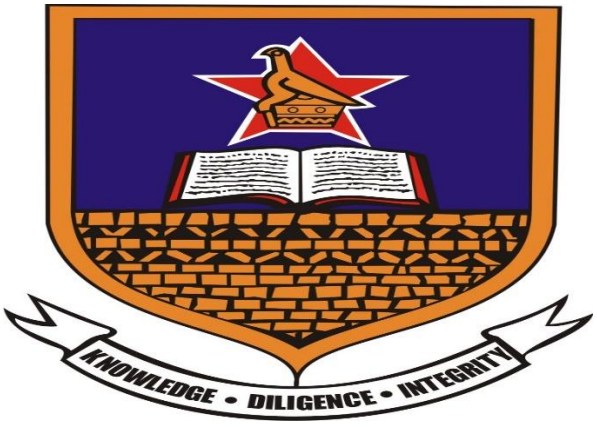

DISSERTATION

Submitted in partial fulfilment of the Masters of Laws (LLM) at the University of Zimbabwe in 2020

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TOPIC

TRADE AND THE ENVIRONMENT: ENVIRONMENTAL ASSESSMENTS OF REGIONAL TRADE AGREEMENTS AND POLICIES FOR ZIMBABWE

DECLARATION

I, Monalisa Chirwa, hereby declare that this dissertation is my original work, and was done in accordance with the rules and regulations of the University of Zimbabwe for the Master of Laws (LLM) degree. This dissertation has never been submitted to any other university or institution.

This declaration is made on this 17th day of August 2020

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DEDICATION

I dedicate this dissertation to my Lord and Saviour Jesus Christ, for it through Him that this work has been possible, being confident of this very thing, that he which hath begun a good work in me, will perform it until the day of Jesus Christ.

To my husband, mother, sister and brothers, this dissertation is also dedicated to you. For all your support, prayers and encouragement. I will forever be grateful for your presence in my life.

To my classmates, colleagues and friends, may this work contribute to the causes you so much desire in our justice system.

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I am grateful to my Lord and saviour Jesus Christ for guiding me through this whole programme. I would also like to express my gratitude to my supervisor Mrs. Dorothy Mushayavanhu, for guiding and supporting me in writing this dissertation, her constructive feedback and valuable insight saw this dissertation through to completion. To my husband Tafadzwa, even though you had no idea what a dissertation is, I am grateful to the support you still gave me, praying with me and encouraging me until it was complete. To my mom, I would like to say a huge thank you. I would never have been able to embark on this journey without your persistent support and prayers. To my siblings, Herbert and Joana your prayers and overall support also pushed me even when I felt like giving up. To my unborn child, thank you for not making me sick to the extent of failing to complete this dissertation. Your constant kicking and cramps, gave me a reason to keep going even though the back pains were a bit much at times, I still felt you were supporting me through it all, I love you.

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TABLE OF CONTENTS

CHAPTER 4

ENVIRONMENTAL ASSESSMENTS: A JURISDICTIONAL COMPARISON, ANALYSIS AND FINDINGS

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

LIST OF ABBREVIATIONS

AfCFTA	-	African Continental Free Trade Area Agreement
CBD	-	Convention on Biological Diversity
CITES	-	Convention on International Trade in Endangered Species
COMESA	-	Common Market for Eastern and Southern Africa
EAC	-	East African Community
EIA	-	Environmental Impact Assessment
EKCH	-	Environmental Kuznets Curve Hypothesis
EMA	-	Environmental Management Agency
EPA	-	Economic Partnership Agreement
EU	-	European Union
FTA	-	Free Trade Area
GATT	-	General Agreement on Tariffs and Trade
ICJ	-	International Court of Justice
IATRP	-	Integrated Assessment of Trade Related Policies
iEPA	-	Interim Economic Partnership Agreement
MEA	-	Multilateral Environmental Agreement
MFN	-	Most Favoured Nation
NAFTA	-	North American Free Trade Agreement
NEPS	-	National Environmental Policy Strategies
NAAEC	-	North American Agreement on Environmental Cooperation
NT	-	National Treatment
OECD	-	Organisation for Economic Cooperation and Development
PHH	-	Pollution Haven Hypothesis
PTA	-	Preferential Trade Agreement
SADC	-	Southern Africa Development Community
SDG	-	Sustainable Development Goals
SEA	-	Sustainability Environmental Assessment
SIA	-	Sustainability Impact Assessment
REC	-	Regional Economic Community
RTA	-	Regional Trade Agreement
RTEA	-	Rapid Trade and Environment Assessment
TBT	-	Technical Barriers to Trade

TFTA	-	Tripartite Free Trade Area
TPP	-	Trans-Pacific Partnership Agreement
TRIPS	-	Trade-Related Aspects of Intellectual Property Rights
UNCCD	-	United Nations Convention to Combat Desertification
UNCED	-	United Nations Conference on Environment and Development
UNEP	-	United Nations Environment Programme
UNFCC	-	United Nations Framework Convention on Climate Change
USA	-	United States of America
WTO	-	World Trade Organization
WTO-DSU	-	World Trade Organization –Dispute Settlement Understanding

ABSTRACT

Environmental provisions have become a common inclusion in trade agreements. Their incorporation is somewhat far-reaching, and more comprehensive in a manner complimentary to the main trade liberalisation provisions. At the helm of this inclusivity is the concept of sustainable development, which is key in the successful establishment, and implementation of trade liberalization structures. Through this concept, environmental provisions among other considerations, have found their way into trade agreements be it at bilateral, regional or multilateral level. This inclusion can be attributed to the growing awareness of states of aspects such as climate change as well as the increased strive towards sustainable development. At the helm of this trade and the environment relationship, is the role of the WTO, which is the global regulating body of all thing international trade. Critics allege the failure by this body to effectively address sustainability and environmental issues that multilateral level albeit it's supposed to then give a guide to regional and bilateral trading relationships.

This dissertation clarified the incorporation of environmental and sustainability provisions in the SADC, COMESA, TFTA, AfCFTA and the IEPA trade agreements. It explored the extent of environmental assessments carried out to determine the effectiveness of the environmental provisions incorporated in the final agreement. Furthermore, this dissertation explored different regional and country approaches in how they have included environmental and sustainability provisions in their trade agreements as well as national policy and law. Close consideration was given to the USA, Canada and the EU, as they are leading jurisdictions in undertaking environmental assessments of trade agreements both *ex post* and *ex ante*.

This comparison helped to demonstrate which approach seems more effective at causing change as well as providing information and guidance in policy formulation. Qualitatively, the research concluded that there is not yet established a one size fits all method of assessment. However, there is nothing barring states from using all the existing models of assessments for more definitive results. Further, the research established that it is important to carry out both *ex post* and *ex ante* assessments to ensure the state parties get the maximum benefits possible from trade agreements an policy.

CHAPTER 1

THE NEXUS BETWEEN TRADE AND THE ENVIRONMENT

1.1 INTRODUCTION

The concept of subjecting trade agreements to environmental assessment is a subject that has been gaining momentum over the years. The motivation to do so emanates from the inextricable link between the two. Over the years, the inclusion of environmental provisions in free trade agreements to achieve freer trade that is sustainable has become a common feature during trade negotiations. The relationship between the two cannot be ignored given that international trade is an important factor where sustainable development is concerned[1]. Of interest on this matter is how environmental issues can best be integrated into trade agreements, particularly highlighting on the importance of environmental assessments. For the purposes of this research, the word environment refers to the components of the earth, which includes land, water and air (all layers of the atmosphere); all organic and inorganic matter; living organisms; and the interacting natural systems that include components of the foregoing.

Over the years, growth in trade related activities has had its share in contributing to the negative changes in the environmental landscape. On the other hand, however, trade regulation has been accepted as a contributory panacea to environmental rehabilitation. The key question to the relationship between trade and the environment, regards whether or not advancements in trade liberalization for economic centric goals also gives attention to environmental goals. Arguments have been put forward that trade liberalization is mostly concerned with economic growth whilst adversely affecting the environment. Thus, the push towards the inclusion of environmental provisions in trade agreements to ensure freer trade in a more sustainable manner.

A number of trade agreements have been concluded with the inclusion of environmental provisions. The inclusion of these provisions follows in some cases the undertaking of environmental assessments, which enable the inclusions of environmental provisions applicable to the given geographic area. This follows the emphasis of the Rio Declaration of 1992 that, one of the important factors that should

[1] See the Rio Declaration of 1992 and its Agenda 21

realize the concept of sustainable development is global trade. This is captured in principle 12, which calls upon states to ensure that their promotion of an open international economic system towards economic growth should also be inclusive of sustainable development to better address the problems of environmental degradation. The Rio Declaration further calls for trade policy measures for environmental purposes not to constitute a means of arbitrary or unjustifiable discrimination or a disguised reaction on international trade[2]. The Marrakesh Agreement of 1994 recognised this principle of the Rio Declaration. It went on to provide that state parties in their trade and economic endeavours, should have the concept of sustainable development as an objective, seeking 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[3].

Given that the World Trade Organization and its enabling agreement is the international body regulating trade among its members, and seeks to ensure that, its members promote sustainable development in the course of their trade. The same objective should cascade to regional trade agreements, as their text will need to conform to the rules of the WTO, should their members also consist of members of the WTO. Following on this path, a number of countries have been entering in trade agreements that include a comprehensive section of environmental issues these include, the North American Free Trade Agreement ("NAFTA") and the Trans-Pacific Partnership Agreement (TPP). For the NAFTA in particular, members like Canada undertook environmental agreements prior to concluding the agreement.

The importance of environmental assessment of trade agreements cannot be overemphasised. However, there are trade critics who argue against that although trade and the environment are related disciplines, they should coexist in their individual capacities as opposed to having environmental issues feature in trade issues. They proceed to argue that, issues to do with the environment are strictly non-trade and their enforcement should not be the subject matter of a trade agreement[4]. In this regard, this dissertation seeks to highlight the importance of environmental

[2] Principle 12 of the Rio Declaration on Environment and Development.
[3] Marrakesh Agreement Establishing the World Trade Organization paragraph 1 of the preamble.
[4] R.V Anuradha, *"Trade and Environment Under the TPP"*, page 255 of A. Das and S. Singh's, *"Trans-Pacific Partnership Agreement, A framework for future trade rules?",* Sage Publications India Private Limited, 2018.

assessments on trade agreements and policies for Zimbabwe. This is because Zimbabwe is party to many trade agreements that have a bearing on its environment for example the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the recently concluded Africa Continental Free Trade Area (AfCFTA). It will also seek to derive lessons from other countries that have yielded plausible results, for possible implementation in Zimbabwe.

1.2 BACKGROUND

The discussion surrounding the linkages between trade and the environment began in the early 1990s following two major developments in international trade law[5]. Until recently, environmental issues were barely featured in trade agreements but fully addressed in standalone environmental agreements. Their inclusion in the Marrakesh Agreement establishing the WTO was a mere statement in the preamble that did not necessarily create an obligation to act on state parties. Notable standalone agreements catering for environmental issues include the UNFCCC, CBD and CITES. These standalone agreements, elaborated on state obligations in respect of the environment and means to sustainable management of the same through concrete steps. The UNFCCC's Kyoto Protocol as well as the Montreal Protocol of the Vienna Convention even went on to differentiate approaches to environmental issues for developed countries as opposed to those of developing countries having considered a number of factors including contribution to the environmental problem.

There is quite some debate surrounding the trade and environment relationship, particularly the effects of trade liberalization on the environment. Promoters of trade liberalization, raise concerns regarding the negative effects of increased environmental regulations on trade liberalization, citing that it may result in creating trade barriers as opposed to removing the same, which is the aim of trade liberalization. Such barriers, which could be brought about by environmental regulation, could reduce efficiency gain brought about by trade. Trade can have both positive and negative effects on the environment in that, on one hand, the growth of economies emanating from the expansion of trade, can affect the environment by increasing pollution or degrading the natural resource base. On the other hand, the

[5] M. Condon, *"The Integration of Environmental Law into International Investment Treaties and Trade Agreements Negotiation Process and the Legalization of Commitments",* Virginia Environmental Law Journal, Volume 33, Issue 102, 2015, page 106

increase in trade activity supports the economic growth of a country as well as its development and capacity to sustainably manage and develop its environment. This can be through access to advanced and in some cases new technologies, brought about by liberalising trade and improving market access to trading partners, which in turn will increase a country's production efficiencies and a reduction in environmental harming strategies.

Environmentalists on the other hand argue for environmental regulation of trade citing the main reason that it reduces the negative impact of trade on a country's welfare. It is argued that stringent environmental policies are compatible with an open trade regime as they create markets for environmental goods that can subsequently be exported to countries that follow suit on environmental strandards – the so-called first-mover advantage[6]. This is especially true for complex technologies such as renewable energies. As such, the inclusion of environmental provisions in trade agreements, result in a harmonised environmental regulation which is beneficial for both developing and developed countries.

This inclusion of environmental provisions in trade agreements is no easy task. States have employed some assessments to determine the extent to which the trade agreements may affect their environment and incorporated provisions that will directly address any concerns. In some cases however, generic provisions are employed and resultantly they have no bearing on the sustainable management or development of a given state's environment. These are some of the concerns that seen the introduction of environmental assessments towards sustainable development.

1.3 PROBLEM STATEMENT

Proponents for environmental protection have been pushing forward the idea of subjecting trade agreements to environmental assessments over the years. Their motivation stems from the concerns that there is not necessarily enough being done to anticipate and address the risks to the environment associated with or resulting from trade agreements with other states. Environmental assessments of trade agreements,

[6] Trade and the Environment, accessed at https://www.oecd.org/trade/topics/trade-and-the-environment/ on 09 March 2020

can present opportunities on trade that are not easily conceived in the absence of such assessments.

Section 73 of the Constitution of Zimbabwe[7] accords every person the right to an environment that is not harmful to their health or well-being; that is protected for the benefit of present and future generations, through reasonable legislative and other measures. It further provides for these legislative and other measures to be such as would prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting economic and social development. To achieve this, the state is obligated to take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of these rights.

In connection with this right, are the provisions of section 4 of the Environmental Management Act [*Chapter 20:27*] (the EMA Act), which further recognises this right as well as a set of principles of environmental management which include the principles of sustainable development and impact assessments[8]. Section 97 as read together with the First Schedule of the EMA Act proceeds to provide for those projects that should be subjected to EIAs. A reading of the provisions however seems to refer to only local projects to the exclusion of trade agreements. There is no other policy or law that speaks to EIAs save for the provisions of the EMA Act.

It is argued that environmental assessments can enable states to direct attention to concerns relating to the environment and impacts of a given agreement on a specific area of the environment[9]. Other arguments relating to which form of assessment between *ex ante* or *ex post* assessments, present a compelling analysis of the relationship between the trade agreement and the environment as well as a clear picture for policy makers and negotiators relating to what should be done. Others have even argued for the employment of both ex ante and ex post assessments[10].

This dissertation therefore considers Zimbabwe's approach to environmental assessments of regional trade agreements in light of its national laws and the

[7] Constitution of Zimbabwe 2013
[8] Section 4 (2) (e) and (f) of the EMA Act.
[9] DAC Guidelines and Reference Series, '*Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation'* OECD Publishing 2006, pages 23 to 28
[10] Ibid

interaction of the same. This consideration will assess the adequacy of the law and policies, as well as the regional trade agreements in considering environmental protection and management issues. It will also look into the processes related to the assessments and possible challenges emanating from these processes if any. Consideration will also be given to what other countries have done in the same area and derive any lessons from their experiences for possible application in Zimbabwe.

1.4 RESEARCH OBJECTIVES

Flowing from the above discussion, the position of environmental assessments of trade agreements, with emphasis on developing countries, deserves attention, a point that is the main motivation of this dissertation. Activities that have unfolded over the years surrounding this area are indicative of environmental and trade related issues, generating interests among researchers. In addition, a number of trade agreements and policies have since incorporated environmental provisions to be adhered to during the operation of the agreement. The aim of this dissertation therefore, is to analyse environment assessments of trade agreements employed by some jurisdictions. It will brief consider and compare the methodologies employed and the influence of such assessments on the trade agreements themselves. The research will then evaluate the effectiveness of the assessments in to the extent that environmental provisions are integrated into the agreements.

Its focus will be on a comparison of different country approaches of considering environmental issues in trade agreement in a bid to demonstrate and effective approach that leads to agreements with positive effects or impacts on the environment. In addition, it seeks to establish positive recommendations that will influence policies and trade agreements that employ more than idle provisions but rather create a definite obligation on the part of the state to act.

This dissertation intends to add to the body of literature surrounding environmental assessments of trade agreements in the context of Africa, with emphasis on Zimbabwe. The conclusions and recommendations developed will be in the best interests of the country as they can be employed towards its overall gain from international trade as well as enabling the government to make the informed policy decisions, which strike a balance on issues of economic growth and those of

sustainable development. The motivation for this study is the pursuit of innovative ways through which countries can be driven to focus on environmental and social issues alongside their pursuit of trade opportunities and economic growth.

However, this dissertation will not go into the detail regarding the different methods and techniques of environmental assessments but rather, it will briefly consider the techniques and what they entail, derive lessons from countries where they have been employed, in comparison to what Zimbabwe has employed, viz its legal and policy status. It will also assess the practicality of environmental assessments, juxtaposing the employment of either ex ante or ex post assessments or both, and lessons learnt from other jurisdictions.

1.5 RESEARCH QUESTIONS

This dissertation is motivated by the continually increasing interest in the trade and environment relationship. Currently, environmental concerns are at the forefront of most international negotiating bodies including trade related bodies. This is because of the increasing concerns relating to environmental degradation because of various human activities, trade included. As such, this dissertation will seek to address the following questions:

- What is the importance of environmental assessments of trade agreements and related policies towards sustainable development?
- How has Zimbabwe been employing the principle of environmental assessments in its trade agreements and policies?
- Which jurisdiction has successfully benefitted from environmental assessments of its trade agreements?
- Which approach can be deemed effective in environmental assessments that Zimbabwe can employ?

