-Gasoline, supra* note 43, at 18).

60. HUNTER, ET AL., *supra* note 1, at 1275.

61. Archibald, *supra* note 8, at 36 (citing JACKSON, *supra* note 8, at 22-23).

62. Gaines, *supra* note 31, at 740; *see also* MATSUSHITA, ET AL., *supra* note 9, at 797.

63. Charnovitz, *supra* note 58, at 696.

64. *Id.* (citing Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 121 (Nov. 6, 1998) [hereinafter *U.S.-Shrimp/Turtle*] (wherein the Appellate Body criticized the Panel's interpretation of Article XX as having the effect of rendering it "inutile")).

also sent a signal to the public that the era of runaway panels on environmental matters was over."[65]

To fully claim the legal defense of an application of the exceptions, some understanding of the structure of Article XX must first be noted. In determining whether a particular exception applies, it must first be established whether the measure properly falls within the ambit of any of the paragraphs under the said provision and whether there is in fact a genuine interest on the part of a State in preventing the risk involved.[66] Thereafter, it must be determined — keeping in mind the particular exception claimed — whether the measure complies with the requirements of the Article XX Chapeau,[67] otherwise identified as the introductory paragraphs of Article XX.[68]

A. Article XX (b)

Under paragraph (b) of Article XX, a measure may be taken if it is "necessary to protect human, animal, or plant life or health."[69] Two requirements under paragraph (b) must be satisfied before it may be deemed applicable: first, it must be shown that the measure has been taken for purposes of protecting human, animal, or plant life or health; and second, that the measure is "necessary."[70]

The first requirement is simply a policy question. No general standards exist for this and it has been deemed as the easier of the two tests.[71] Greater leeway is thus given to authorities to determine the existence of a need to protect human, animal, and plant life or health. To illustrate, the GATT Panel of the *Thailand-Cigarettes* case[72] decided that an importation ban measure established to help reduce the expenditure and use of cigarettes was well within this policy question.[73] Clearly, therefore, authorities will find it less difficult to establish the existence of this reason and would more likely declare that this test has been satisfied.

65. Charnovitz, *supra* note 58, at 696.

66. *Id.*

67. *Id.* at 697.

68. HUNTER, ET AL., *supra* note 1, at 1284.

69. GATT, *supra* note 8, art. XX, ¶ (b).

70. MATSUSHITA, ET AL., *supra* note 9, at 800.

71. Yavitz, *supra* note 8, at 215.

72. GATT Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, SD10/R-37S/200, ¶ 73 (Nov. 7, 1991) [hereinafter *Thailand-Cigarettes*].

73. Yavitz, *supra* note 8, at 215 (citing *Thailand-Cigarettes*, *supra* note 72).

The second test is not, however, as easily satisfied and is definitely not without its difficulties in understanding. Past interpretations of what was "necessary" were extremely narrow, requiring measures to be that which were the least restrictive in order to call forth the application of paragraph (b).[74] An explanation for the narrow interpretations of the GATT in previous cases was the fact that the WTO's primary goal was the promotion of free trade and, as such, even if its panels were not necessarily working from an anti-environmental protection premise, it was somewhat compelled to decide cases in accord with its objectives.[75] In fact, in the *Tuna-Dolphin II* case,[76] it was held by the Panel that narrow interpretations of the exceptions were a "long-standing practice."[77]

These past interpretations, however, have effectively been cast aside by more recent interpretations made by the Appellate Body regarding the application of Article XX.[78] Given this reversal of decisions,[79] some aspects about the necessity test must be understood. To begin with, the test of necessity is not one that is applied to the policy itself. Instead, the test is satisfied when the question of whether the measure taken is *necessary to realize the policy* is answered in the affirmative.[80] However, in order for a measure to be considered necessary as such, it is believed by some that it must not merely contribute to the policy; rather it must be indispensable to its achievement.[81]

More recent decisions of the Appellate Body, however, laid down a balancing test wherein measures that restrict trade are considered with other factors.[82] It does not necessarily require indispensability. This "balancing test [is one] in which the 'trade restrictiveness' of a measure is weighed along with other factors, as part of a determination whether a WTO-consistent alternative measure which a Member could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available.'"[83] Note that to be "necessary," the government

74. HUNTER, ET AL., *supra* note 1, at 1276.

75. Yavitz, *supra* note 8, at 212-13 (citing WTO Agreement, *supra* note 8).

76. Panel Report, *U.S. — Restrictions on Imports of Tuna,* DS29/R (May 20, 1994), *reprinted in* 33 I.L.M. 839 [hereinafter *U.S.-Tuna/Dolphin II*].