1.6 METHODOLOGY

This dissertation is based on doctrinal research, which will be conducted mostly through analysing secondary sources comprising published articles, working papers, reports, books and journals. The research will further draw from relevant international

instruments pertinent to the area of trade and the environment and these will include instruments of organisations such as the WTO, UNFCC, OECD, CBD, CITES, SADC, COMESA, and AfCFTA among others.

1.7 RESEARCH OUTLINE

This Dissertation is organised into five Chapters, which will be relayed as follows:

Chapter One – provides the background and structure to this research, whilst highlighting its importance.

Chapter Two – gives a broad appraisal of the theoretical aspects of the research. It comprises detail on the principle of sustainable development and environmental assessments as they relate to trade, methods of environmental assessments. Perspectives will also be given on the different stances to the relationship between trade and the environment and how the WTO relates to the relationship.

Chapter Three – explores trade agreements that Zimbabwe is party to and highlighting whether they have been subjected to any form of environmental assessments by the parties thereto. It will also consider the extent given to environmental issues in the presence or absence of environmental assessments. In this regard, focus will be on the following trade agreements; the SADC, COMESA, TFTA, iEPA and the AfCFTA. The Chapter will conclude by summarily looking into Zimbabwe's Legal and Policy framework providing for environmental assessments and the extent of their provisions.

Chapter Four – is a consideration of environmental assessments in other countries and other trading blocs similar to the ones considered for Zimbabwe. It will also do a comparative analysis of the different approached to environmental assessments in the jurisdictions considered.

Chapter Five – Condenses findings on environmental assessments in Zimbabwe's regional trade agreements and policies and identifies gaps if any, in the methods of environmental assessments and in Zimbabwe's environmental assessment processes. The second part will discuss these findings linking them to the reviewed

literature, as well as the comparison with other jurisdictions. The research questions will then be revisited and conclusions and recommendations made.

CHAPTER 2

TRADE LIBERALIZATION, SUTAINABLE DEVELOPMENT AND ENVIRONMENTAL ASSESSMENTS

2.1 INTRODUCTION

Environmental Assessments are essential to the conclusion of RTAs if the USA, Canada and EU approaches are anything to go by. The aims of the assessments, is to identify the potential economic, social and environmental impacts of the RTA. Of recent, the relationship between trade and the environment has become very significant in international relations. Particularly in relation to the impact of trade and trade policies on the environment as well as the effects of environmental measures on trade flows and the employment of trade measures to achieve the aims of environmental policies.

The manner, in which trade is conducted, has significantly changed due to the increasing global economic interdependence, trade liberalisation and "globalisation". The growing environmental pressures, particularly, the use and exploitation of natural resources, further exacerbate this. It is therefore argued that for trade and the environment to be mutually supportive, the trade liberalisation process should be paralleled with the development and strengthening of effective environmental policies nationally, regionally and internationally[11]. It is further argued that, "trade friendly" environmental policies proffer an incentive for technological innovations, promote economic efficiency and improve productivity[12]. From this position, one can conclude that trade laws need to support as opposed to constraining the development and implementation of non-protectionist environmental measures. A position argued by Indian theorist that it should be done in standalone policies and agreements as opposed to having environmental provisions in trade agreements[13]. Ideally however, trade liberalisation should also seek to assist in eliminating those trade positions that result in damage to the environment given it is one of the objectives of the Marrakesh Agreement to promote sustainable development.

[11] South Africa Department of Environmental Affairs and Tourism. "*Environmental Assessments of Trade Related Agreements and Policies in South Africa"* 2005, page 4 accessed at http://www.deat.gov.za on 24 February 2020
[12] Ibid
[13] Supra note 4

In a utopia, trade and environmental concerns should be able to coexist and complement each other in terms of implementation. The failure to harmonise the two concerns, is outed as one of the causes of environmental degradation, threats to biodiversity and destruction of ecosystems. Further, non-coordination between the two areas, will see demand of a product by one party, resulting in the compromise of conservation priorities in as far as that same product is concerned. This therefore warrants the need for environmental assessments of trade agreements, to safeguard the environment from being subjected to such compromises.

2.2 INTERNATIONAL LAW ON SUSTAINABLE DEVELOPMENT

Sustainable development plays an important role in international trade law to the extent of being employed in dispute settlement. Whether it is referred to as an objective, a norm, a principle or a mere concept, its importance is undoubtable. Others describe sustainable development as an 'interstitial norm' or 'meta principle', which does not necessarily possess normative force in the traditional sense but rather operates by modifying the normative effect of other primary norms of international law[14]. Whilst the law in this regard would consider an existing or emerging corpus of international legal principles and instruments addressing the intersection between environmental and economic laws, towards development that benefits present and future generations. It is not clear whether or not this concept has gained the character of a customary norm of international law nor does this uncertainty void it of its normative value in the same[15]. Sustainable development may however, be used to calm tensions between potentially conflicting norms, a position the ICJ opined that the need to reconcile development with environmental protection, is what is expressed in the concept of sustainable development[16]. The Permanent Court of Arbitration in the Iron Rhine Railway[17] case, also affirmed the concept integrates environmental and economic development concerns. Its legality is however not confirmed but it can be noted as an internationally agreed objective as is evidenced by its provision in many

[14] G. Marceau and F. Morosini, *"The Status of Sustainable Development in the Law of the World Trade Organisation"* Arbitragem E Comercio Internacional, Estudos em Homenagem A Luiz Olavo Baptista, Editora Quartier Latin do Basil, 2013, page 60

[15] *"Sustainable Development Law & Policy"* Volume 10, Issue 1, Fall 2009 page 2, accessed at http://www.wcl.american.edu/org/sustainabledevelopment on 18 February 2020

[16] Gabcikovo-Nagymaros Project (Hungary v Slovakia) 1997, ICJ, 7, 140

[17] Arbitration Regarding the Iron Rhine Railway Belgium, Belgium v Netherlands, 24 May 2005

international and regional treaties[18] and in international trade treaties such as the Marrakesh Agreement[19] and the General Agreement on Tariffs and Trade (GATT)[20]. Given the aforementioned trade agreements, relate to the major world trade regulating body, it cements the well representation of the concept of sustainable development in international trade law. This was even acknowledged in the US –Shrimp[21] dispute, where the WTO Appellate Body agreed that the preamble of the Marrakesh Agreement, which informs not only the GATT but also all other WTO Agreements, expressly acknowledges the objective of sustainable development.[22]

Sustainable Development can be traced in the Stockholm Declaration[23], which considered issues around the integration of economic, environmental, and social justice. Essentially, state parties were encouraged to employ an integrated and coordinated approach in their developmental plans, and ensure that the policies are alive to the need for environmental protection and improvement. The provision of sustainable development in the Stockholm Declaration went on to influence the 1980 World Conservation Strategy of the International Union for the Conservation of Nature. The Brundtland Report, prepared by the World Commission on Environment and Development[24], further motivated the international recognition of Sustainable Development as it put forward the argument that, there was a need for states to consolidate and extend relevant legal principles in a new charter to guide their behavior in the transition to sustainable development. Thereby providing a basis for the settling of the sovereign rights and reciprocal responsibilities of all states on environmental protection and sustainable development[25]. This position of the Brundtland report, read together with Principle 27 of the Rio Declaration, called for the further development of international law in the field of sustainable development[26]. The

[18] See the UNFCCC of 4 June 1992, United Nations CBD of 5 June 1992, the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa of 14 October 1994 (UNCCD)
[19] Supra note 3
[20] General Agreement on Tariffs and Trade of 1994
[21] India, Malaysia, Pakistan and Thailand v United States of America – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc, WT/DS58/AB/R at para 129 of the Appellate Body Report
[22] Ibid
[23] Declaration of the United Nations Conference on the Human Environment adopted on the 16th of June 1972, (Stockholm Declaration)
[24] World Commission on Environment and Development, Our Common Future, (Oxford: Oxford University Press, 1987) page 43
[25] ibid
[26] Declaration of the UN Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, in Report of the United Nations Conference on Environment and Development, Annex 1, U.N. Doc. A/Conf.151/26 (Vol. 1)

Rio Declaration was a result of a conference convened by UNCED, to consider the integration of environmental considerations into development needs. This conference gave birth to a declaration of principles commonly known as the Rio Declaration on Environment and Development (the Rio Declaration) and the Agenda 21. The UNCED conference resulted in the conclusion of three treaties namely, UNFCC, the CBD and the UNCCD.

Subsequent meetings have also been held in a bid to encourage the vision of global commitment to sustainable development. These meetings include, the 2002 World Summit on Sustainable Development in Johannesburg, which resulted in the Johannesburg Declaration on Sustainable Development, and the Johannesburg Plan of Implementation. Various studies were then conducted, considering the relationship between Sustainable development and international law[27] and they commonly sought to establish the rules and principles relating to economic development, environmental protection and human rights, in a bid to ascertain and then further develop and international law in the field of sustainable development[28].

The Stockholm and Rio Declarations are major outcomes of conferences held in respect of the environment. The declarations are however not formally binding but represent what others refer to as the 'modern era' of international environmental law[29]. Evidently the crux of the two declarations, is on one had a stock take of the impact of human activity on the environment and on the other hand, a general framework aimed at preserving and or enhancing of the environment. Given that both declarations are an outcome of diplomatic conferences, their effect is believed to be reflective of customary international law[30], as they have over the years, guided the crafting of various policy and legal instruments on the area of Envrionmental law.

Flowing from the above, it is imperative to ascertain the meaning of the concept of sustainable development. Indeed a number of definitions have been put forward in many a disciplines including economic and legal discourse. The meaning out forward

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[27] The Brundtland Report on Supra note 14, the 1995 UNCED Principles of International Law of Sustainable Development , the 2000 IUCN International Covenant on Environment and Development and the 2002 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development

[28] A. Rieu-Clarke, "*International Law and Sustainable Development"* IWA Publishing, London, UK, 2005 page 59

[29] P.H. Sand, *'The Evolution of International Envrionmental Law'* The Oxford Handbook of International Environmental Law, by D. Bodansky, J. Brunnee and E. Hey, Oxford University Press, 2007, Pages 30 to 42

[30] G. Handl, *'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992'* Tulane University Law School, United Nations Audiovisual Library of International Law, 2012, accessed at https://lwww.un.org/law/avl, on 09 April 2020

by the aforementioned Brundtland Report of 1987, is currently the widely accepted among states. The Brundtland Report of 1897 defined 'sustainable development' as: "…*development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs*."[31] The Brundtland report propounded that sustainable development conceptually integrates environmental protection and economic development. As time progressed, key aspect of the concept were clearly enunciated with further developments being noted in treaty making and case law, among other techniques, by a number of international and regional bodies. Worth noting is the conference held in New Delhi, India in 2002, that put forward ideas which were adopted in the form of a Declaration of Principles of International Law Relating to Sustainable Development.[32] Akin to the outcome of this declaration, other authors[33] put forward a list of principles that are important to the full realisation of sustainable development and these include;

i) The principle of intergenerational equity;
ii) The principle of sustainable use;
iii) The principle of equitable use or intra-generational equity;
iv) The principle of integration;
v) The precautionary principle;
vi) The principle of environmental impact assessment; and
vii) The principle of public participation in decision making[34]

From these principles, it can be noted that sustainable development is essentially an integrative concept, considerate of at least three special areas of law namely, international economic law in relation to development, international environmental law and international human rights law, areas of law which are of concern to both developed and developing states. This dissertation however will focus on the concept as it relates to International economic law and international environmental law. Important to note however, is the arguments that have been put forward regarding the

[31] Supra note 14
[32] This ILA Declaration was put forward, by the governments of Bangladesh and the Netherlands, to the attention of the Johannesburg summit as UN Doc.A/CONF 199/8 and later the United Nations General Assembly in New York as UN Doc. A/57/329. The Declaration appeared, with an introduction, also in 49 NILR (2002), page.299. The final report of the ILA Commission and the New Delhi Declaration were published in ILA, Report of the 70th Conference New Delhi, London, 2002, page. 22 and page. 380 and can also be found on www.ila-hq.org
[33] N. Schrijver and F. Weiss, *"International Law and Sustainable Development: Principles and Practice"* Martinus Nijhoff Publishers, Leiden, Netherlands, Volume 51, page xii; Supra note 27
[34] P. Sands, "*Principles of International Environmental Law"*, Cambridge University Press, 2003 page 253

consequence of the commitment to sustainable development with international law theorist on one hand arguing that it is an emerging principle of customary international law[35] and others arguing that it can be thought of as a right of states[36], an obligation *erga omnes.*[37] There however is an agreement among jurists, to consider the concept as an objective of international law forming part of the objectives of international treaties, as is evidenced by the growing corpus of international law on sustainable development spanning a variety of fields, international trade law and RTAs included[38].

Various treaties providing for international trade and environmental law call for the sustainable management of state resources in meeting developmental needs. For example, the SADC Treaty's Article 2(3) of the 1995 Protocol on Shared Watercourse Systems calls upon members whose geography lies within the basin of a shared watercourse system to maintain a proper balance between resource developments for a higher standard of living for their people and conservation and enhancement of the environment to promote sustainable development. For international trade law, the Marrakesh Agreement now mentions sustainable development in its preamble and there have been notable changes in the manner the WTO Panels approach issues that deal with the relationship between freer trade and the protection of the environment[39]. Worth noting also is the NAFTA which captures the concept of sustainable development in its preamble and proceeds to capture numerous provisions related to the environment.

The importance of sustainable development, particularly in relation to its legal status, does not end with its provision as an objective in treaties but also extends to the interpretive function it plays in international adjudication. This jurisprudence, offers and insight into the role and function of sustainable development, The International Court of Justice (ICJ), has employed the concept in its reasoning of cases brought before either it, or a tribunal. The basis for the analysis is provided by the aforementioned

[35] The Gabcikovo Nagymaros Project of Hungary v Slovakia, separate opinion of the Vice President Weeramantry [1997] ICJ Report 88
[36] Pulp Mills on the River Uruguay (Argentina v Uruguay) Order of 13 July 2006, [2006] ICJ Report 113
[37] Supra note 32
[38] P. Reynaud, "*Sustainable Development and Regional Trade Agreements: Toward Better Practices in Impact Assessments"* McGill International Journal of Sustainable Development Law and Policy, Volume 8 Issue No. 2, 2013, page 210
[39] US Shrimp Turtles case of 1998 WT/DS58/R, 15 May 1998. Where the Panel noted in paragraph 52 of its decision, the Preamble of the Marrakesh Agreement and how it endorses the need for environmental policies to be designed in manner that takes into account the situation of each Member, in terms of its actual needs as well as its economic means

excerpt of the ICJ judgment in the Gabcikovo-Nagymaros case, where the Court noted, by reference to environmental norms, that they had 'to be taken into consideration, and properly weighed not only when States contemplate new activities but also when continuing with activities begun in the past[40]. The ICJ however, did not vest sustainable development with a binding value but rather treated it as an objective or concept that needed due consideration in reconciling development issues and environmental protection[41]. The Iron Rhine arbitration in 2005[42], also followed a similar line of reasoning by expressly affirming the ICJ's reasoning that states had an obligation to give due consideration to norms and standards in projects they pursue. The tribunal however went on to reason that sustainable development might benefit more as a general principle, in so doing, the tribunal did not accord sustainable development a normative status but left it at the need to strike a balance between the concept and developmental plans.

The ICJ further employed sustainable development as a balancing tool to somewhat strike a balance between two conflicting norms in the Pulp Mills on the River Uruguay case[43]. The disputed related to the installation of several commercial paper mills on the River Uruguay, in manner that pitted the claims of the need for environmental protection by Argentina. Uruguay in this case was arguing for its right to economic development. The ICJ in hammered on the notion that the reasonable and equitable utilization of the River Uruguay gave rise to the obligation on Uruguay to consider the interests of Argentina of environmental protection. State parties were therefore encouraged to strike a balance between the use of the waters and the protection of the river in line with the object of sustainable development[44]. The WTO DSU Panel also relied on the 'objective' of sustainable development captured in the preamble of the Marrakesh Agreement, to interpret certain terms contained in the GATT particularly Article XX[45] as it relates to trade and sustainable development.

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[40] Gabcikovo-Nagymaros Project (Hungary v. Slovakia) ICJ Reports 1997 at para 7, similar reasoning were also followed in the WTO Appellate Body Report on US – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R 12 October 1998 at paras 131 and 153

[41] V. Lowe, "*Sustainable Development and Unsustainable Arguments*" in A. Boyle and D. Freestone, "*International Law and Sustainable Development: Past Achievements and Future Challenges*" Oxford University Press, 1999 page 19

[42] Iron Rhine Arbitration (Belgium v Netherlands) (Perm. Ct. Arb.2005) R. Int'lArb.Awards, v, XXVII, pages 35-125

[43] Pulp Mills on the River Uruguay (Argentina v Uruguay)

[44] ibid

[45] Supra note 30, as well as the decision of the Appellate Body in the China Raw Materials case were the panel concurred that the Marrakesh Agreement struck a balance between trade and non-trade-related concerns.

2.3 INTERNATIONAL TRADE LAW AND SUSTAINABLE DEVELOPMENT

Generally, trade has been identified as a source of development and a driver for economic growth across the world[46]. It is ruled to bring about a rationalisation of resources and economies of scale as well as a platform of technology transfer, among other things. However, trade in itself is not a panacea to the very objects of sustainable development but is interlinked in an important way, towards supporting its realisation. It is generally accepted that apart from the broadcasted economic benefits emanating from trade, environmental benefits can also be reaped from the same.

Howbeit-environmental issues were not a primary concern in the development of the multilateral trading system; the 1947 GATT still gave room for consideration of environmental issues. The multilateral trading system addresses environmental sustainability concerns through the medium of the WTO and its GATT framework. In fact, the foundations of international trade as is known today, date back to the 1947 negotiations, which gave birth to the GATT 1947. Following the conclusion of the GATT 1947, a series of rounds of negotiations were held from 1948 to 1994. A total of eight negotiating rounds were held as follows; the Geneva Round in 1948; the Annecy Round in 1949; the Torquay Round in 1951; another Geneva Round in 1956; the Dillon Round during the period 1960 – 1962; the Kennedy Round during the period 1962 – 1967; the Tokyo Round during the period 1973 – 1979 and the Uruguay Round during the period 1986 - 1994[47]. The meetings were initially aimed at developing requirements to lower and or eliminate tariffs as well as the creation of obligations to prevent or eliminate barriers to trade. This ended with the Uruguay Round, which birthed the Marrakesh Agreement establishing the WTO during the period 1994 – 1995. The coming in of the Marrakesh Agreement increased the membership of the WTO to 128 by 1994, relative to the initial membership from the GATT 1947. It further broadened the terms of reference to include trade in services and intellectual property.

The Marrakesh Agreement highlights the main operations of the WTO as including, the management and implementation of WTO agreements, providing a forum for trade negotiations as well as mechanisms for dispute settlement. The objectives of these operations extend to the raising of standards of living, provision of employment

[46] A. Young, '*Learning by Doing and the Dynamic Effects of International* Trade' The Quarterly Journal of Economics, Issue 106, Volume 2, 1991, pages 369 - 405

[47] A round of meetings is described by referring the country, city or town in which the meeting took place.

opportunities, growth and steady real incomes as well as an expansion of trade in goods and services. The WTO also specifically seeks to assist developing countries in growing their share of international trade. In achieving the foregoing, the WTO's modus operandi on all matters trade-related hinges on the successful implementation of two core principles namely, the National Treatment (NT) and Most Favoured Nation (MFN) principles. Essentially, the NT principle requires the treatment of goods and services imported from other countries to be the same as that accorded to goods and services emanating from within the same importing country. The MFN principle on the other hand, provides for the equal treatment of goods and services of one WTO member, with good and services from all the other WTO members. Ideally, no special treatment extended to a given country should distort trade.

The WTO recognizes the importance of addressing environmental issues without necessarily seeking to enforce any environmental standards through trade sanctions. The broad and generic reference to the environment in the context of sustainable development, in the preamble of the Marrakesh Agreement, recognizes that while environmental preservation and protection is important, it will be handled in a manner akin to the respective needs of countries given the different levels of economic development. The WTO Appellate Body in the United States-Standard for Reformulated and Conventional Gasoline[48], emphasized that the provisions of the WTO treaty were 'not to be read in clinical isolation from public international law'[49]. The Appellate Body emphasised the need for the interpretation to be in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties[50]. Essentially, however, the aspect of whether or not sustainable development has legal status is of no consequence for the WTO as the concept has been given a voice in the preamble of the Marrakesh Agreement. This status therefore does not necessarily require sustainable development to be raised to the position of a principle of public international law for it to inform the interpretation of the rules of the WTO[51].

The GATT as negotiated in 1947, was mainly concerned about economic growth, at times without due consideration to environmental issues. The GATT 1947 had no

[48] United States-Standard for Reformulated and Conventional Gasoline WT/DS2/AB/R DSR 1996 at 17
[49] G. Marceau, "A Call for Coherence in International Law: Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement' J. World Trade, 1999
[50] Vienna Convention on the Law of Treaties
[51] Supra note 14

exceptions enabling parties to employ when there was need to pursue non-trade related priorities. Article XX of the GATT provides in part 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[52]"

The above prescription is often read as incorporating environmental consideration even though the provision makes no express reference to the environment. Dispute Settlement Panels under GATT, applied a strict approach to interpreting Article XX, particularly indicative of a preference for freedom of trade over environmental protection and improvement. This preference was however not express.

In the Canada – Herring and Salmon case[53], the GATT Panel considered measures employed by Canada, which were alleged to have been employed to protect fishery stocks. Canada argued that the measures could be justified under Article XX (g) of GATT. The GATT Panel agreed to the application of the provision fish stocks, but struck down Canada's measures by strictly interpreting the meaning of the said provision. The Panel used a 'primarily aimed at test', applied to mean the measure should have been primarily aimed at rendering effective the domestic production restrictions. Canada's measure failed to meet this strict test and hence was unjustifiable under Article XX (g)[54]. Following this case, a series of disputes involving the USA, arose, and in these disputes, the USA imposed restrictions on imports of

[52] See Article XX of GATT
[53] Report of the Panel, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon L/6268 1987 and GATT BISD 1989
[54] Ibid

tuna caught with purse-seine nets citing reasons that the technique was highly destructive and ensnared and killed other marine animals[55]. The United States went on to enact an Act[56] cementing this import restriction particularly in areas of the Pacific Ocean. Its main argument was that fisherman in the Pacific Region targeted dolphins when fishing for tuna, for the sole reason that schools or tuna shadowed dolphins, as such in catching the dolphins, they would also catch the tuna. It went on to justify its action under Articles XX (b) and (g) of the GATT. The Panel disagreed with the US's position on the basis that the arguments did not pass the strict 'primarily aimed at' test used in interpreting Article XX (g) of the GATT. The rationale for the Panel's reasoning was that the US's restrictions had an extraterritorial application[57]. The Panel further held that the US has failed to demonstrate that it had exhausted all options reasonably available prior to invoking the GATT Article XX exception.

This case was followed by yet another US-Tuna II case[58], in which the US invoked Article XX (b) and (g) of the GATT to defend the legislation it had enacted to promote the ban[59]. The Panel again ruled against the US and still maintained that the US had failed to meet the exception requirements. The most notable thing of the US Tuna II case is that it explicitly mentions the objective of sustainable development, although in a manner that did not change the Panel's view on how sustainable development related to the dispute. The Panel noted that the objective of sustainable development is inclusive of the preservation and protection of the environment and has been recognized by parties to the GATT. In relation to the US's case however, the Panel ruled that the issue was not solely related to environmental objectives but rather with whether in pursuit of environmental objectives, the US could impose trade restrictions to influence policy changes in the jurisdiction of other parties to the GATT[60].

Issues discussing the relationship between trade and the environment were not discussed in detail during the Uruguay Round negotiation but, the amount of attention drawn on the matter, resulted in the reference to the importance of the sustainable development to trade in the Marrakech Agreement. The Conclusion of the Marrakesh Agreement, giving birth to the WTO, changed the approach to environmental concerns

[55] Report of the Panel, United States – Restrictions on Imports of Tuna DS21/R/1991
[56] Marine Mammal Protection Act of 1972
[57] Supra note 14
[58] Report of the Panel, United States – Restrictions on Imports of Tuna, GATT Doc DS 29/R June 16 1994
[59] Supra note 53
[60] Supra note 55

on the trade arena. This is because sustainable development was accorded express recognition in the preamble of the Marrakesh Agreement as well the Ministerial Decision on Trade and Environment[61]. The Preamble texts reads in part as follows;

"*Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*,"

The implication of this preamble was a clear shift from the largely exclusive pro-trade bias of the old GATT system to a system where concerns of free trade for economic development or advancement, were evenly balanced with environmental concerns. This inclusion of sustainable development in the preamble of the Marrakesh Agreement, therefore informs the context in which the WTO agreements should be interpreted[62].

The Ministerial Decision on Trade and Environment made sustainable development an important part of the agenda of the WTO, in a manner that resulted in the creation of a Committee on Trade and Environment. The Committee's main functions were to identify the linkages between trade and environmental measure, in a bid to promote sustainable development and make appropriate recommendations on modifications needed where necessary. This is argued to have created a platform where trade and environment issues can positively interact and due consideration be given to the objective of trade and that of sustainable development. Since its creation, the Committee undertook some work around, sustainable development, environmental requirements and market access and some studies too[63].

It is important to note the new GATT of 1994, did not change the text of Article XX as it read in the old GATT 1947. However, the interpretation to the exceptions has changed in light of sustainable development. The WTO Appellate Body in the US-

[61] Ministerial Decision on Trade and Environment, 14 April 1994
[62] Supra not 14 page 77
[63] https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm accessed on 9 March 2020.

Shrimp case pointed this out[64]. The Marrakesh Agreement preamble, demonstrated a recognition by the WTO that the optimal use of the world's resources should be made in accordance with the objective of sustainable development. This followed the reasoning that the language of the preamble, reflected the intention of the parties to the Agreement and should therefore add colour, texture and shading to the interpretation of the agreements annexed to the WTO Agreement[65]. This reasoning of the Appellate body can be concluded to mean that they were entitled or had an obligation to read Article XX in a manner considerate of member's rights to take environmental measures that are not illusory[66]. The US-Shrimp dispute involved a conflict between the right to free trade and the need to protect the environment, and the Appellate Body used the concept of sustainable development to balance these conflicting priorities.

Following the US-Shrimp dispute, the Appellate Body has continued to try to create a harmony between the aspect of free trade and that of environmental protection in a bid to harmonise discorded situations. Worth noting is the US- Reformulated Gasoline[67] dispute, where the US distinguished between two types of baselines to assess gasoline quality among refiners in a discriminatory manner against foreign refiners Brazil and Venezuela included. The US invoked Article XX (b) and (g) of GATT arguing that the measures were aimed at protecting the environment. The Appellate Body although it ruled that the US's behaviour could not be justified under Article XX (b) and (g), its reasoning gave due consideration to environmental issues, and created an avenue for environmental priorities by states to not be neglected in future disputes. The Appellate Body affirmed the states' rights to institute measures aimed generally at environmental protection[68].

Essentially therefore, the WTO's coverage of environmental concerns were laudably addressed in the 1994 Marrakesh Decision on Trade and Environment, which resulted in the creation of the Committee on Trade and Environment whose main mandate is

[64] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products 153, WT/DS58/AB/R October 1998
[65] Ibid.
[66] G. Marceau and J. West, "*Trade and the Environment: The WTO's Efforts to Balance Economic and Sustainable Development"* Economie Environment Ethique: De La Responsabilitie Sociale Et Societale, 2009, pages 225 and 227
[67] Panel Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R of 1996
[68] Further consideration to the concept of sustainable development was given by the Appellate Body in the US-Shrimp I Supra note 37 and Shrimp II (Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia, WT/DSB/RW 2001) cases.

to establish the relationship between trade and environmental issues, with the ultimate objective of promoting the objects of sustainable development. With this objective, it can be noted that the language of the GATT Article XX, can be related to Principle 12 of the Rio Declaration as well as Article 3.5 of the UNFCCC[69].

There are also a number of agreements under the WTO Marrakesh Agreement that make provision for the environment. Worth noting in this regard are the Agreement on Technical Barriers to Trade, which allows members to enforce measures they consider appropriate to ensure the protection of among other things the environment. The Agreement on Application of Sanitary and Phytosanitary Measures, recognises the sovereign right of members to determine protection levels that are appropriate against sanitary and Phytosanitary risks, these measures can be extended in matters where the environment is of concern. The Agreement on Agriculture has an inclusive statement in its preamble that reiterates members' commitment to reform agriculture in a way that guarantees environmental protection. The Agreement on Subsidies and Countervailing Measures in its current amended form now makes provision for non-actionable subsidies, which extend to situations where governments introduce a subsidy aimed at promoting the adaptation of existing facilities to new environmental requirements. The Agreement on Government Procurement provides exceptions similar to those in article XX of GATT 1994 and includes a liberty to members to employ measures necessary to protect animal and or plant life or health. The Agreement on Trade-Related Aspects of Intellectual Property Rights provides in Article 27, that governments can refuse to issue patents if they threaten animal or plant life or health or risk damaging the environment in a serious way. Lastly, the General Agreement on Trade in Services in Article XIV, which exempts policies, aimed at environmental protection from its normal application.

The foregoing discussion on the WTO and the environment has made a number of scholars conclude that it has made notably visible strides in observing the linkage between trade and the environment, particularly in its text and dispute settlement mechanism[70]. This conclusion is made based on text reading as well as an increase

[69] Article 3.5 of the UNFCC provides as follows, "*Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."*

[70] S. Jinnah and A. Lindsay, '*Diffusion Through Issue Linkage: Envrionmental Norms in US Trade Agreements'* Global Envrionmental Economics 2016; see also R. McCormick, *'A Qualitative Analysis of the WTO's Role on Trade and Environment Issues'* Global Envrionmental Politics Volume 6, Issue 1, 2006 pages 102 - 124

in the number of cases that have been centred on trade restriction through environmental provisions. The ruling of the WTO panels on the cases however, especially from a point of view of environmental governance, does not conclude on an institution that pushes forward, the trade and environmental relationship, the implementation still pushes forward the aspect of trade liberalisation and the removal of barriers to trade at most costs.

As a member of the WTO, Zimbabwe has the liberty to enjoy all the rights accorded by the WTO rules as well as bear any obligations brought about by its agreements. Zimbabwe has the right to employ adequate measures aimed at addressing environmental concerns attributed to trade liberalization. With the rounds of negotiations now open to include the trade-environment relationship, Zimbabwe can needs to actively participate in the processes advocating for rules that will promote trade in a sustainable manner.

2.4 IMPACT OF TRADE LIBERALISATION ON THE ENVIRONMENT

Trade liberalisation may have an impact on the environment in a variety of ways and these impacts may be positive or negative. These impacts relate to the reduction and in some cases elimination of barriers to trade, and increase in trade amongst countries resulting in economic growth among other things. The global economy has significantly changed over the years and is notable on a number of fronts including the rise of countries like China as global economic powerhouses. Together with these changes in the economy, many improvements can be noted in the form of communication, reduction and to an extent elimination of trade barriers among others. This notable spin on the global economy has in turn been identified as one of the causes of the decrease in environmental sustainability[71].

It is argued that the existing multilateral trading system is one of the causes of the delay in satisfactory environmental regulations and implementation. This is mainly attributed to the stance taken by the WTO rules, which are said to limit policymaking. In addition, it has been argued that the global trading arena does not necessarily accord an opportunity to improve environmental norms this is because the costs associated in the course of trade such as unemployment as well as loss of

[71] https://www.ukessays.com/essays/economics/impact-trade-liberalization-5154.php accessed on 16 March 2020

investments, usually makes governments delay in implementing some environmental regulations. As highlighted, trade reduces or eliminates trade barriers and increases trade, which in turn spurs a country's economic growth.

Notwistanding the positive impacts highlighted above, there are also a number of structural and other effects that affect negatively on the environment. In most cases, the increase in trade results in the expansion of sectors in varying degrees. This expansion will increase production and consumption, which in turn may pollute the environment, for example, if the coal mining sector expands, it negative effects will manifest on water, land and air pollution. This is not the case for all sector expansion but it is a notable impact. In addition, changes in the methods of production, which flow from trade liberalization, may also affect the environment. This is a method referred to as the technique impact. It entails a change by a country in the way production is done, for example the elimination of trade barriers may likely increase trade in goods and services and liberalizing investment rules, may open a country to more efficient ways of productions as well as effective methods of environmental protection, particularly in the case of developing economies.

There are also regulatory impacts, which refer to the impact that a given agreement may have on the ability of the parties to implement environmental regulations, this also may be positive or negative. Negative impacts in this instance may emanate from the agreement's trade rules, which can be used to prevent a party from implementing laws, and policies that seek to protect the environment. On the other hand, the agreement may be a panacea to a party's environmental woes by requiring the implementation of stronger environmental regulations.

Other environmentalists are concerned with some decisions countries take in relation to their economies at the expense of the environment. This move has been called 'race to the bottom' and it entails countries, which are party to an agreement, lowering their environmental standards and creating pollution havens, in a bid to gain competitive advantage in the market. In so doing, such countries then attract investment from companies that seek to cut their costs of production by doing their production in such pollution havens. In turn, advocates of free trade tend to dismiss

this hypothesis, arguing that the costs of complying with environmental standards are insignificant to the overall cost of production[72].

Effects emanating from increased trade on the environment in developing countries have far-reaching effects. If the 'race to the bottom' concept is anything to go by, a number of developing countries' economies heavily depend on the export of natural resources and agricultural products. The absence of an environmental policy framework that adequately addresses the potential effects on the environment, results in significant negative implications on the environment. In turn, the rate of environmental degradation from human activities is therefore severe in such instances.

In addition, the impact of trade on the environment is acknowledged in a number of international instruments some of which have been mentioned above. These include the Marrakesh Agreement[73], the Doha Ministerial Declaration launching the Doha Development Round[74], the UNFCC[75], among other trade, investment and environmental treaties. This is indicative of the fact that the global community acknowledges the relationship between trade and the environment, but also is committed to ensuring harmony between two. This is evidenced by the continual advocacy to align the two areas of concern, trade and the environment, and ensure a maintenance of the harmony. This need for alignment is captured in the Sustainable Development Goals (SDGs), a declaration by the global community of nations' overarching long-term framework for progress, agreed to in 2015 by the UN General Assembly. Trade is described as a key means of implementing these SDGs[76].

Trade therefore is important in economic restructuring, a role which connects it further to environmental issues given that the changes brought about by trade, can be positive in as far as moving economies towards greater efficiencies and wider dissemination of environmentally friendly technologies. Nevertheless, they can also be bad for the environment, perpetuating and intensifying investment in polluting and resource-intensive economic activities. As such, it is important that trade rules allow national

[72] W. Krist, https://www.wilsoncenter.org/chapter-7-uneasy-neighbors-trade-and-the-environment accessed on 17 March 2020
[73] The Preamble
[74] Paragraph 6
[75] Paragraph 3
[76] Goal 17 of the SDGs calls for the strengthening of the means of implementation and the revitalization of the Global Partnership for Sustainable development.

governments the flexibility to adequately protect the environment. This need is all the more important in light of the movement of trade rules "behind the border," expanding from governing tariff levels to governing how states regulate in areas such as services, investment, intellectual property rights, government procurement, subsidies and other important elements of the domestic regulatory regime.

The relationship between trade and the environment, should be viewed to an extent beyond just removing barriers aimed at environmental protection, but it should also be realised that trade in turn supports environmental policies. Hence, the need to assess trade agreements and policies against environmental concerns and ensure the two areas speak to each other in all respects.