77. Yavitz, *supra* note 8, at 213 (citing *U.S.-Tuna/Dolphin II, supra* note 76, at 894).

78. Charnovitz, *supra* note 58, at 695.

79. *See generally U.S.-Gasoline, supra* note 43; *U.S.-Shrimp/Turtle, supra* note 64; *EC-Asbestos, supra* note 58.

80. Yavitz, *supra* note 8, at 215.

81. Charnovitz, *supra* note 58, at 697.

82. HUNTER, ET AL., *supra* note 1, at 1277; MATSUSHITA, ET AL., *supra* note 9, at 800.

83. HUNTER, ET AL., *supra* note 1, at 1276-77.

defending the measure need not show that it is better than the alternatives, if any.[84] If a complaining country avers that the defendant country should have taken one of the alternatives, the defendant country must try to prove that such alternative was not in fact "reasonably available."[85] To determine whether an alternative is reasonably available, it is suggested that in applying the balancing test, "the extent to which the alternative contributes to the realization of the end pursued" must first be established.[86]

B. Article XX (g)

Another available provision is paragraph (g) of Article XX, which allows resort to trade-restricting measures if it relates "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption."[87] In applying this provision, three issues must be resolved: "*first*, is the measure concerned with the conservation of exhaustible natural resources? *Second*, is the measure on 'relating' to the conservation? And *third*, is the measure made effective in conjunction with restrictions on domestic production or consumption?"[88]

To determine the first issue, the phrase "exhaustible natural resources," or at least the term "resource," must be understood. The Appellate Body has rendered an openhanded interpretation, in that a resource may simply be living or non-living, without needing to be rare or endangered to be considered as "exhaustible."[89] As such, it has been construed to include dolphins, clean air, salmon fisheries, sea turtles, and gasoline.[90] With an interpretation as expansive and encompassing as this, practically any living or

84. Charnovitz, *supra* note 58, at 698.

85. *Id.*

86. *Id.* at 698-89 (citing *EC-Asbestos*, *supra* note 58, ¶ 172) (Charnovitz explains in footnote 71 of his article that "[a]n alternative is not reasonably available if it is merely theoretical in nature, imposes undue burden on the regulating government, or the regulating government is not capable of taking it."); Appellate Body Report, *U.S. — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, ¶ 311 (Apr. 20, 2005).

87. GATT, *supra* note 8, art. XX, ¶ (g).

88. Charnovitz, *supra* note 58, at 699 (emphasis supplied).

89. MATSUSHITA, ET AL., *supra* note 9, at 797 (The Appellate Body rulings indicated here are those made in *U.S.-Gasoline*, *supra* note 43, and *U.S.-Shrimp/Turtle*, *supra* note 64. The authors of the book have indicated that paragraph (g) of Article XX has been advanced by these two cases.).

90. HUNTER, ET AL., *supra* note 1, at 1278; MATSUSHITA, ET AL., *supra* note 9, at 797.

non-living resource, especially those protected by multilateral environmental agreements, would be included.[91]

The second issue, however, is not as easily determined. Nevertheless, it is considerably a less stringent standard than paragraph (b)'s "necessary test," merely calling for the measures to "relate to" the goal.[92] The Appellate Body has in fact determined that it was not a requirement for a measure that is "related to" the conservation of an exhaustible natural resource to be "necessary" for its achievement.[93] The real difficulty is found in determining what it actually means for a measure to "relate to" conservation. "[T]he GATT panels have interpreted 'relating to' to mean that it must be 'primarily aimed at' conservation."[94] Needless to say, this is rather a stringent interpretation of the term since, as pointed out by some writers, the phrases "relating to" and "primarily aimed at" are hardly synonymous to each other.[95] The better interpretation of "relating to" seems to be that espoused in the *Shrimp/Turtle* case wherein the Appellate Body simply determined that a *reasonable* relation between the means and the end was sufficient to satisfy the requirement.[96]

The third and final issue has been given a definitive interpretation by the Appellate Body in the *U.S.-Gasoline* case, to wit:

> [T]he ordinary or natural meaning or 'made effective' when used in connection with a measure — a governmental act or regulation — may be seen to refer to such measure being 'operative,' as 'in force,' or as having 'come into effect.' Similarly, the phrase 'in conjunction with' may be read quite plainly as 'together with' or 'jointly with.'[97]

Simply stated, the third issue simply requires a certain level of fair dealing by the government with respect to domestic and imported products. It is not required that their treatments be absolutely identical;[98] but similar restrictions should be placed on producers and products of the same category.[99]

---

91. MATSUSHITA, ET AL., *supra* note 9, at 797.

92. HUNTER, ET AL., *supra* note 1, at 1278.

93. *Id.* at 1281.

94. MATSUSHITA, ET AL., *supra* note 9, at 797 (citing *U.S.-Gasoline*, *supra* note 43, at 19).

95. MATSUSHITA, ET AL., *supra* note 9, at 797.

96. HUNTER, ET AL., *supra* note 1, at 1282 (citing *U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 141).

97. MATSUSHITA, ET AL., *supra* note 9, at 797 (citing *U.S.-Gasoline*, *supra* note 43, at 20).

98. *Id.* (citing *U.S.-Gasoline*, *supra* note 43, at 21).

99. *See generally U.S.-Shrimp/Turtle*, *supra* note 64, ¶¶ 143-145.

C. The Chapeau

After having delineated the provisions of Article XX that one may resort to for the protection of the environment, the procedure by which a measure may be justified is still not complete. Apart from satisfying the requirements discussed earlier, a government that has imposed a measure must likewise satisfy the requirements of the Article XX Chapeau. Found in the introductory paragraphs of Article XX, the Chapeau essentially prohibits any "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[100] Given that this is the second step, the Chapeau stands as a qualification to the exceptions[101] and, at the same time, ensures against abuse by the parties who resort to it.[102] It serves as a balancing medium by which a member's right to invoke the exceptions, in derogation of its obligations with respect to other members, is mediated and its exercise is made "conditional and limited."[103]

A perusal of the Chapeau shows three standards that qualify the use of any of the exceptions in Article XX. Simply stated, a measure is not to be permitted if it is established as an (1) arbitrary discrimination, (2) unjustifiable discrimination, and (3) a disguised restriction on international trade.[104] While the *U.S.-Gasoline* case analyzed these three together,[105] the Appellate Body of the *U.S.-Shrimp/Turtle* case, however, tackled them separately and individually analyzed their implications.[106]

The concept of "unjustifiable discrimination" is best illustrated by the pronouncement of the Appellate Body in the *U.S.-Turtle/Shrimp* case, to wit:

> [i]t is not acceptable, in international trade relations for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within the Member's territory without taking into consideration different conditions which may occur in the territories of other Members.[107]

---

100. GATT, *supra* note 8, art. XX.

101. MATSUSHITA, ET AL., *supra* note 9, at 801.

102. Yavitz, *supra* note 8, at 218 (citing *U.S.-Gasoline*, *supra* note 43, at 623-633; HUNTER, ET AL., *supra* note 1, at 1248).

103. MATSUSHITA, ET AL., *supra* note 9, at 801 (citing *U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 157).

104. MATSUSHITA, ET AL., *supra* note 9, at 801; Yavitz, *supra* note 8, at 219.

105 Yavitz, *supra* note 8, at 219 (citing *U.S.-Gasoline*, *supra* note 43, at 17).

106. Yavitz, *supra* note 8, at 220.

107. *Id.* at 222 (citing *U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 164).

The Body found that the U.S. measure was unjustifiable because it essentially required countries to duplicate the U.S. program without regard to the various circumstances of each country and because it "applied differing phase-in periods for countries similarly situated and impacted by the import ban."[108] It was also indicated that a facet of "unjustifiable discrimination" is the failure of a country to negotiate with countries affected by the measure.[109] The Appellate Body explained that a "prior recourse to diplomacy as an instrument of environmental protection" must be made[110] and the failure to do so would necessarily resort in discrimination.