In addition to the pros and cons of the trade and environment relationship, there are also other schools of thought that argue on the relationship using two hypothesis, namely the Pollution Haven Hypothesis (PHH) and the Environmental Kuznet's Curve Hypothesis (EKCH). On one hand, scholars argue the negative impacts of trade on the environment which is the point of view pursued by the 'pollution haven hypothesis', whilst on the other hand, there are scholars who argue for a high economic turnover as a result of trade, which translates to an improvement in environmental quality.

In position, the PPH stands on the notion that countries whose environmental regulations are not as strong, attract to a greater extend polluting industries that will be migrating from countries with a stronger environmental regulation. These countries with a weak environmental regulatory framework are therefore referred to as pollution havens[77]. This characteristic of a pollution haven is argued to be akin to developing economies whose resources and labor tend to be cheaper in addition to the less strict environmental regulations, as opposed to economies with strict environmental regulations, whose costs of production are essentially more expensive, taking into account just the cost of pollution in addition to other overheads.[78] A consideration of this hypothesis in this thesis is important in that it will assist in argue for the need to subject regional trade agreement to assessments ex ante and ex post implementation so as to ensure the environment is not compromised in the name of economic development and trade liberalisation.

[77] G.S. Eskeland and A.E. Harrison, '*Moving to greener Pastures? Multinationals and the Pollution Haven Hypothesis*', Journal of Development Economics, Issue 1, Volume 70, pages 1 - 23
[78] ibid

The EKCH on the other hand, posits an argument different from that of the PHH. The EKCH suggests that levels of pollution in a country increase as a result of an increase in industrialization and development, only for the same level of pollution to fall again when the country begins to make use of the economic benefits emanating from increased industrialization and development, to remedy or reduce the pollution[79]. This is however, the most debated models.

2.5 ENVIRONMENTAL ASSESSMENTS

Environmental assessments are important and enable countries to make decisions that promote environmental protection and broadly, the concept of sustainable development. They assist governments of nations to make decisions in a more transparent way and engage relevant personnel from the other government departments, public, private sector and non-governmental organizations, to contribute to the process. They further enhance the coherence of policy by enabling decision makers to appreciate the implication of trade policy on the environment. Generally, however, they are mostly used in projects or plans at national level. The idea of extending them to agreements and policies has only recently started gaining ground and not very common in developing countries.

Environmental assessments are undertaken in relation to either projects or plans at national level and these are referred to as Environmental Impact Assessments (EIA) EIAs were established as a legislative tool aimed at managing environmental impacts brought about by a number of developmental projects. With EIAs, information gathered is in relation to the effects on the environment of a given project. This information is gathered by both the owner of the project as well as other stakeholders and is then considered by the decision making body before making its decision as to the procession of the proposed project. The idea of undertaking environmental assessments of policies and trade agreements is a move known by many countries but employed by a few[80]. It is common cause that the negotiation of trade agreements is ultimately for the benefit of the parties to the agreement. These benefits include generally economic growth, preservation as well as creation of jobs. However, the

[79] C.H Ling *et al, 'Decomposing the Trade-Envrionmental Nexus for Malaysia: What do the Technique, Scale, Composition and Comparative Advantage Effect Indicate?'* Journal of Envrionmental Science and Pollution Research International Issue 36, Volume 6, pages 502 - 510

[80] See the EU, USA, and Canada

motives have been until recently mainly economical, the development of the concept of sustainable development globally has seen an increased inclusion of social and environmental issues in the conclusion of agreements.

Therefore, whether one is of the view that environmental assessments relate to a potent or radical mechanism of regulation, its extent in persuading sound implementation of other laws and policies in a manner alive to environmental concerns, has yielded positive results in a number of projects[81]. As a law, environmental assessments is a keystone in modern environmental law, providing a legal basis not just for projects to be implemented, but its scope has widened to include other policies, agreements and projects[82]. The concept is not just a requirement of law in many countries but goes on to set out procedures to be followed in carrying out the assessment and the legal consequences of non-compliance.

Procedures may differ in jurisdictions, but the objective of carrying out environmental assessments is somewhat similar, sustainable development. There is a growing awareness among countries of the need to enjoy environmental resources in manner that does not cause irreparable harm to the environment but rather a manner that is rehabilitative to any form of environmental degradation and ensures continual enjoyments by countries of their environmental resources.

As such, the evolution of environmental assessments as a foundation for decision making is evident in many developments around the area of environmental law in particular, the development of integrated and preventive methods of control, the fostering of responsibility for the environment, and the growing acceptance of the validity of preventive or even precautionary measures[83]. Environmental assessments also act as vehicles for enhancing public participation in environmental decision-making. This move in turn, encourages qualitative comments from the public on the suitability of proposed projects or policies to the environment.

Environmental assessments seek to examine two major categories of effects namely legal effects and economic effects. In relation to legal effects, the assessment considers whether the obligations arising because of the trade agreement will prevent

[81] J Holder and D McGillivray, "*Taking Stock of Environmental Assessment: Law, Policy and Practice"*, Cavendish Publishing House, 2007 page 37.
[82] Ibid.
[83] CT, Emejuru and ONP. Adiela, "*Understanding the Legal Context of Envrionmental Impact Assessment",* Donnish Journal of Biodiversity and Conservation, Volume 1, Donnish Journals April 2015, page 007

or result in the need for a country to relook at its national laws and policies, a move that may have an impact on the environment. For economic effects, assessments are done of any changes in trade flows and the general economic activity resulting from the trade agreement, and these economic effects may have an impact on the environment.

Essentially, environmental assessments act as a means of combining the opinions of experts and those of the public in relation to environmental effects of a given project or policy, and also ensuring that these opinions are given due consideration by decision makers before a decision is made or taken. Environmental assessments are premised on the concept that introducing information about the environmental effects of projects or policies into decision-making encourages decision makers to make informed decisions relating to development between environmental and other objectives, objectively resulting in less environmentally harmful decisions.

2.6 ENVIRONMENTAL ASSESSMENTS OF TRADE AGREEMENTS

Pursuant to the above, environmental assessments of trade agreements and policies, have become an important tool influencing decision makers to promote sustainable development in any agreements or policies they intent to conclude. The 1993 OECD Ministerial Council recommended having countries examine or review trade policies and agreements assessing environmental implications of such policies and agreements, and offering alternative options to address any concerns that may arise from the assessments. The intention however in negotiating trade agreements, is primarily for economic benefits; environmental considerations are not commonly given as much primacy as the former.

Environmental assessments primarily considers the effects of a trade agreement on the environment of an affected country prior to its conclusion, this may be done prior to negotiating the agreement or even during the negotiation process (*ex ante assessments).* The objective in this case is to have the findings of the assessment incorporated into the agreement, to come up with a final agreement that cognisant of the positive impacts and has ways to prevent or remedy any identified negative impacts of the agreement on the environment. On the other hand, environmental assessment are also employed upon concluding the agreement, particularly during its implementation (*ex post assessments)*. At this stage, an examination is undertaken of

the impact on national environmental policies and law, to enable the country to take measures aimed at enhancing the positive environmental impacts or mitigating any identified impacts. It is argued that *ex ante* assessments, assist countries in identifying their priorities and take requisite action during the negotiation process[84]. This however, creates uncertainty in the results of the *ex ante* assessments. *Ex post* assessments, as distinct from the *ex ante* assessments; have as their basis the results of the negotiations which are then observed in implementation, and addressed adequately should need be[85]. It is therefore advocated that instead of choosing one form of assessment over the other, countries consider making use of both ex ante and ex post assessments[86].

Currently, countries like Canada, the USA and intergovernmental organisations such as the EU, mandate such assessments for all trade agreements. In addition, the Economic Commission for Latin America and the Caribbean has undertaken a number of impact studies of integration agreements for Latin American governments.

Environmental assessments came about because of economic globalisation and international trade liberalisation, which have generated widespread concern, regards their environmental impact in a given country. The 1990s saw the introduction of impact assessments of trade-related policies and agreements, a move, which began with the aforementioned NAFTA, as well as an increase in the global issues, raised at the WTO conference in Seattle in November 1999. The object of these assessments is to combine the ongoing debate on the impact of trade related agreements and policies on the environment, with available technical analysis, to enable trade negotiators and other decision makers, better understand the issues critical to the agreement, and make informed decisions. In principle, these impact assessments of trade related agreements and policies enable state parties to make meaningful contributions to achieving sustainable development at global, regional and national levels. In practice however, it is argued that there are a number of challenges that will have to be overcome[87]. This is because, these assessments may take the form of strategic environmental assessments at national policy level a move which in most

[84] WTO Committee on Trade and Environment, "*Environmental (Sustainability) Assessments of Trade Liberalization Agreements at National Level'* WT/CTE/W/171, 2000
[85] Ibid
[86] ibid
[87] C. George and B. Goldsmith, *"Impact Assessments of Trade-Related Policies and Agreements: Experiences and Challenges" 2012*, accessed at https://www.tandfonline.com/loi/tiap20 on 20 February 2020

cases results in challenges from involving difficult relationships with the policy-making process, a wide range of stakeholder interests, and complex interactions between causes and effects[88].

A number of efforts to address possible challenges have been advocated for by a number of international bodies with the UNEP playing a major role in developing methodologies and applying them in a variety of situations as well as developing capacity to undertake assessments in developing countries. The OECD led much of the early work in relation to the methodological development and it has maintained its interest in the area as well as collaborated with other organisations like the Commission for Environmental Co-operation (CEC).

Environmental assessments are now regarded by some countries to be a key element in concluding trade agreements, particularly if the aim is to align the trade agreement, to sustainable development prerogatives in a given country. The guidance of principle 17 of the Rio Declaration, that environmental impact assessment as a national instrument, should be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and should be subjected to a decision of a competent national authority, cannot be overemphasized in this regard.

In essence, therefore, a comprehensive environmental assessment is considerate of the potential environmental impacts of a policy or agreement before its adoption by decision makers. This in turn minimizes unwanted outcomes whilst at the same time enhances the implementation desired outcomes. Environmental assessments are therefore conceptualized as an information collection process incorporating opinions of relevant stakeholders[89].

2.7 FRAMEWORKS AND METHODOLOGIES TO ENVIRONMENTAL ASSESSMENTS

Frameworks employed in environmental assessments, are attentive to the priorities and the scope of the environmental assessment. They categorise the assessment into defined procedural steps, which are to be followed and in some cases provide guidance on how to identify the ideal impact areas for correct indicators and analytical

[88] ibid
[89] J. Ferretti *et al," Trade and the environment: Framework and methods for impact assessment"* accessed at https://www.researchgate.net/publication/251570929 on 31 March 2020

methods[90]. Trade liberalization as propagated across the globe continues to contribute significantly to the increased impact of trade on the environment. The impact of trade as it relates to the environment requires the employment of integrated environmental assessments of trade agreements and policies to warrant a clear observation of all relevant factors from a sustainable development point of view. This strategy of environmental assessments has been employed since the mid-1990s particularly to trade related policies and agreements.

Canada, the USA and the EU, have employed environmental assessments in pursuit of policies for transparency and public involvement as motivated by their respective national legislation on the environment. The introductions cover both *ex ante* and *ex post* assessments. The introduction follows the recommendation by the OECD Ministerial Council that urged governments to review trade and environmental policies and agreements with the potential of affecting the other. The rationale for such was to enable governments to assess the implications of the policies and agreements on the other and identify alternatives for sound implementation. As aforementioned, the USA, Canada and the EU, mandates such impact assessments for all the agreements they sign.

Environmental assessments of trade agreements, essentially assesses the potential impacts of these agreements on the environment of the country undertaking the assessment. The assessment looks at a variety of factors including the changes in the amount of economic activity; changes in national-level mix of economic activity; impacts of the flow of new technologies; impacts of legal and policy changes stemming from the agreement; and public participation. In undertaking the assessments, a number of factors are considered including timing (ex post or ex ante or both); the scope of the geography (national or international); the scope of the assessments; and the mode of analysis.

There are a variety of methods that are being used in carrying out environmental assessments of trade agreements and policies. These include general Integrated Assessments as guided by the United Nations Environmental Program, Strategic Environmental Assessment, Sustainability Impact Assessment and Strategic

[90] Supra note 73

Integrated Assessment of Trade. Only the first three methodologies will be discussed in detail as they are the most commonly employed:

2.7.1 Reference Manual for Integrated Assessment of Trade Related Policies

The United Nations Environmental Program (UNEP) put in place the Reference Manual for Integrated Assessment of Trade-Related Policies (IATRP) as a tool to provide a method for governments and all decisions makers, an effective methodology to use in undertaking integrated assessments. The aspect of environmental assessment on trade-related policies in foreign countries provides countries like Zimbabwe with different methodologies and a range of transferable experiences.

The manual provides technical support for the integrated assessment of trade-related policies as well as methodologies for the integrated assessment of the same, helping decision makers, with the optimum solutions to employ. It details the key significance of carrying the assessments and the key factors that require attention in carrying out the assessment. These solutions are computed in relation to the available resources and are aimed at reducing the consumption of resources and levels of pollution whilst at the same time maximizing economic and other gains. The assessment is based on qualitative and quantitative analysis and has reliable theoretic support. The manual offers an exposition of the significance and functions of the assessment, the key factors to be considered in the assessment, the methodology, technical feasibility and the assessment indices system. In addition, there is a summation of experiences of many countries on environmental assessment as well as suggest areas of where and how improvements can be made, thereby making the manual of great referential value.

An integrated assessment is posed to explore the relationship between and the environment, act as an advisor to government and policy makers, and inform trade negotiators and make decision-making transparent among other things. The manner, in which the IATRP is structured, makes the employment flexible as well as gives room to include alternative designs if needed. A number of factors are put forward as key in undertaking an integrated assessment and these are timing, information, consultation and participation, indicators and capacity building. An important fact to note is that the timing factor makes allowance for both *ex ante* and *ex post* assessment.

2.7.2 Strategic Environmental Assessment

Strategic Environmental Assessments (SEA) are employed during trade negotiations with the objective of identifying potential environmental impacts of a given agreement in the country undertaking the assessment. These impacts are in relation to policy initiatives, laws, projects on the environmental among other aspects and they do act in compliment to general environmental impact assessments, which are project specific. They do extend to other countries particularly in instances where domestic interests may be affected. They are therefore carried out *ex-ante*, during trade negotiations to provide negotiators with information additional to that normally available for economic and social concerns. SEA is a useful tool in assessing trade agreements and policies on environmental grounds, and they enable the integration of sustainable development principles into the negotiation and formulation of a trade agreement or policy.

SEAs when being undertaken employ a variety of approaches where use is made of multiple tools to get optimum results. SEA can be impact based or institution centred. Impact based SEAs combine the biophysical environment and its considerations, into decision making, by forecasting the potential impacts of proposed policies on the environment and adopting appropriate measures aimed at protection or mitigation any negative impacts so forecasted. Institution based SEAs on the other hand, essentially mainstreams sustainability and the environment at policymaking level, by assessing the ability of policies in place to detect risks on the environment as well as the capacity to manage them in a timely and effective manner[91].

Impact assessment based SEAs are defined as a systematic process, which evaluates the consequences on the environment, of proposed agreements or policies in order to ensure the full inclusion and addressing of any environmental concerns in a timely manner[92]. Other scholars further broaden the definition to include an analysis of existing policies to identify any inadequacies in relation to the environment, and address them in a timely manner[93]. The extend definition, includes the institution based approach of SEAs. The SEAs therefore, are considered a participatory

[91] K. Ahmed and E. Sanchez-Triana, *'SEA and Policy Formulation'*; Strategic Environmental Assessment for Policies, An Instrument for Good Governance, The World Bank Washington DC, 2008, page 3
[92] ibid
[93] R. Connor and S. Dovers, *'Institutional Change for Sustainable Development'* Cheltenham United Kingdom, Edward Elgar, 2004

approach that streamlines environmental, social and economic issues in agreement or policy making, to come out with a position inclusive of all the major factors that warrant consideration.

SEAs are essentially a broadening of the EIAs to extend them from the national individual project level and introduce them to an even broad and higher agreement negotiation level at either regional or international front, which in turn will influence local policymaking. In trade agreement negotiation, they influence the resolution of environmental concerns identified, before the implementation of the trade agreement or its inclusion in national policy. In terms of methodology, SEAs as similar to EIAs, involve a screening process, scoping, identification, prediction and evaluation of impacts, mitigation and monitoring[94].

2.7.3 Sustainability Impact Assessment

Sustainability Impact Assessments (SIA) are carried out on trade agreements. Their conclusion, provides the undertakers with the possible impacts of the given trade agreement on the country's economic, social, and environmental status. These are independent assessments carried out by a diverse team including external consultants with consideration to the submissions of other relevant stakeholders including the government. SIAs are conducted in three phases, the inception phase, the interim phase and the final report. They are aimed primarily at feeding into the trade negotiation process.

The inception phase maps out the basics for the assessment particularly providing a layout of the entire process. It is at this stage that the methodological approach to be employed will be concluded on, a consultation plan is prepared, relevant stakeholders are identified and other preliminary screening and scoping processes carried out. Upon conclusion, there is produced an inception report which is available on the public domain for access by all interested parties, enabling them to make any further comments should need be.

The interim phase constitutes the main stage of the whole SIA process. This stage sees to the implementation of the methodological approach chosen in the inception stage. A further process of scoping and screening is conducted among other things,

[94] Supra note 85 page 4

resulting in the identification of the major sustainability impacts. Consultations with relevant stakeholders are carried out at this stage using the medium of various channels including interviews. At the end of this phase, an interim report is produced and like the inception report, this one is made available to the public.

The final stage of this SIA process is the final report phase, which essentially refines all the information from previous reports, to come out with a final report. This report among other things, addresses possible mitigation mechanisms to be employed by trade negotiator during the trade negotiation process.