As regards the test of "arbitrary discrimination," it was determined to exist as well in the case "because the U.S. authorities, in their certification process for shrimp imports, did not comply with the basic standards of fairness and due process with regard to notice, the gathering of evidence, and the opportunity to be heard."[111] The Appellate Body was quick to note that affected countries also had no means by which to ascertain whether the standards were being applied fairly.[112] From this, it is fair to say that "arbitrary discrimination" exists if the basic requirements of due process are absent in the application of the measure.[113]

Finally, a measure is deemed to be a "disguised restriction on international trade" if it is essentially one that is protectionist in nature.[114] Additionally and interestingly enough, it has also been decided that if the measure is found to be discriminatory under the two preceding qualifications, determining the application of this last test is irrelevant.[115]

IV. THE JAPAN-PHILIPPINES ECONOMIC PARTNERSHIP AGREEMENT

The Japan-Philippines Economic Partnership Agreement (JPEPA),[116] while essentially a free-trade agreement (FTA), must be noted as distinct from the

108. MATSUSHITA, ET AL., *supra* note 9, at 802.

109. *Id.*; Yavitz, *supra* note 8, at 222.

110. Yavitz, *supra* note 8, at 222 (citing *U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 167).

111. MATSUSHITA, ET AL., *supra* note 9, at 802 (citing *U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 182).

112. Yavitz, *supra* note 8, at 224 (citing *U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 181).

113. *Id.*

114. Yavitz, *supra* note 8, at 224.

115. *Id.*; *see also U.S.-Shrimp/Turtle*, *supra* note 64, ¶ 184.

116. Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, Japan-Phil., Sep. 9, 2006, *available at* http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf (last accessed Mar. 6, 2009) [hereinafter JPEPA].

run-of-the-mill FTA by reason of its "sheer comprehensiveness."[117] A perusal of the treaty clearly shows that the same covers provisions regarding services, investment, and human resource development, prompting Philippine officials to dub the agreement as an "FTA plus."[118] The importance of JPEPA cannot be overemphasized. It is reported to be the first of many FTAs to be negotiated by the Philippines, certainly with others to follow.[119] It therefore "set the stage for all future trade and investment agreements to come."[120]

Having discussed the nuances of Article XX and its exceptions, the possibility of its application to the JPEPA may be considered. However, before any considerations in this regard can be made, it is first important to understand what the JPEPA essentially is and to determine the environmental controversies pertinent to the discussion.

A. Brief History and Current Status

The JPEPA was eventually realized in 9 September 2006 in Helsinki, Finland, but the journey towards signing the agreement, however, began in January 2002 when Prime Minister Junichiro Koizumi visited the Philippines and gave the proposal for the constitution of an "[i]nitiative for Japan-ASEAN Comprehensive Economic Partnership" to President Gloria Macapagal-Arroyo, to which she responded with her fullest support.[121] In June 2002, a letter from then Department of Trade and Industry Secretary Manuel Roxas to Japanese Minister of Trade Takeo Hiranuma regarding the establishment of the procedure by which discussions on the Bilateral Agreement may begin was sent for the purposes of exploring the possibility of concluding an Economic Partnership Agreement.[122] Subsequently, a

117. Ronald A. Rodriguez, *Understanding the Political Motivations Behind Japan's Pursuit of an Economic Partnership Agreement (EPA) with the Philippines: Considerations for the Philippines Side* 1 (Philippine Institute for Development Studies (PIDS), PIDS Discussion Paper Series No. 2004-09, Mar. 2004), *available at* http://dirp4.pids.gov.ph/ris/dps/pidsdps0409.pdf (last accessed Mar. 6, 2009).

118. *Id.*

119. Tanya Lat, *The Japan-Philippines Economic Partnership Agreement: An Act of Economic Treason* 6 (Global Union Research Network, Comment Paper, May 23, 2007), *available at* http://www.gurn.info/en/topics/bilateral-and-regional-trade-agreements/bilateral-and-regional-trade-agreements-1/other-comments/ideals-japan-philippines-economic-partnership-agreement-an-act-of-economic-treason-may-07 (last accessed Feb. 22, 2009).

120. *Id.*

121. Joint Coordinating Team Report, Japan-Philippine Economic Partnership Agreement 3 (Dec. 2003), *available at* http://www.mofa.go.jp/region/asia-paci/Philippine /joint0312.pdf (last accessed May 21, 2008).