Essentially, SIA assessments indicate whether the impacts of trade liberalisation may be positive or negative, relative to the country and term of the agreement. It is agreed that most of the environmental effects come about, as a result economic effects, a position which seems to lean on the EKC hypothesis[95]. They assess various impacts of trade agreements using a combination of theoretical analysis and empirical evidence and literature. In carrying out the assessment, an evaluation of the causal link for all aspects of the trade policy agenda, which encompasses market access for goods as well as rule based measures[96]. The market access for goods evaluates aspects of agricultural tariffs, non-agricultural tariffs as well as trade in services, whilst under rule based measures, an evaluation of trade facilitation, government procurement, trade and investment, competition policy, TRIPS, TBT, SBS, rules of origin, trade remedies, dispute settlement and trade and environment are is carried out. In carrying out the assessment, the potential impacts of significant changes in any of the aforementioned measures need to be considered[97]

2.8 CONCLUSIONS

Environment and sustainability concerns have been noted to not be sufficiently addressed in most RTAs particularly on the part of developing countries. Mark Elder[98] emphasizes the importance of assessing not only the environmental impacts, but also the broader sustainability impacts and linkages to Sustainable Development Goals

[95] C. George and C. Kirkpatrick, *'Sustainability Impact Assessment of Trade Agreements: From Public Dialogue to International Governance'*, Journal of Envrionmental Assessment Policy and Management, Volume 10, Issue 1, 2008, pages 67 – 89
[96] Ibid page 75
[97] Ibid page 74
[98] M. Elder, "*Considerations on Environmental Impact Assessment of Trade Agreements in the Asia Pacific"* Paper Prepared Under the Auspices of the Institute for Global Environmental Studies, 2017

(SDGs) in coming up with trade agreements. He further argued for the need for specifics in relation to the institutions in charge of this responsibility, citing the reason that normally trade or economic ministers in charge of trade agreements do not consider these issues[99]. Flowing from this argument, other supporters of environmental assessments argue for the definition of the institutions to undertake the assessments, citing the changing focus of trade negotiations, which have in recent years begun to move from solid discussions of trade barriers, to include a broad range of topics, with environmental issues included[100].

Notwithstanding proponents for environmental assessments of trade agreements, there are schools of thought that argue against combining trade and environmental issues[101]. They put forward the argument that the two topics, trade and the environment, will interlink in their individual regulations, since freer trade eventually results in economic growth, better income levels that in turn translate into investment in higher environmental standards. This dissertation however not only argues for the inextricable link between trade and the environment, but seeks to emphasize on the importance of environmental assessments of regional trade agreements and policies for Zimbabwe in a bid to foresee any impacts the agreement may have on the environment and put in place applicable mechanisms to avoid negative impacts.

Whether as a norm or principle, it is apparent that the concept of sustainable development has played an important role in the resolution of environmental disputes as well as the development of jurisprudence at the WTO. As discussed, sustainable development has influenced the interpretation of key provisions in the WTO Agreement interlinking the aspect of free trade as promoted by the WTO and the right to protect the environment.

From the foregoing, it is evident that the international community has recognised that economic development and environmental protection are interlinked aspects of sustainable development; this is where the inclusion of environmental issues in international trade agreements stems from. The Rio Declaration further provides in principle 4 that "*in order to achieve sustainable development, environmental protection*

[99] ibid
[100] C. George and B. Goldsmith, "*Impact Assessment of Trade-Related Policies and Agreements: Experience and Challenges"* Volume 24, Issue 4, Impact Assessment Project Appraisal, 2006 pages 254 - 258
[101] Supra, note 4 pages 247 - 258

shall constitute an integral part of the development process and cannot be considered in isolation from it". This inclusion of environmental concerns in trade agreements, significantly pampers the implementation of environmental policies in the countries of parties to the agreement.

The Rio Declaration also accepts that environmental considerations may be employed to justify trade restrictions and the liberalization of trade may come with positive contributions to sustainable development. Principle 12 states that "*trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade"*. Agenda 21[102], puts forward twin goals resolved on at the summit, in putting together a plan of action. These goals are the promotion of sustainable development through trade liberalisation and making trade and environment mutually supportive[103].

The establishment of the WTO in 1994 saw the creation of the Committee on Trade and Environment, and the main for this creation was to give due consideration to the objectives of the Rio Declaration. Subsequent work that followed on trade and the environment focused on action at the multilateral level, like the 2001 Doha Round, the extension of the objectives of the Rio Declaration, and the Paris Agreement on climate change. This attention cascaded to bilateral and regional agreements, which has today resulted in the inclusion of environmental provisions in trade agreements. The WTO when of the 270 RTAs notified by May 2016 confirmed this, 263 included at least one environmental provision either in the main text, annex or side agreements, and 177 RTAs included progressive environmental provisions that go beyond statements in the preamble and general exception clauses[104]. This outcome buttresses the need to subject trade agreements to environmental assessments, and ensure the goals toward economic growth by countries, is alive to the impact on the environment of the economic growth methods they may elect to employ.

[102] Agenda 21 of the United Nations Conference on Environment and Development, a product of the 1992 Earth Summit on Sustainable Development
[103] Ibid Chapter 2 paragraph 2.3
[104] JA Monteiro, *"Typology of Environment-Related Provisions in Regional Trade Agreements",* World Trade Organization, Economic Research and Statistics Division, WTO Working Paper ERSD-2016-13, https://www.wto.org/english/res_e/reser_e/ersd201613_e.pdf accessed on 17 march 2020

CHAPTER 3

ASSESSING ENVIRONMENTAL ASSESSMENTS OF ZIMBABWE'S REGIONAL TRADE AGREEMENTS AND POLICIES.

3.1 INTRODUCTION

Having understood the relationship between trade and the environment at a global level, this chapter will qualitatively consider how regional trade agreements have incorporated the same, with particular attention to only the regional trade agreements Zimbabwe is party. A qualitative approach will be employed in studying the reconciliation initiatives between trade and the environment from a regional FTA perspective, with particular attention being drawn on Zimbabwe. The aim in this case is to assess the manner in which potential effects on the environment, emanating from trade agreements is being handled in Zimbabwe. This will be done by referencing the objectives of this research as well as answering some of the research questions posed. Considering the nature of the questions, a comparative research methodology was employed through a review of literature and other information gathered through desk research.

Another component of this research will compare different country approaches in considering Environmental issues in their treatment of trade agreements. Not only will a comparison be done with other jurisdicitons in different regional trading blocs, countries in the same trading bloc and how they have responded will also be considered. At the helm of this research is to come out with results that identify Zimbabwe's position on the regional fora in as far as trade and environmental issues are concerned and also make recommendations from other analysed jurisdictions which can be employed by Zimbabwe in any area found wanting. It is therefore imperative that this study in comparatively studying jurisdictional approaches, assesses a more effective approach which can potentially trigger change in guiding, infroming and tranforming futre trade negotiations and policy making initiatives. In addition, it seeks to advocate for a more robust and comprehensive development of environmental policies that are not confined to individuals but also to more bigger institutions like trade agreements, hence the need for a comparative study.

3.2 REGIONAL TRADE AGREEMENTS AND THEIR LEGAL EFFECT IN ZIMBABWE

The need for economic cooperation amongst countries prompted the formation of trading blocs cum economic communities to foster this cooperation as well as eliminate any barriers to this intention. In addition, through economic cooperation, African countries anticipate a reduction in the continent's dependence on industrialized economies for a greater part of their international trade[105].

Pursuant to the above intention, there are several trading blocs and economic communities in Africa with the common objective of increasing regional integration through trade liberalization in the form of customs and monetary unions, free trade areas among other means. For the purposes of this research, only the trading blocs and economic partnerships Zimbabwe is party will be the focus of discussion. Zimbabwe is party to the SADC, COMESA, AfCFTA, iEPA, and the TFTA. Trade liberalization, from an African perspective, encompasses key policy changes the likes of removal of both tariff and non-tariff barriers, avoidance of import bans among others. It is however important to note that trade is not the sole objectives these blocs aim to pursue even though it is a priority.

In Zimbabwe, the effect of these agreements does not begin by a mere signature to the main agreement only. Section 327 of the Constitution requires an international treaty, which has been concluded by the President or under his or her authority, to be approved by Parliament and incorporated into the law through an Act of Parliament in order for it to have a legal or binding effect in Zimbabwe. Parliament is however empowered in subsection (5) to by resolution, declare any treaty from not requiring such approval. Pursuant to this provision, all agreements discussed below have since been ratified Parliament for application in Zimbabwe. Following this ratification, Zimbabwe therefore agreed to be bound by these agreements, hence the need to examine the process of environmental assessments of these agreements as their implementation, undoubtedly has an effect on the Zimbabwean environment.

[105] C.K. Ntara, '*African Trading Blocs and Economic Growth: A Critical Review of the Literature'* International Journal of Developing and Emerging Economies, Volume 4, Issue 1, 2016, page 1

3.3 ENVIRONMENTAL ASSESSMENTS UNDER THE SADC TREATY

SADC has as one of its primary objectives the promotion of sustainable and equitable economic growth and socio-economic development that will ensure the alleviation of poverty until its eradication, enhancement of the people's standard and quality of life as well as the support of the socially disadvantaged through regional integration[106]. In addition, the bloc aims to achieve the sustainable utilisation of natural resources and effective protection of the environment[107]. In Article 21 of the Treaty, Members undertook to cooperate in a number of areas including food security, land, agriculture, natural resources and the environment [108]. Article 22 permits Members to conclude such protocols as may be necessary in each area of cooperation agreed upon.

Pursuant to Article 22, the Protocol on Trade concluded in 1996 was concluded. This protocol constitutes a major area of the very existence of the SADC as a trading bloc as it supports the institution's goals of economic development and poverty eradication. The Protocol in essence provides for the liberalisation of intra-regional trade through the creation of mutually beneficial trade arrangements. It advocates for the elimination of trade barriers, the easing of customs procedures, harmonisation of trade policies based on international standards as well as the prohibition of unfair trade practices.

In implementing the protocol, Article 9 provides for general exceptions to the rules in the case where a member may need to implement measures contrary to the general objective of trade liberalisation. Some of the cases where the exception measures may be employed include employing measures aimed at protecting among other things, human, animal or plant life or health, or necessary to conserve exhaustible natural resources and the environment, among other measures[109].

Akin to this protocol, there are a number of other protocols members should pay attention to in implementing the SADC Treaty. These protocols are aimed realising the SADC objective of sustainable utilisation of resources and environmental protection. The protocols cover a wide scope in as far as environmental issues are concerned and they include energy use, forests, and water and aquatic resources.

[106] SADC Treaty Article 5(1)(a)
[107] Ibid (g)
[108] Supra note 102, Article 21 (3)
[109] SADC Protocol on Trade 1996, Article 9 (b) and (h)

The Protocol on Energy of 1996, aims at ensuring that the development and utilisation of environmentally sound energy should be based on cooperation and the development of renewable energy sources, energy efficiency and conservation. In addition, the protocol seeks to promote renewable energy sources production. The Protocol on Forestry of 2002 calls on members to among other measures; protect the environment by harmonising sustainable forest management approaches, policies, legislation and enforcement. This resulted in the development of the SADC Support Programme on Reducing Emissions from Deforestation and Forest Degradation (REDD) which is aimed at the sustainable management of SADC forests and fostering sustainable development among other objectives. There are a number of other protocols as well that are aimed at environmental protection under the SADC Treaty and these are the Protocol on Wildlife Conservation and Law Enforcement of 1999; Protocol on Health of 1999; Protocol on Mining of 1997; Revised Protocol on Shared Watercourses of 2000; Protocol on Tourism of 2000; Protocol on Fisheries of 2001 and the Protocol on Transport, Communications and Meteorology of 1996.

In addition to the foregoing, there in place a Regional Indicative Strategic Development Plan (RISDP), a fifteen-year strategic roadmap to provide direction for SADC's social and economic goals. The RISDP has a number of strategic priority areas of intervention including the development of mechanisms on the implementation of MEAs ratified by members of the SADC. The aim is to ensure environmental sustainability in accordance with broader global sustainable development strategies like the MDGs. In so doing, the RISDP in the area of the environment and sustainable development is to ensure the equitable and sustainable use of the environment and natural resources whilst at the same time harmonising policy environments as well as legal and regulatory framework in member territories. The RISDP is also focused on environmental mainstreaming and regular assessment as well as the monitoring and reporting on environmental conditions in the SADC region, among other environmental related initiatives.

The RISDP in its initial form is due to expire in 2020 and SADC has engaged consultants to look at producing a revised version for implementation during the 2020 to 2030 period. SADC has also employed other strategies including the Regional Biodiversity Strategy and the Climate Change Adaptation Strategy for Water. Pursuant to its objectives, other members have been actively developing and implementing

national legal and policy frameworks and strategies to address and to an extent curb the effects of climate change. Among a number of initiatives, South Africa implemented renewable energy feed-in tariffs and put in place a National Climate Change Response Strategy, Mauritius approved the waste to energy project and a coal-fired electric power plant. Malawi implemented the National Framework on Climate Change on Adaptation and Zambia the National Disaster Management Policy and Wildlife Policy.

3.4 ENVIRONMENTAL ASSESSMENTS UNDER THE COMESA TREATY

Established in 1994, COMESA was formed primarily to enhance cooperation of its members in developing their natural resources among other things for the benefit of its member states. In so doing, its major thrust is on the formation of a large economic and trade bloc that would see to the liberalization of trade and removal of trade barriers amongst its members in the course of trade among its members. Its major priority is the promotion of sustainable economic development by attaining sustainable growth and development whilst promoting a balanced and harmonious development of its production and marketing structures; it is a trading bloc with a membership of twenty-one sovereign states.

The basis of COMESA is found in the treaty wherein members agreed to establish a Preferential Trade Area for states in the Eastern and Southern parts of Africa. The aim of establishing this PTA is to enhance economic and market integration of among members through consolidating their cooperation and implementing common policies and programmes that will assist in the achievement of the sustainable growth and development of the common market. Whilst its objectives as captured in Article 3 of the treaty are mainly centred on trade, Article 4 (6) (h) of the treaty requires members to cooperate in the development and management of natural resources, energy and the environment in a bid to enable the common market to meet its objectives related to economic and social development. Pursuant to these objectives, the treaty devoted Chapter 16 to encourage cooperation in the development of natural resources, environment and wildlife.

Article 122 outlines the general scope and principles of cooperation as agreed and committed upon by members. It recognises the need for members to cooperate in the joint and efficient management and sustainable utilisation of their environmental

resources[110]. The members further recognise the potential of economic activity to cause environmental degradation and depletion of natural resources among others, and calls for a clean and attractive environment for long term economic growth[111]. Members further undertook to coordinate and cooperate on strategies aimed at environmental conservation and preservation against pollution of any sort, as well as the need to cooperate and adopt common policies for controlling hazardous waste, nuclear and radioactive materials as well as any other materials used in the development or exploitation of nuclear energy[112]. The article proceeds to call upon members to observe the preservation, protection and improvement of the environmental quality, protection of human health and prudent and rationale use of natural resources, as the objectives to be observed under the treaty in relation to the environment[113]. The Article concludes by providing for action by the common market in relation to the environment, to be based on the principles that preventive action should be taken, environmental damage be rectified as a priority, polluters should pay and these requirements be components of the COMESA's policy in all fields of activity under the common market[114].

Article 123, calls for the cooperation of members in the management of natural resources. In paragraph 1, members agreed to take concerted measures to foster cooperation in the joint and efficient management and sustainable utilisation of natural resources within the common market, for the mutual benefit of members. Paragraph 1 further obligates members to take necessary measures to conserve their natural resources, to cooperate in the management of their natural resources for the preservation of the eco-systems and arrest environmental degradation and to adopt common regulations for the preservation of shared land, marine and forestry resources. The treaty provides in paragraphs (2) to (4) for nearly the same measures to be observed in relation to forests and water resources. Paragraph (5) further calls on members to accede to international conventions or agreements that are designed to improve the policies of development, management and protection of their natural resources.

[110] COMESA Treaty, Article 122(1)
[111] COMESA Treaty, Article 122 (2)
[112] COMESA Treaty, Article 122(3) and (4)
[113] COMESA Treaty, Article 122 (5)
[114] COMESA Treaty, Article 122(6)

Article 124 provides for cooperation from members in the management of the environment. This cooperation is to be done through the development of a common environmental management policy aimed at preserving the environment of member states and prevent degradation in various forms. The article also provides for the development of special environmental strategies to manage the environment, measures to control transboundary pollutions. Members are further called upon to accede to UNCED agreements as well as the UNEP Convention for Eastern and Southern Africa on water and marine resources[115]. To achieve the requirements in paragraph (1), members undertook to adopt common environmental control regulations, incentives and standards, develop capabilities for the assessment of all forms of environmental degradation and pollution and the formulation of regional solutions, among other measures aimed at protecting, preserving and managing the environment[116].

In article 125, members agreed to employ measures that would prevent illegal international trade in toxic and hazardous wastes. Members further undertook to cooperate and adopt common positions against illegal dumping of the same within the common market[117] and to cooperate in sharing technological knowledge on clean technologies and low waste production systems for the energy and productive sectors[118]. They also undertook to accede to international environmental conventions designed to improve environmental policies and management particularly the Montreal Protocol on the Environment[119] and to include environmental management and conservation measures in trade, transport, agricultural, industrial, mining and tourism activities in the Common Market[120]. Article 126 provides for wildlife development and management and calls upon members to develop a collective and coordinated approach to sustainable development and management, rational exploitation and utilisation and the protection of wildlife in the common market.

In addition to the treaty provisions, COMESA has come up with initiatives aimed at achieving economic development whilst preserving and protecting the environment.

[115] COMESA Treaty, Article 124 (1)
[116] COMESA Treaty, Article 124 (2)
[117] COMESA Treaty, Article 125 (1)
[118] Ibid paragraph (2)
[119] Supra note 108, paragraph (3)
[120] Ibid

Under these initiatives, COMESA operations will be alive to a number of aspects including the promotion of agriculture and other practices related to land use.

COMESA put in place a comprehensive climate-change initiative aimed at achieving economic development whilst protecting the common market region from the effects of climate change. This initiative seeks among other objectives to promote sustainable agriculture and land-use practices, the conservation of biological diversity and environmental maintenance services. The aim of the initiative is to uphold the dictates of the concept of sustainable development. Its specific objectives include the building of a shared vision on climate change for Africa, enhancing regional cooperation to address the effects of climate change and work on integrating climate change considerations into national and other regional policies. In addition, the initiative seeks to build the capacity and improve the knowledge base of its members so at to effectively address climate change impacts, improve collaboration between stakeholders on the same matter and develop a framework to establish and African Bio-Carbon Facility. The thrust of this initiative is to support the continent in adapting to climate change and safeguard its environment.

Flowing from this, COMESA is working towards having agriculture, forestry and other land use included in the international climate change regime. To achieve this, COMESA is focusing on eight thematic priority areas namely the Post-Kyoto climate-change regime and beyond; enabling policy and institutional framework; African bio-carbon facility; research, information management and communication; technology development and transfer, capacity building, enhancing partnerships and early action flagship programmes. In addition, a model for coordinating climate change initiatives among stakeholders was also developed. The essence of the model is such as would require the interaction these various stakeholders in a manner that will effectively address the impact of climate change through mitigation and adaption actions[121]. Members of COMESA are developing and implementing national legal frameworks, policies and strategies to address the impacts of climate change.

[121] W. Viljoen, “Addressing Climate Change Issues in Eastern and Southern Africa: the EAC, COMESA, SADC and the TFTA” Cape to Cairo: Exploring the Tripartite FTA Agenda, Trade Law Centre and Swedish Embassy, Nairobi, 2013, pages 130 - 14

3.5 ENVIRONMENTAL ASSESSMENTS UNDER THE AFCFTA

Zimbabwe is also party to the recently concluded agreement establishing the AfCFTA. This agreement brings together all fifty-five members of the African Union, building the world's largest free trade area since the WTO. It the members' main objective, to boost intra-African trade by removing import duties as well as reducing barriers to trade especially non-tariff barriers.

The AfCFTA aims to create a single continental market for goods and services, with free movement of businesspersons and investments, and thus pave the way for accelerating the establishment of the Customs Union. It will also expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation and instruments across the RECs and across Africa in general. The AfCFTA is also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.

On the environmental front, progressive reduction and elimination of customs duties and non-tariff barriers on goods, is argued to be contributory to the realisation of sustainable development in Africa[122]. This is because the agreement includes as part of its goals initiatives that can help bring greater resilience to the effects of climate change in Africa's conflict zones. In addition, the free trade area is intended to further cooperation and implement a common policy on plant import requirements and sanitary conditions. This is especially important in light of the increased risks climate change poses to the continent's food security, water security, disease, and health conditions. The free trade area also has as its goal, the development and promotion of regional and continental value-chains to help the agricultural, water, and energy industries transfer infrastructure, technology, and financial tools across boundaries to build resilience to withstand climate change. Programs that help farmers avoid losing their crops and livestock, conduct precision-agriculture, and offer microcredit could be especially useful in securing access to food and water. In so doing, the long-term sustainability, development, and security of African countries can be bolstered through

[122] D. Harary, *'African Free Trade Could Increase Resilience to Climate Change and Conflict'* October 2018, accessed at https://www.newsecuritybeat.org/2018/10/african-free-trade-increase-resilience-climate-change-conflict/ on 8 June 2020

industrial collaboration, partnerships, and trade. The creation of the AfCFTA is therefore a landmark first step towards achieving this goal.

Like the foregoing agreements, the AfCFTA provides in Article 26, general exceptions to the application of the agreement. The exceptions include their application in a situation necessary to protect human, animal or plant life or health and if their application relates to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

3.6 ENVIRONMENTAL ASSESSMENTS UNDER THE TFTA

The TFTA is an agreement concluded among member states of the EAC, SADC and COMESA regions. The coming in of the TFTA was mainly driven by the need to boost intra-African trade and integration. This boost would be achieved by aligning the policies of the three RECs in the areas of trade liberalization in goods and services and related areas. In addition, the agreement seeks to work towards, towards establishing a single REC resulting from the merger of the three RECs into a single bloc and ultimately creating the African Economic Community.

In addition to boosting intra-African trade, the TFTA also seeks to address climate change issues obtaining in the region. To this end, the member states signed the Tripartite Agreement for the Implementation of the Programme on Climate Change Adaptation and Mitigation in Eastern and Southern Africa, in 2012. This agreement allows for the inclusion of climate change issues as one of the areas of cooperation under the Tripartite Negotiations Framework.

The Tripartite Agreement for the Implementation of the Programme on Climate Change Adaptation and Mitigation in Eastern and Southern Africa came up with a five-year programme focused on climate change. The focus of the programme was on addressing the impacts of climate change through adaptation and mitigation aimed at socioeconomic resilience through Climate-Smart Agriculture (CSA). CSA is that type of agriculture that sustainably increases productivity, resilience, and enhances achievement of national food security and development goals. The aim of the programme is to attract and increase investment in climate resilient and carbon-efficient agriculture, with its linkages to forestry, land-sue and energy practices.

The TFTA agreement generally focuses on promotion of trade among member states. In Part X of the agreement however, there are provided exceptions, which members may apply to the effect of restricting the bare fundamentals of the agreement. These exceptions are a number and they include the allowance given to members to not implement a part of the agreement in a bid to protect human, animal or plant life or health. In addition, the refusal by a member to implement may be in relation to the conservation of exhaustible natural resources. These are the only two provisions that expressly relate to environmental protection in the TFTA.

3.7 ENVIRONMENTAL ASSESSMENTS UNDER THE IEPA

EPAs document free trade agreements concluded between the EU and select countries in the African, Caribbean and Pacific (ACP) countries. They are designed as instruments fro facilitate the development of the countries involved. Negotiations for these EPAs are not as smooth sailing as one would anticipate with countries seeking to ensure the safeguarding of their own interests to achieve the desired development goals sought after by the EPA. As such, the current EPA negotiations Zimbabwe is party to were initiated in 2009 and remains an interim agreement as negotiations leading to its full ratification into a full EPA are still ongoing. Zimbabwe signed this agreement together with Mauritius, Seychelles and Madagascar, which agreement guaranteed an open market to Zimbabwean products on the EU market as well as EU products on the Zimbabwean market. The agreement is still interim as there are some negotiating points that are still under negotiation and upon agreement, a full EPA can then be ratified. Whilst it is apparent that Zimbabwe's industry has a weaker standing power when put against products emerging from EU countries, Zimbabwe is still expected to liberalise 80% of its imports from the EU.

Interesting about the EPA negotiations, is the fact that Sustainable development has also been included as a negotiating point. Chapter 6 of the draft EPA agreement provides for the objective to promote a mutually supportive relationship between trade and sustainable development by promoting sustainable trade practices. In addition, the provision provides for fostering the contribution of trade and environmental issues by encouraging ethical business practices, responsible consumption and responsible production along the whole global value chains[123].

[123] EPA Chapter 6, Article 6.1

Under the agreement, parties recall various global instruments on sustainable development, affirming their commitment to promote international trade in a way that contributes to the objectives of sustainable development[124]. The non-EU countries to the agreement are also putting forward a clause that seeks to realise these international sustainable development instruments in a manner that takes into account the specific needs of these countries, and their level of development so as to protect the poor and vulnerable communities.

In Article 6.5. parties recognise the value of multilateral environmental governance and agreements as a response of the international community to environmental challenges and stress the need to enhance the mutual supportiveness between trade and environment. The Parties undertake to consult and cooperate, as appropriate, with respect to trade-related environmental issues of mutual interest. Further, parties reaffirms their commitment to effectively implement in each of their respective domestic law and practice the multilateral environmental agreements to which they are party. There is a further commitment to exchange, as appropriate, information and experiences on their respective situation and progress with regard to the ratification of multilateral environmental agreements or their amendments.

Article 6.6, provides for climate change, with parties reaffirming their commitment to reaching the ultimate objective of the UNFCCC and to effectively implementing it. Parties further reaffirm their commitment to effectively implementing the Kyoto Protocol and the Paris Agreement. Under this provision, parties recognise the role of domestic policies in addressing climate change and undertake to consult and share information and experiences. In relation to Biological Diversity, Article 6.7 provides for the recognition by parties of the importance of ensuring the conservation and sustainable use of biological diversity. This recognition is provided to be in accordance with the CBD, CITES, the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, adopted at the tenth meeting of the Conference of the Parties in

[124] Agenda 21 of 1992; the Johannesburg Plan of Implementation of the World Summit on Sustainable Development of 2002; the Ministerial Declaration of the United Nations Economic and Social Council on Full Employment and Decent Work of 2006; the Outcome Document of the United Nations Conference on Sustainable Development of 2012, entitled "The future we want"; the Outcome Document of the United Nations Summit on Sustainable Development of 2015, entitled "Transforming Our World: the 2030 Agenda for Sustainable Development" and the Paris Agreement under the UN Framework Convention on Climate Change.

Nagoya on 18 to 29 October 2010, and other relevant international instruments to which they are party.

Sustainable forest management and trade in forest products is provided for under Article 6.8 with parties recognising the importance of ensuring the conservation and sustainable management of forest resources in contributing to their economic, environmental and social objectives. Trade and sustainable management of living marine resources and aquaculture products, is provided for in Article 6.9, with Article 6.10 providing for trade and investment favouring sustainable development.

3.8 POLICY AND LEGAL FRAMEWORK FOR ENVIRONMENTAL ASSESSMENTS IN ZIMBABWE

Zimbabwe is party to the aforementioned RTAs in addition to the WTO when considered globally. These groupings pose varying interests and approaches to trade in a manner that invariably influences the environment of the country. In relation to a trade policy, Zimbabwe currently does not have in place a trade policy. The expired trade policy[125] however recognised the link between trade and environmental protection. This policy was cognisant of the impact of environmental policies on trade and vice versa. In so doing, the government undertook to put in place measures that would ensure that trade and environmental policies were mutually supportive in order to achieve sustainable development. In addition, the policy called upon coordination among the relevant ministries, in order to minimise policy conflicts between trade and the environment. It would be prudent therefore to have another trade policy to ensure a continued harmony between its implementation and the environment.

On the environmental management front, Zimbabwe put in place an Environmental Impact Assessment Policy in 1994. Through this policy, at least 7000 projects have been subjected to EIA[126]. The EIA policy was then incorporated into the Environmental Management Act [*Chapter 20:27*] in 2002 (the EMA Act). The effect of the legislative provision, gave the Environmental Management Agency (EMA), the regulatory powers to regulate the application of EIAs. EIAs in the context of Zimbabwe have been employed to ensure that due consideration is accorded to environmental issues and

[125] Zimbabwe National Trade Policy 2012 - 2016
[126] R.K. Machaka and S. Bere, *'Environmental Impact Assessment System Evaluation Conference Report, Zimbabwe'* 2014, page 4

should be included in making decisions on projects that have a potential impact on the environment.

The starting point for considering EIAs in Zimbabwe is the Constitution of Zimbabwe of 2013. Through the Constitution, the country committed in section 73 to the environment by affording every person environmental rights. Previously, these rights were found in the EMA Act, as the previous constitution did not have such provisions. According to section 73;

> *"(1) Every person has the right-*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that—*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.*
>
> *(2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section"*

These environmental rights are accorded to every person in Zimbabwe and are further buttressed by the provision of section 56 of the Constitution, which provides the right to equal treatment and non-discrimination. Section 73 also forms the backbone for carrying out EIAs in Zimbabwe. This is because as per the reading of section 73, EIAs assist in ensuring that the environment is not harmful to the health or well-being of persons and that it is adequately protected for the benefit of present and future generations.

The EIA policy as declared in 1999 still is an essential tool that brings together the consideration of environmental and economic issues during planning. The effectiveness of the EIA Policy in managing environmental issues was pillared by the

introduction of guidelines[127] that identified activities that are likely to require an EIA. The guidelines were however limited in that they did not cover the whole spectrum of the environment but rather limited themselves to mining and quarrying, forestry, agriculture, transport, energy, water, urban infrastructure and tourism[128]. The guidelines besides identifying activities that were likely to require an EIA also put forward possible measures that could be employed to manage the impact of an identified activity[129]. The introduction of the National Environmental Policy and Strategies of 2009(NEPS), then buttressed the provisions of the EIA Policy.

The NEPS worked hand in hand with the government objective of among other things, alleviating poverty and improving the livelihoods of the people of Zimbabwe. The main goal of the NEPS is;

"*to avoid irreversible environmental damage, maintain essential environmental processes, and preserve the broad spectrum of biological diversity so as to sustain the long-term ability of natural resources to meet the basic needs of people, enhance food security, reduce poverty, and improve the standard of living of Zimbabweans through long-term economic growth and the creation of employment.[130]"*

The policy per this goal evidently centralises the environment in creating economic opportunities. The goal of the policy is pursued by a set of objectives aimed at ensuring its achievement. The objectives include, seeking to conserve biodiversity and maintain the natural resource base and basic environmental processes to enhance environmental sustainability. Promoting public participation and a sense of responsibility for the environment through environmental education and awareness, and by promoting environmentally sustainable lifestyles. Establishing and supporting an effective institutional framework, committed to sustainable development and able to collate and manage environmental information. Promoting national interests by cooperating in drawing up and implementing international environmental agreements, and collaborating with neighbouring countries on transboundary environmental issues. Lastly the NEPS seeks to encourage sustainable development by optimising the use of resources and energy and minimising irreversible environmental damage, waste

[127] B. Walmsley and S. Patel, "*Handbook on Envrionmental Assessment legislation in the SADC Region"* , 3rd Edition, Development Bank of Southern Africa, Pretoria, 2012, page 501
[128] ibid
[129] Environmental Impact Assessment Guidelines of 1997
[130] See the Government of Zimbabwe 2009, National Environmental Policy and Strategies

production and pollution through incorporating provisions for environmental assessment and management in all economic and development activities.

Flowing from these legal frameworks is the EMA Act, which prescribes a set of environmental management principles, to be adhered to by every person particularly in relation to environmental resource utilization. Important to note is the fact that the EMA Act, provides for the sustainable management of natural resources and protection of the environment and the prevention of pollution and environmental degradation[131]. The EMA Act provides for EIA to mean an evaluation of a project to determine its impact on the environment and human health and to set out the required environmental monitoring and management procedural plans[132]. The EMA Act recognises the principle of sustainable development in section 4(1)(c) (i) and (ii) by according every person the right to protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative policy and other measures. Essentially, section 2 encapsulates rights and principles that every state must heed to and actively recognise in pursuing its objective of environmental protection and sustainable development.

For EIAs, section 97 of the EMA Act, as read together with the First Schedule, sets out all activities, which require an EIA before they are implemented. The First Schedule makes no specific mention if RTAs qualify as projects that require an EIA. The list of projects listed is however so broad as to cover all areas of the environment such projects should result from an RTA. Some of the projects listed include Dams and man-made lakes, forestry, industry, infrastructure, mining, power generation and waste treatment and disposal.

Concerning EIAs, the EMA Act calls for any person who proposes to carry out any project listed in the First Schedule to prepare and submit an EIA report to the Director General. Following submission of this report, the person can only carry out the project, should the Director General issue a certificate of authorisation to do so. Should a person knowingly carry out a project without the aforementioned certificate, the Act qualifies it as an offence.

[131] See section 4 of the EMA Act which captured the environmental rights and principles of environmental management
[132] EMA Act, Section 2

Notwithstanding the EMA Act, there are a number of enactments and policies that have been put in place in Zimbabwe to address environmental issues, albeit some of them are due for either a repeal in light of the EMA Act or an amendment to align to the current global and national thrust on environmental issues. These include the Town and Country Planning Act [*Chapter 29:12*] which previously empowered the local authorities to grant permits, but this power was changed by the introduction of the new EIA Regulations, which now provide for local authorities to only issue licences to developers upon proof of the licence from the Agency confirming that an EIA has been approved. In addition, this Act recognises the Ministry of Environment and Natural Resources Management is regarded as the local authority for parks, wildlife and forestlands, to which any developer must undertake an EIA for any developments in these specific land use areas. The Mines and Minerals Act [*Chapter 21:05*] regulating mining projects, requires EIAs to be undertaken and policy conditions to be met for projects. The Water Act [*Chapter 20:24*]authorises the granting of permits relating to water abstraction and water storage in accordance with set requirements in the Act.

The Environmental Management (Environmental Impact Assessments and Ecosystems Protection) Regulation of 2007, Statutory Instrument 7 of 2007. These regulations provide for the process of EIA and the protection of ecosystems to the effect of barring the implementation of any industrial project without an EIA[133]. Section 16 (4) of the Regulations provides that a developer who intends to carry out a project, should after submitting an EIA, submit a prospectus to the EMA Agency which will then issue a licence to carry out the project should they be satisfied by the prospectus. Details of the EIA of the project and the measures to be taken to manage any impacts should be spelt out in the prospectus. Furthermore, wide spectrum of stakeholder consultation in preparing the EIA is obligatory. Other instruments include the Waste and Solid Waste Disposal Regulations, Statutory Instrument 6 of 2007, the Hazardous Substances, Pesticides and Toxic Substances Regulations, Statutory Instrument 12 of 2007 and the Plastic Bottles and Plastic Packaging Regulations, Statutory Instrument 98 of 2010.

The afore drawn assumption of these legal instruments on RTAs could be justified in that a ban on the implementation of a specific project locally, could have a bearing on

[133] See Part II of the Regulations

the regional commitments the country may have made in accordance with the RTAs. For example, the government banned the importation of plastic packaging with a thickness of less than 30 microns in 2010, following the introduction of the Plastic Bottles and Plastic Packaging Regulations, Statutory Instrument 98 of 2010. Whilst this ban had environmental concerns as the rationale, it still did affect the dictates of trade liberalisation under all the aforementioned RTAs.