122. *Id.*

Working Group represented by members of the relevant government agencies of both the Philippines and Japan was established "in October 2002 to study the possible content, substance, and coverage of a mutually beneficial economic partnership between the two countries, including the possibility of forming a free trade agreement."[123]

Following the establishment of the Working Group and the five subsequent meetings held thereafter, it was determined that both countries were ready to "proceed to the next level of discussions."[124] As such, a Joint Coordinating Team was inaugurated in a meeting on 26-27 September 2003. The Team's first meeting included an "exchange of views on various sectors including their sensitivities in both countries."[125] From this point, negotiations continued until that historic day in 2006 when both leaders from Japan and the Philippines finally signed the JPEPA in Helsinki.

B. Environmental Threats Possible under the Treaty

When news broke out that the JPEPA had already been signed, many protested and asked the Senate not to give its concurrence. Many of the contentions made were based on supposed unconstitutionality and the fact that its provisions were simply not beneficial at all in various fields.[126] Arguably, the most controversial of these allegations pertain to the provisions allowing the importation of wastes.

To determine, therefore, whether there is substantial basis for the claims against JPEPA, a look into its provisions is but proper. Of importance is Article 29, paragraph 2, particularly subparagraphs (i), (j), and (k) which recognize the following as "originating goods" capable of being traded:

> (i) articles collected in the Party which can no longer perform their original purpose in the Party nor are capable off being restored or repaired and which are fit only for disposal or for the recovery of parts or raw materials;
>
> (j) scrap and waste derived from manufacturing or processing operations or from consumption in the Party fit only for disposal or the recovery of raw materials;

123. *Id.*

124. *Id.* at 4.

125. *Id.*

126. Rina Jimenez-David, At Large, *Letter on JPEPA*, PHIL. DAILY INQUIRER, Apr. 8, 2008, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/2008 0408-128995/Letter-on-JPEPA (last accessed Mar. 6, 2009).

(k) parts or raw materials recovered in the Party from articles which can no longer perform their original purpose nor capable of being restored or repaired.[127]

A schedule of goods and their corresponding classifications in terms or tariff ratings are annexed to the Agreement. These show that certain hazardous wastes have been included at zero-tariff. Basel Action Network, an international organization specifically constituted to monitor the compliance of States to the Basel Convention[128] compiled the following in its 2006 report, indicating that the following wastes have been reduced to zero tariffs under the JPEPA (note that their corresponding tariff number and the schedule where they may be found is likewise indicated):

WASTE	TARIFF NO.
Ash and residues from the incineration of municipal waste	Annex 1, part 2-schedule 2, tariff no. 26.01, 2610.10 00
Radioactive Residues	Annex 1, part 2-schedule 2, tariff no. 2844. 40 00
Spent Fuel elements of Nuclear Reactors	Annex 1, part 2-schedule 2, tariff no. 2844.50 00
Waste pharmaceuticals	Annex 1, part 2-schedule 2, tariff no. 3006.8
Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes	Annex 1, part 2-schedule 2, tariff no. 38.25
Municipal wastes	Annex 1, part 2-schedule 2, tariff no. 3825.10 00
Clinical wastes	Annex 1, part 2-schedule 2, tariff no. 3825.20 00
Waste organic solvents — halogenated	Annex 1, part 2-schedule 2, tariff no. 3825.41 00
Other wastes from other chemical or allied industries	Annex 1, part 2-schedule 2, tariff no. 3825.50 00
Ash and residues, containing arsenic, mercury, thalium or their mixtures, of a kind used for the extraction of arsenic or for the manufacture of their chemical compounds.	Annex 1, part 2-schedule 2, tariff no. 26.20 (2620.60 00)

As found in the Annexes of JPEPA[129]

127. JPEPA, *supra* note 116, art. 29, ¶ 2 (i), (j), (k).

128. Basel Action Network, About the Basel Action Network - BAN, *available at* http://www.ban.org/main/about_BAN.html (last accessed Feb. 22, 2009).

129. JPEPA, *supra* note 116, Annexes, *available at* http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/index.html (last accessed Mar. 6, 2009).