Lastly, all EIA reports are available for inspection to the public at any given time. However, no one is allowed to use the information in these reports, for personal benefit, save for civil proceedings under the Act or any other law as a matter relating to the protection of the environment[134].

3.9 CONCLUSION

Environmental assessments of trade agreements are exercises that are being applied in a number of jurisdictions. In Africa however, the southern and eastern parts to be exact, there is no easily accessible and documented evidence of the same being undertaken in relation to the RTAs discussed above. Though it can be noted that each agreement made reference to aspects of the environment in relation to trade, there is no basis upon which such provisions were agreed upon and came to be included in the RTA. There is therefore a growing need on the part of state actors, to parallel these assessments with the whole negotiation process to ensure there is no policy shift against environmental concerns.

Trade is an important economic driver in any country and Zimbabwe is no exception. In Zimbabwe, trade poses an avenue to dealing with some of the country's developmental challenges, hence the rationale for the country being party to a number of bilateral, regional and multilateral trade arrangements. As aforementioned, on the regional front, Zimbabwe is party to the SADC, COMESA, TFTA, iEPA and the recently concluded AfCFTA.

SADC plays an important role in Zimbabwe's trade cycle as most of its trading partners are within this region. COMESA as the other trading bloc Zimbabwe is a member, also has a pivotal role it plays in boosting the trade levels in Zimbabwe even though the rate is lower when compared to that of the SADC trading bloc. The same is the overall

[134] Supra note 122

outlook for Zimbabwe's trade with the TFTA countries, albeit the avenue offers Zimbabwe with a wider market for its products. With the AfCFTA, it is anticipated that the returns of trade will be positive on Zimbabwe, as the export base with reduced restriction will be even wider, than the spectrum covered by the TFTA. However, the outcome of the AfCFTA can only be speculative now, as the agreement has not yet been put in practice. The same can be said of the iEPA.

Related to this research however, the main thrust in not necessarily on improving the trade balance in these regions but rather in sustainably promoting trade in the region. The country makes various commitments under these agreements that need to be scrutinized under the spectacles of environmental protection notwithstanding the fact these commitments will be aimed ultimately at trade liberalization.

It is interesting to note that while the trade agreements discussed make provision for the environment, there is no mention of environmental assessments in the aforementioned manner. The national legislative and policy framework for Zimbabwe does speak to EIAs, which have been discussed to relate to national projects and not necessarily trade agreements.

CHAPTER FOUR

ENVIRONMENTAL ASSESSMENTS: A JURISDICTIONAL COMPARISON, ANALYSIS AND FINDINGS

4.1 INTRODUCTION

In negotiating agreements and policies, impacts of environmental concerns have not been ordinarily on the forefront of negotiations. From the foregoing discussion, it may be concluded that this lack of adequate consideration can be attributed to the lack of defined strategies, which can be employed to integrate environmental issues in trade negotiations. The need to provide these strategies can however not be overemphasised in light of the proliferating number of trade agreements being concluded.

As is the crux of this research, environmental assessments either *ex ante* or *ex post* of trade agreements and policies, pose a promising route if the recorded impacts in Canada, USA and the EU to mention but a few, are anything to go by. Though there exists a number of recommended procedures of environmental assessments it is currently left to individual states or trading blocs to agree or decide on a method to employ. In coming up with country specific methods of assessment, attention must be given to concerns like when and who should carry out the assessment as well as what scoping method should be employed.

It has been argued that environmental assessments of trade agreements and policy is important, as both instruments are an important process in international policymaking as well as, as a framework for domestic policy[135]. Additionally, the interface between trade and the environment continues to expand as both areas develop, and essentially, developing as sound economic system for any country, is reliant upon the presence of certain environmental qualities, an idea often put forward by proponents of sustainable development. It is therefore important to ensure that trade agreements and policy, do not bring about impediments in the development of efficient environmental policies[136].

[135] O.K Fauchald and M. Greaker, *"Envrionmental Assessment of Trade Agreements and Policy"*, Nordic Council of Ministers, Copenhagen 1998, page 12
[136] ibid

From the foregoing, it is apparent that environmental assessments of trade agreements have been undertaken in varying approaches by different states actors and in turn been given differing names. Albeit, though they may be somewhat similar in nature, in that they provide for the environment, they do not necessarily cover similar issues pertaining to the environment. An important factor to note is that many environmental assessments are termed sustainability environmental assessments yet their concentration is on the environment itself as opposed to all aspects of sustainable development. They do however provide an in-depth assessment and proffer a clearer methodological and comprehensive approach in carrying out the assessments. This chapter therefore highlights the gap note in the preceding chapter in that the RTAs do contain environmental provisions but no evidence to suggest how the environmental provisions came to be included in the same. In addition, this chapter will highlight the importance of environmental assessments and the benefits they have yielded for the countries that have undertaken them. It will also explore examples of comparable jurisdictions and RTAs that have successfully introduced and implemented environmental assessments.

This chapter will therefore highlight the significance of this study, analyse approaches by other jurisdiction on employing environmental assessments of their trade agreements. It will then conclude by summarising the findings of this study, which findings will be referring to this chapter as well as preceding chapters.

4.2 SIGNIFICANCE OF THE RESEARCH

This study sought to examine environmental assessments of regional trade agreements Zimbabwe is party. Having described and analysed the environmental provisions in the different regional trade agreements Zimbabwe is party to in Chapter 3, it is important to juxtapose the findings with whether environmental assessments are a necessary tool to be employed in pursuing sustainable development in a country, more specifically sustainable development as it relates to the environment.

As highlighted in the problem statement, the constitution of Zimbabwe guarantees every person the right to an environment that is not harmful to their health or well-being; that is protected for the benefit of present and future generations, through

reasonable legislative and other measures[137]. The EMA Act further expands on this right by not only providing for it as a right but also setting out a set of principles of environmental management. The extent of these provisions in as far as Environmental Assessments are concerned, is limited to only EIAs of projects within Zimbabwe.

This is where the cause of concern on this study stems from. With the proliferation of trade agreements, to which Zimbabwe is an active participant on bilateral, regional and multilateral scale, it is prudent that environmental protection issues be not ignored in negotiating these treaties. This is because with these agreements, comes obligations to perform on the part of the states which obligations may result in harm to the environment.

This study therefore advocates for the carrying out environmental assessments of trade agreements as well as national policy, to come up with agreements that are alive to environmental protection and preservation. This research therefore seeks to inform action on the part of state actors in seeing to the introduction of environmental assessments of trade agreements and national trade policy, to ultimately protect the environment from any potential harm that may come from these instruments.

As evidenced by an analysis of the RTAs and Zimbabwe's own policy and legal framework, the existing environmental provisions are not backed by evidence of such assessments having been carried out such that the effectiveness of the provisions employed cannot be adequately measured. Furthermore, it is one thing for these instruments to incorporate environmental provisions and another to attach obligations to perform on the part of state actors, a move which will ensure that effective inclusion of environmental concerns in trade negotiations. This study will therefore add to the corpus advocating for the consideration of environmental issues in international trade to ensure the effects of trade liberalization, are not detrimental to the environment.

4.3 ENVIRONMENTAL ASSESSMENTS IN OTHER JURISDICTIONS:

Many countries are no regarding environmental assessments as a very important tool that can be used in trade negotiations in a bid to ensure trade agreements are aligned to the environmental goals and objectives of a country. This is in line with the guidance

[137] Section 73 of the Constitution of Zimbabwe

of the aforementioned Principle 17 of the Rio Declaration. The need for these assessments emanate from the fact that globally, the concept of sustainable development has become a key policy principle considered as it incorporates three important pillars of development namely, economic development, social development and environmental protection[138]. In trade agreements, sustainable development ensures that, trade also contributes effectively to the realisation of these three pillars. Evidently, the inclusion of sustainability provisions in RTAs is indicative of a growing awareness of its concerns globally.

4.3.1 USA

In terms of the U.S. Presidential Order 13141, The Environmental Assessment of Trade Agreements, all proposed trade agreements are required to undergo an environmental review. Pursuant to this requirement, there were issued a set of guiding principles on the environmental assessment of trade agreements[139]. The guiding principles aimed to ensure that environmental impacts of trade agreements were given due consideration as well as highlighting how the trade and environmental goals, complimented each other.

The Presidential Order and its guiding principles focused on the assessment procedure of major trade agreements and commanded that an environmental review be published at the end. The Presidential Order prescribed the carrying out environmental assessments of multilateral trade negotiations, trade liberalization agreements involving two or more parties and trade liberalization agreements in major natural resources sectors. The Order provides further for the scope, analytical content, documentation of the assessment factors among other principles that must be adhered to in carrying out the environmental assessment.

Following the success with NAFTA, environmental assessments of agreements have since increased since then. Following the conclusion of each stage of the assessment, the procedure is required to be monitored by both the Council on Environmental Quality and the Office of the U.S. Trade Representative and further availed to the public for comment. The USA undertakes SEAs in environmentally assessing its trade

[138] C. Toubeau, *'Trade and Sustainable Development in the Trans-Atlantic Investment Partnership'.* A Concept Note by Transport and Environment, Issued by the Council for Envrionmental Quality and the US Trade Representative, June 2015

[139] J.F.C. DiMento, *The Global Environment and International Law"*, University of Texas Press, USA, 2003, page 173

agreements. These SEAs are associated with the development and implementation of policies and plans by the government and related agencies. Per section 42 of its National Environmental Policy Act of 1969 (NEPA), all agencies of the Federal Government, are required to include in their major federal actions that have a significant effect on the environment among other areas, a detailed statement on environmental impacts of such actions. Major actions in this case were defined to include programs, rules, regulations, plans, policies or procedures[140].

SEAs in the USA are carried out on comprehensive multilateral round of trade negotiations, trade liberalization agreements involving two or more parties and new trade liberalization agreements in major natural resources sectors. Per the order, these environmental impacts must be assessed in light of their potential impacts be it positive or negative. For the better implementation of the SEAs, the guiding principles make a detailed provision on the launch, scope, content, public participation among other steps, of the SEA.

4.3.2 CANADA

In the 1990s, Canada committed to undertaking environmental assessments of its trade agreement, a position it strengthened by issuing the 1999 Cabinet Directive on Environmental Assessment Policy, Plan and Program Proposals which was supplemented by the 2001 Framework for the Environmental Assessment of Trade Negotiations. The Directive guides the strategic assessment of all government policies and proposed actions with an effect on sustainable development. The Directive calls for SEAs in instances where ministers or cabinet alone are forming policies or when policies have the potential of significantly affecting the environment either positively or negatively.

Pursuant to the Directive, Canada put together a framework guiding the manner, in which these assessments are undertaken. Guidelines to undertaking assessments were further published in the Handbook for the Environmental Assessment of Trade Negotiations. Both these documents, define the principles to be applied, procedure to be followed in carrying out the assessments and the role of various stakeholders in

[140] This definition was put forward by the NEPA established President's Council on Envrionmental Quality.

the assessment. The framework is crafted in such a way that it can be applied on a case-by-case basis depending on the agreement being negotiated.

According to the framework, the objectives of the environmental assessment are primarily to help Canada ensure the integration of environmental considerations into the negotiating process by providing information on the impacts of a proposed trade agreement, on the environment. In addition, the framework provides for the documentation of how environmental factors are being considered in the negotiating the trade agreement. To fulfil these intentions, three phases of assessment therefore ought to be completed namely, the initial environmental assessment which examines potential key issues; draft environmental assessment which build on the findings of the initial assessment and puts together a detailed analysis of those issues; and the final environmental assessment which is published after the conclusion of the negotiations. This final assessment details the outcome of the negotiations and notes any divergences that may have been done from the previous environmental assessment. All these phases are concluded by issuing a public report, which also invites comments from the public.

For Canada, this form of environmental assessment, promotes a harmonized social, economic and ecological development plan, whilst at the same time enabling the government as well as public and private sector stakeholders, involved in the decision making process and make the process transparent. Per the Framework, it main objectives are to bring to light the potential effects of the agreement on the environment and putting forward ways in through which trade and environmental policies can be harmonised. The other objective is to make the public aware that environmental factor are being considered in negotiating the agreement and giving them a platform to add their views and or concerns to the negotiating table.

4.3.3 EU

Distinct for the USA and Canada, the EU undertake SIAs of trade agreements as opposed to SEAs and in the context of the EU, these are undertaken at regional level, on behalf of member states. Through these assessments, the EU posits that they provide information that is important in driving and influencing their decision-making in relation to trade policy affecting the EU. These assessments follow the EU's Better Regulation Agenda, which among other things, seeks to make the EU policymaking

system transparent. Of these assessments, the EU undertakes both *ex post* and *ex ante* assessments.

Unlike the personal state approach employed by the USA and Canada, the EU is empowered to make decisions binding on its member states and these decisions extend to the setting of environmental standards. This move is known as the harmonization of environmental standards. In so doing, the EU made a commitment to undertake four major types of assessments and evaluations in concluding its trade agreements[141]. These assessments entail an impact assessment at the initial design stage, an SIA during the negotiations, an economic assessment of the negotiated outcome after the conclusion of the negotiations but before the agreement is signed and finally an ex post evaluations which is then done after implementation of the agreement [142].

Impacts assessments were first carried out in 2002 and are used as analytical tools, which enable the European Commission to outline clearly identifiable economic, environmental or social impacts regarding a given agreement. This is expected to guide the European Commission in gathering and analysing evidence to support its decisions making. SIAs as afore discussed, provide methodological guidance in assessing the impact a trade agreement will have on the EU. As distinct from impact assessments, they entail an in-depth analysis of the potential economic, social, human rights and environmental impacts of the trade agreement under negotiations and ensures all stakeholders have a say before a decision is made. Economic assessments constitute an economics analysis of the proposed agreement, assessing the impact of the actual outcome of the negotiations in terms of reducing trade barriers. Ex post, evaluations are then conducted after the agreement has entered into force and are intended to analyse the social, economic, and environmental impacts that will have been observed during negotiations. They are used to assess the outcome of specific interventions that will have been made because of the aforementioned assessments and weigh whether the interventions achieved their intended objectives[143].

[141] This commitment was made at the Trade, Growth and World Affairs in 2010
[142] European Commission, "*Handbook for Trade Sustainability Impact Assessment"*, 2nd Edition, Luxembourg Publication Office of the European Union, 2016, page 7
[143] Ibid

4.3.4 NAMIBIA

For Namibia, it resolved that government agencies are the main institutions likely to initiate the development of a policy, plan or programme; they are obligated to appoint a qualified environmental assessment practitioner to determine whether a policy, plan or programme is likely to have significant environmental effects. As is the case with project-level EIA, public consultation is required and a SEA report must be compiled. This is evaluated by the Office of the Environmental Commissioner (with or without specialist support) and a clearance is issued or denied, as the case may be.

Namibia undertook a Rapid Trade and Environment Assessment (RTEA) in 2009. The assessment was aimed at highlighting the key policy issues arising out of the interaction between trade and the environment. The outcome of this assessment was then intended to influence the policy makers in their decision-making, particularly given that it highlighted the benefits and possible negative impacts that could come from trade liberalization. The RTEA a variant of sustainability environmental assessments of trade agreement, is argued to have been contributory, to advancing the decisions made in policy making given the fact that it considered international trade and investment, economic policy, climate change, measurement and indicators, and natural resources management[144]. The RTEA considered among other things, the impact of trade agreements on the environment and sustainable development, how trade liberalization could be harmonized with environmental considerations and how trade and environment policies could mutually support rural development and poverty alleviation.

The methodology employed was similar to that employed in SIAs and comprised a six-step process. The first step focusing on building a team that would guide the research comprising key government and non-government actors in the country. The second step saw the setting of statistical, empirical and economic analysis. The third step would see the expert input through broad based stakeholder interviews and a literature review whilst the fourth step focused on scenario building to establish the potential economic impact of liberalization agreements. The fifth step analysed the economic

[144] J. Jones *et al, "Rapid Trade and Environment Assessment (RTEA), National Report for Namibia",* International Institute for Sustainable Development, Canada, 2009, page 6

impacts to identify the potential environmental and social results of trade liberalization and this sixth and last step concluded and made strategic policy recommendations[145].

The report concluded by arguing the need for Namibia to understand the interaction between trade and the environment, a move that justified the undertaking of the RTEA. Undertaking such assessment, would enable a country to achieve its development visions from an informed point of view. The RTEA also argued for a robust intersectoral policy framework that would ensure different sectors were generating benefits for the country jointly. Through this assessment, it was argued that policy makers would be able to plan on the decisions they were to make in the areas of trade and the environment. Important to note however is the fact that the RTEA did not necessarily subject Namibia's existing trade agreements to environmental assessments but rather highlighted the need for the same to be done whilst environmental assessments were done on its national law and policy.

For Namibia, the RTEA managed to successfully assess the interaction between environment and trade policies in the country, and managed to harmonise policies from different sectors with key stakeholders, allowing them a platform to discuss joint issues for the benefit of the country. This was the first of this kind of assessment to be done in Africa and it produced four sector papers whose recommendation can enable Namibia to tackle environment and trade issues in a more responsive and progressive way.

4.4 REGIONAL TRADE AGREEMENTS SUBJECTED TO ENVIRONMENTAL ASSESSMENTS

The first agreement to include a comprehensive side agreement on the environment following environmental assessments was the NAFTA. Canada, Mexico and the USA signed the NAFTA in 1993 and the agreement became effective in 1994. The agreement boasts both an ex ante and ex post assessment with one being carried out by Canada and the other by the USA. For Canada, the assessment was aimed at promoting the consciousness of the potential consequences trade policies or agreements, may have as well as work out a framework of solutions to environmental problems. The impacts assessed were mainly in relation to environmental impacts of

[145] Supra note 131

the agreement on Canada and only involved the USA and Mexico on cross border issues.