The threats of hazardous wastes have been downplayed by the Arroyo administration as "red herring," while dismissing the issue altogether.[130] Note, however that "[w]ith the JPEPA in place, legally Japan will be well placed to *insist* that the Philippines '*must approve*' such export."[131] This is made all the more possible when Article 29, vis-à-vis the listed wastes found in the annexed schedules, is considered. As such, the inclusion of waste products as tradable goods and their immediate zero-rating create the market condition that will encourage and facilitate trade in toxic waste between Japan and the Philippines.[132] It is thus clear that the JPEPA will serve to facilitate the movement of such wastes between the two countries because under the agreement, such are presumably allowed.[133]

These provisions notwithstanding, the Senate on 8 October 2008 concurred to the JPEPA, much to the dismay of many.[134] Given its provisions and the products allowed to be traded thereunder, it is clear that certain protections against the ill effects of JPEPA must be placed.

V. ADVANCING TRADE AND THE ENVIRONMENT: IMPORT BANS THAT ARE JUSTIFIED BY THE EXCEPTIONS AND THE CHAPEAU

Chapter 2 of the JPEPA speaks of trade in goods and makes a reference to originating goods[135] of which wastes are now a part of. Also part of the same chapter is Article 23 which makes a specific reference to the application of Article XX of the GATT: "Article XX and XXI of the GATT 1994 respectively, shall apply *mutatis mutandis*."[136] From this, it can be seen that

---

This list is not comprehensive. Nevertheless, this list alone, in comparison to Annex I and III of the Basel Convention, arguably shows that the wastes covered by JPEPA are hazardous by their very nature.

See generally Basel Action Network, *JPEPA as a Step in Japan's Greater Plan to Liberalize Hazardous Waste Trade in Asia* 20-22 (BAN, Report by the BAN, Nov. 4, 2006), *available at* http://www.ban.org/Library/JPEPA_Report_BAN_A4.pdf (last accessed Feb. 18, 2008) (citing Basel Action Network and the Philippine Center for Investigative Journalism, *available at* http://www.bilaterals.org/article.php3?id_article=6323 (last accessed Feb. 22, 2009)).

130. Lat, *supra* note 119, at 1.

131. Basel Action Network, *supra* note 129, at 3 (emphasis supplied).

132. Lat, *supra* note 119, at 2.

133. *Id.*

134. House Solons Slam Senate Ratification of JPEPA, Oct. 9, 2008, GMANEWSTV.COM, *available at* http://www.gmanews.tv/story/126059/House-solons-slam-Senate-ratification-of-Jpepa (last accessed Feb. 22, 2009).

135. JPEPA, *supra* note 116, art. 15 (d).

136. JPEPA, *supra* note 116, art. 23.

the Philippines may then impose import bans for so long as they are pursuant to Article XX of the GATT. In justifying the imposition of a ban, the pronouncements made by the Appellate Bodies in interpreting Article XX may be resorted to, this being clearly allowed under the JPEPA.

In order for the Philippines to impose an import ban, however, it must comply with the qualifications of the GATT exceptions, particularly paragraph (b) of Article XX. The policy goal is the protection of animal and human life and health. This cannot be gainsaid, considering that the entry of hazardous wastes into a country that does not have the means to handle such is clearly detrimental to its inhabitants' welfare. The Philippines already has difficulty managing its own wastes; it will clearly have difficulties in handling the wastes of a developed country. Thus, as far as the first test under Article XX, paragraph (b) is concerned, an import ban would be permissible.

The next test is to show that the imposition of a ban is "necessary" to the achievement of the policy established. To establish necessity, it must be shown by the party imposing the ban that while there are alternatives, these alternatives are not in fact available. Thus, it is recognized that before any ban may be imposed, the Philippines must first attempt to negotiate with Japan in this respect. Considering that both are parties to the Basel Convention,[137] the Philippines may first negotiate with Japan the possibility of signing the Basel Ban Amendment[138] which essentially bans the trade of wastes between a developed country and a developing country.[139] The other portions of the JPEPA will not be affected by this, if ever, and as such a majority of the provisions governing trade will still subsist. If this is not amenable, the Philippines and Japan may still negotiate the possibility of a prior-informed consent system, wherein the Philippines may exercise its right to refuse the entry of any goods that it may not be able to manage properly. A negotiation in this regard becomes necessary for purposes of clarity mainly because no such system can be found in the JPEPA and was in fact not negotiated upon in any other separate agreements. As such, it is necessary that both countries clearly understand that the Philippines can exercise its right to be properly informed of the wastes and to deny the same when it cannot manage disposal in an environmentally sound manner.[140]

137. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention]; *see also* Basel Convention, Parties to the Basel Convention, *available at* http://www.basel.int/ratif/convention.htm (last accessed Feb. 22, 2009).

138. Basel Convention, The Basel Convention Ban Amendment, *available at* http://www.basel.int/pub/baselban.html (last accessed Feb. 22, 2009).

139. *Id.*

140. *See generally* Basel Convention, *supra* note 137, art. 4.

The standards by which waste is denied shall be based on those established through negotiations.

If and when these negotiations fail, the imposition of a ban may become necessary. The treat notwithstanding, the Philippines is permitted to impose an import ban because the JPEPA incorporates Article XX of the GATT in its provisions on trade of goods.[141] Thus, so long as the Philippines can justify the same under the rulings of the Appellate Body, an import ban may be resorted to, in order to protect the Filipino people, without breaching the JPEPA.

Current laws may be insufficient to help deter the trade of wastes. Although the Philippine Constitution specifically recognizes the right of the Filipino people to a healthful ecology,[142] and the JPEPA or some of its provisions may be struck down as unconstitutional, the fact that the Senate has concurred with it has made it a binding obligation under international law. Consequently, the Philippines cannot invoke its internal law as a basis for reneging on its international obligations.[143] As such, even if the Supreme Court declares the JPEPA as unconstitutional, the Philippines may still be compelled by Japan to comply with it. Additionally, despite the fact that the Philippines already has an existing law that essentially bans the importation of wastes,[144] the concurrence by the Senate had the effect of enacting the JPEPA as a law and therefore, since it is later in time, the treaty may be deemed to have effectively repealed the prior law in so far as inconsistent provisions are concerned.

It has been opined that when the trading concerns hazardous wastes, discrimination against these may be justified. Given the nature of these items, the standards against discrimination may be dispensed with and the Philippines may choose whether to accept goods from industrialized countries without violating the provisions of Article XX and the Chapeau. "Even a discriminatory … ban may be upheld under Article XX(b) if the discrimination is not 'arbitrary or unjustifiable … between countries where

---

141. JPEPA, *supra* note 116, art. 23 ("For purposes of this Chapter, Article XX and XXI of the GATT 1994 respectively, shall apply *mutatis mutandis*.").

142. PHIL. CONST., art. II, § 16 ("The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.").

143. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 32, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.").

144. An Act to Control Toxic Substances and Hazardous and Nuclear Wastes Providing Penalties for Violations Thereof, and for Other Purposes [Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990], Republic Act No. 6969 (1990).

the same conditions prevail."[145] As such, the Philippines can accept goods from other developing countries but deny goods from developed nations. That being said, the Philippines may be justified in refusing the entry of wastes altogether even if such refusal be discriminatory against Japan.[146]

All things considered, therefore, the imposition of another trade ban based on an Article XX exception is allowable considering that Article 23 of the JPEPA specifically incorporates such exceptions into itself. As long as the qualifications of the exceptions are met, there is no reason why the Philippines will be considered in breach of the FTA. At the same time, the government will be ensuring its people of protection from possible health problems wrought by the entry of hazardous wastes which it is not equipped to handle. Also, the other trade provisions in the JPEPA will still be protected, along with free trade.

VI. CONCLUSION

Trade and environment are not opposed to one another. Clearly, recent decisions of the Appellate Body have shown that the mutual support both fields have for each other can be achieved so long as it is facilitated. It cannot be denied that protection of the environment is a growing concern and all fields under the law are to be affected by it. The trading system is not immune to this and practitioners must now take environmental law into consideration. Free trade, as it is today, has come a long way from that which Adam Smith may have envisioned in the 18th century. Along with its progression and development, however, certain issues must be addressed. Contrary to what some may believe, trade may facilitate rather than hinder environmental protection and it is the responsibility of States, practitioners, and jurists alike, to ensure that such facilitation is carried out.

145. MATSUSHITA, *supra* note 9, at 822

146. *See* MATSUSHITA, *supra* note 9, at 822.