During the negotiation of this agreement, advocates for the environment, argued strongly that liberalizing trade more could negatively affect the environment. Resultantly, there was created a side agreement to work together with the main NAFTA. This agreement, the North American Agreement on Environmental Cooperation (NAAEC), set up the Commission for Environmental Cooperation whose primary mandate is to promote environmental cooperation among the three parties to the agreement namely Canada, Mexico and the USA. This move was unprecedented in the negotiation of trade agreements, and it marked a major involvement, particularly on the part of Canada and the USA, of its public and private stakeholders in not only national policymaking but also regional agreements with an impact on the national geography.

NAFTA is essentially one agreement that was intensively scrutinised for environmental concerns. The NAAEC concluded its assessment by calling for a number of studies to be undertaken in connection of this agreement a number of which discussed the effects of NAFTA on greenhouse gas emissions. There further resulted a North American Symposium on Assessing the Linkages between Trade and Environment, which comprises thirteen studies focused on the environmental effects of NAFTA. It is among these studies that the detail regarding the greenhouse emissions arising from the transportation of goods within the NAFTA region, were highlighted[146]. In addition to greenhouse emissions, other studies also highlighted the increased use of electricity in NAFTA countries, which would be because of increase in trade, as another environmental concern that required attention. Increased electricity generation and use was mainly concerned in instances where the electricity was generated from coal, natural gas and hydropower, which sources tend to cause pollution on the environment.

Besides the NAFTA, Australia and the USA subjected the Australia-US Free Trade Agreement to environmental with each country undertaking its own assessment. For the USA, the assessment excluded aspects of climate change whilst for Australia, it

[146] L. Tamiotti, *et al "Trade and Climate Change",* World Trade Organization and United Nations Environment Programme, WTO Publications, 2009, page 56.

was concluded that the agreement entailed a significant increase in domestic and international transportation, which would negatively affect the level of greenhouse gas emissions, and other areas of pollution[147].

The EU also undertook environmental assessments on its trade agreements and notable agreements include the EU-Chile FTA, the EU- Mediterranean FTA, the EU-Mercosur Association Agreement and its EU-EPA FTAs, which it entered into with a number of African and Caribbean Pacific countries. Of these agreements, the EU-Chile FTA examined the effect the agreement would have on the forestry sector as a whole, particularly the increase in forests plantations, which would come about as a result of the increase in the demand for forests product. Resultantly, such increase in plantations, would slow the effects of climate change by increase the rate at which the plantations would be able to capture carbon dioxide thereby reduce its concentration in the atmosphere. This assessment did not consider the impact of the agreement on greenhouse gas emissions[148]. The Euro Mediterranean FTA concluded in adverse impact on climate change from greenhouse gas emissions resulting from increase transport usage and production, precipitated by the increase in trade. These adverse effects were noted in contrast to the overall economic gain that would be brought about by the trade. It concluded by calling for measures that would mitigate the adverse effects on the environment whilst the parties also benefitted from the positive effects of economic growth.

From a developing country perspective, Bangladesh environmentally assessed it Shrimp Farming Industry the rationale being that the product was majorly export oriented. Chile also carried an assessment of its Mining sector as another export-oriented sector. Both the assessments in these countries were guided by the UNEP's model for environmental assessments. India undertook an assessment of its automotive industry, Philippines of its forestry sector and Romania of its Water Sector. The objective of these assessments from a developing country position was to ensure that these major export oriented sectors were not being promoted in terms of productivity to the detriment of the environmental needs of these countries. Further

[147] ibid
[148] ibid

the impact of the outcome of the assessments was to be in favour of the environment as opposed to their for sustainable production.

4.5 COMPARATIVE ANALYSIS

For countries like Canada, SEAs carried out in trade agreements promotes both environmental and economic development in a harmonized manner. In addition, SEAs provides the government, and all other stakeholders with a platform to participate in the decision-making process thereby making it more transparent. Through carrying out SEAs of trade agreements, Canada inevitably considers environmental factors pertinent to an agreement being negotiated and their potential impacts. Secondly, through SEAs of trade agreements, countries are able to demonstrate to affected persons that due consideration is being given to environmental factors. The ultimate result of SEAs in this case is the harmonization of trade and environmental policies. The SEA carried out on the NAFTA yielded for Canada these results.

For the USA, undertaking SEAs evidently saw the inclusion of various stakeholders in the decision of the country to sign the NAFTA, the results of which benefited the country on the trade front was also positively affecting the environment. Essentially, it is evident that environmental assessments are not intended to prefer the environment to trade but to rather strike a balance on the interests of both disciplines. The rationale for the need to strike this balance is that the two are actually not independent of each other as most goods that are the subject of most agreement have a bearing on the environment in producing them. Furthermore, striking this balance ensures the realisation of the concept of sustainable development thereby leaving all its pillars duly considered.

Environmental assessments, from the foregoing jurisdictional discussion, have been undertaken in different scenarios. Developed countries in the case of the USA and Canada, developing countries in the case of Namibia, Bangladesh, Chile, and Philippines among others and a regional grouping such at the EU. This shows the need for the same to have been done by regional groupings similar to the EU like the SADC, COMESA, TFTA and others. If developing countries are anything to go by, Zimbabwe is also in a position to undertake its own environmental assessments if similar developing economies were able to do so. Even though for developing

countries, the approach is piece meal in that it focused on specific sectors, it did yield results in the sectors assessed.

Though not discussed in detail, Section 23 of the Zambia Environmental Management Act 12 of 2011, states that a SEA must be conducted for any draft policy, programme or plan that could have an adverse effect on environmental management or the sustainable management and utilisation of natural resources. Section 23(3) specifies the contents of such an assessment. Where a strategic environmental assessment recommends amendments to a policy, plan or programme, ZEMA will ensure that the amendments have been brought about before approving such a document.

The Kingdom of Eswatini in its Environmental Management Act 5 of 2002 also makes provision for SEAs in section 31. The provision calls for SEAs to be undertaken for any parliamentary Bills, Regulations, policies, plans and programmes that may have an adverse impact on the protection, conservation or enhancement of the environment or on the sustainable management of natural resources. Section 31(3) stipulates that the information that a SEA report must contain and this includes an identification, description and assessment of the positive and adverse effects that implementation of a proposed policy, programme, plan or legislation is likely to have on the environment and on the sustainable management of natural resources.

From the foregoing comparison, SEAs seem to be the most commonly adopted and implement method of environmentally assessing trade agreement. In Southern Africa, they seem to also be the preferred method of environmental assessments preferred. There however is not much detail as to how many of the countries in Southern Africa that make provisions for SEAs, have actually undertaken them in relation to trade agreement, let alone trade policies in their respective countries. Another major highlight to learn from the jurisdictions above is that their provision for one form of environmental assessment or another, is in legislative forms be it a presidential directive, or provisions in an Act of parliament.

4.6 FINDINGS

This research has examined the environmental assessment of trade agreements and policy particularly, the need and effects thereof. It identified the introduction of environmental assessments as well as the manner and results of implementations for those countries that have been implementing them. The research noted the fact that

though the concept has been there for some time now, in relation to trade agreements and policy, the introduction and implementation at state level or even regional level, has been snail paced and in most instances like in Africa, varied. The WTO, which is the point of reference for all things international trade, does not provide much detail on environmental concerns. It barely covers environmental issues by including an exception clause in Article XX of the GATT 1994 and trade measures put in place by member states aimed at environmental protection, have not been successful before the DSU Panel. This is the reason why RTAs are expected to play an important role in catering for these issues.

For countries like the USA and Canada, environmental assessments are a serious issue. As already noted, both countries undertook extensive reviews of their trade agreements with the inaugural one being the NAFTA. The results of these assessments were released to the public. Canada conducted its assessment prior to negotiating the agreement thereby informing its negotiation strategy. The USA on the other hand assessed the NAFTA after negotiations were completed. NAFTA remains under scrutiny for the USA, Canada and Mexico given the rising concerns of climate change.

At regional bloc level, the EU is one example indicative of the fact that environmental assessments can be introduced and successfully implemented at regional level. The success rate is noted in the number of assessments concluded by the EU with the aforementioned iEPA included. This is a lesson the RTAs discussed above can consider. Environmental issues when linked to trade liberalization need to be adequately considered, as the result thereof will be beneficial for both the environment and trade. Whilst these RTAs have their own methods of catering for environmental needs, the absence of prior assessments of these need vis-a-vis the trade agreement, raises the question of what the point of departure justifying their provision could be. This question arises from the fact that there was no assessment done to establish what the areas of concern that needed provision, would be.

Additionally, significant to this research was the method of assessment that may be employed in undertaking the environmental assessment. The research put forward at least three most commonly employed methods of assessment, SEAs, SIAs and UNEP's IATRP. The UNEP's IATRP acts mostly as a general guide to undertaking

environmental assessments, whilst SEAs and SIAs are the most used methods of assessment. The EU mostly employs the SIA whilst a number of other countries like the USA and Canada use the SEA. In Africa, SEAs are gaining momentum, with legislation, being introduced requiring SEAs for policies, plans and programmes. Countries in Africa that have such provisions include Eswatini, Zambia, Tanzania, Namibia and South Africa.

Concerning environmental assessments, this research leaned more towards them being an important aspect towards any state benefiting from trade agreements without causing irreparable harm on the environment. The rationale being that environmentally assessing trade agreements and policy identifies any potential impacts and puts in place ways to remedy any such impact thereby having a country sustainably benefit from any trade agreement and or policy. In Africa, however, particularly the RTAs Zimbabwe is party; no evidence could be established, speaking to any environmental assessments being undertaken for these RTAs. The only comfort can be derived from the iEPA given that for the EU environmental assessments are a prerequisite for the conclusion of any trade agreement. However, the downside to the iEPA is that such assessments are only carried out to the extent of their impact in the EU or in a transboundary context where the EU is affected, not necessarily for all parties to the agreement.

For the SADC RTA, no specific mention is made of environmental assessments. However, the regional body put in place policies and protocols that seek to influence the manner in which development projects are implemented. As aforementioned, these protocols are on shared watercourses, fisheries, wildlife, forestry, and mining. Hitherto, the RISDP introduced in 2004, gives direction for future policies and programmes under SADC. The Plan identified twelve priority areas for intervention as well as strategies and targets for the same. In section 4 (7) of the Plan, SADC committed to integrate and sustainably develop environmental management in the region.

Whilst SEAs are internationally recognised as a systematic process used to analyse the environmental effects of policies, plans and programmes the scope particularly in Africa seems to have been broadened to include other policy tools and strategic approaches that constitute a near form of environmental appraisal. This is however a

step towards the full introduction of the same as a requirement in concluding agreements and considering environmental issues

For Zimbabwe, the importance cannot be over emphasized as a look at all RTAs concluded; Zimbabwe is one of the founding members. With this keenness to join the global trading arena, it is important to have the country concerned about its environmental resources. Subscribing to provisions that have not been evaluated nor are evaluated from time to time could be detrimental to the environment of the country. This is because concluding agreements comes with obligations to perform and environmental assessments enable governments to make informed decisions and have an informed negotiating standpoint. Flowing from this, decisions on trade agreements and policy made following environmental assessments have been argued to be more environmentally sensitive. Stakeholder participation in the assessment process makes it transparent and increases accountability from those spearheading the process. Envrionmental assessments of trade agreements and policy are therefore a positive step in achieving sustainable development.

Pursuant to the objectives of this research, the following were the major findings;

a) Environmental Issues at Multilateral Level not Seriously Considered

Most countries of the world are members of the WTO. However, where environmental issues arise in dispute at the WTO, decisions of the DSU are indicative of a preference of trade to environmental issues. Countries that have taken measures against trade citing environmental reasons, have not been successful at the WTO, preference seems to be given to promotion of trade. This is notwithstanding the presence of environmental provisions as a safeguard measure.

This is concerning of the WTO in that as a Multilateral body, it h=gives guidance to all other regional and bilateral trade agreements. Largely, most blocs, especially those comprising developing nations, seems to follow the WTO approach.

b) Environmental Provisions in RTAs have no Traceable Origin

From the RTAs examined, they all contained somewhat similar provisions on the environment. However, in undertaking this study, no evidence was found suggesting how these provisions were incorporated into the agreements. A look into some international treaties like CITES, seems to indicate that these provisions were taken

from similar treaties and pasted into the agreements, without first assessing the effectiveness of the provisions. This is probably the reason why the provisions as incorporated in these instruments, do not give rise to obligations on state parties to perform nor provide remedies in the event of failure to perform per these provisions.

c) Successful implementation in other Countries and Regions

Environmental Assessments have been successfully carried out in countries like the USA, Canada as well as trading blocs such as the EU. This is evidenced in some of the agreements, policies and laws they put in place, which sought to address specific environmental concerns during negotiations as well as measured the effectiveness of the provisions post negotiations. The EU even subjected some WTO rounds of negotiations to Environmental Assessments. This goes to show that Environmental Assessments do work to ensure sound consideration of environmental issues in trade agreements and policies. For the USA and Canada, law obligates the states, to perform certain acts related to trade and the environment, which acts include undertaking environmental assessments of trade agreements.

d) Absence of Environmental Assessments Requirements in Zimbabwe

For Zimbabwe, the EMA Act calls for EIAs of projects specified in the Act at national level. There is no further provision on the carrying out of environmental assessments of trade agreements. The trade negotiating process is equally not transparent to inform stakeholders as to the contents of the negotiations. As such, whatever provisions agreed upon at regional level, once ratified in Zimbabwe, have an effect on the environment in Zimbabwe. This is where the call for environmental assessments in Zimbabwe is stemming from. It is important that agreements with an effect on the environment in Zimbabwe be environmentally assessed to ensure the interest of the country are adequately provided for and protected.

Furthermore, the expired trade policy has been taking long to be replaced. This is a key document that can work together with the environmental policy to ensure correct steps are taken in negotiating and concluding trade agreements. Its absence seems to indicate that it is not of primary importance in influencing trade issues in Zimbabwe.

e) Provisions for Environmental Assessments in Policy and Law

Other countries in Africa have made provision for environmental assessments in their national laws. These include Namibia, Zambia, South Africa, and Eswatini among others. The provisions essentially call for environmental assessments of laws, policies, plans and programmes that may have an impact on those countries' environment. unlike in Zimbabwe, this have this requirement as a point of law ensures that in the absence of a policy, provision still stands for environmental assessments to be carried out.

4.7 CONCLUSION

It is evident from the foregoing discussion that in countries like the USA and Canada, environmental assessment are mandatory in concluding most multilateral, regional and bilateral trade agreements. These countries legislatively provide for the carrying out of environmental assessments of trade agreement and the provision is mandatory. The same is the position for the EU at regional level, that the provision is legislative thereby giving it the weight of law in the event of failure to do so.

Through the CBD and other similar conventions and agreements, environmental reviews can be said to have an extended reach beyond national laws. This national reach is important as it then addresses the subjection of RTAs to environmental assessments. This is evidenced in institutions like the World Bank and other regional development banks, which require environmental assessments at the early stages of major development projects. This move helps consider and screen out environmental projects that may be harmful on the environment.

From the foregoing, the main objective of free trade advocates, is to have environmental and trade policies separated, a move advocates for environment critique and argue for the integration of both policies. Given the impact that these two disciplines have on each other, it has to be understood that environmental policies should not be employed as a protectionist measure but a move towards good policymaking for the good of both the environment and trade.

A look into Zimbabwe's law and policy on environmental assessments indicates that their advent was effectively from 1994 when the EIA policy was put in place. Their position was further strengthened by their incorporation in to the EMA Act. However, the EMA Act seemingly mandates EIAs for projects at national level and there is no evidence to date that suggests the application for the same beyond this national reach.

Nationally however, EIAs are a matter of course as they ensure the due consideration of environmental impacts of proposed projects as well as put forward alternative courses of action in the event that the assumed impacts concluded upon can be remedied.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This study was carried out with the objective of assessing the consideration given to environmental assessments of trade agreements and policy in Zimbabwe. In carrying out the study, the relationship between trade and the environment globally was considered as well as how environmental assessments can assist in strengthening the relationship in the context of country development.

The study carried out an analysis of the different RTAs Zimbabwe is party to, assessing whether they were subjected to environmental assessments or gave any consideration to environmental issues. Further, a comparison was done on different country approaches to environmental assessment. The results of the study are intended to assist in concluding on the importance of environmentally assessing trade agreements as well as proffering the method best suitable for Zimbabwe. It was therefore an important aspect of this study to assess which method of environmental assessments of trade agreements could be more effective at triggering change, as well as giving guidance, information and ways that can transform future trade policy. In this regard, the rate of success in implementing environmental assessments was also considered.

This chapter will therefore revisit the research questions, summarise the findings of the research, make policy recommendations, and draw conclusions.

5.2 REVISITING RESEARCH QUESTIONS

5.2.1 What is the importance of environmental assessments of trade agreements and related policies towards sustainable development?

Environmental assessments of trade agreements and policy is important in a number of ways highlighted in this study. There is a notable increase in the number of trade agreements and policy instruments being concluded internationally which in turn have a domestic impact on the national interests of the signing state. It is therefore important

that these effects are assessed and any potential negative results remedied before any harm is caused, in this case on the environment.

For trade to continue to thrive on a global scale environmental concerns should be considered, given the bulk of trade has a bearing on the environment. Therefore, the development of trade policies should not be void of the development of environmental concerns, to yield the much-needed developmental results. Environmental assessments of trade agreements enable the relevant policy makers to minimize the potential conflicts between trade and environment. If the jurisdictional employment of environmental assessment is anything to go by, in the USA and Canada, they assisted the respective governments to conclude the NAFTA in a manner that considered and catered for the concerns of all groups involved.

It is therefore concluded that, environmental assessments assist governments to make informed decisions concerning national policy or in concluding international agreements with an effect on the national environment. They go beyond thumb suck or generic provisions but rather result in the inclusion of provisions that are aimed at addressing established concerns.

5.2.2 How has Zimbabwe been employing the principle of environmental assessments in its trade agreements and policies?

Zimbabwe's regulated mode of environmental assessments is EIAs. From the research, Zimbabwe currently employs EIAs at projects intended to be undertaken within Zimbabwe. The provision for EIAs in all the legal instruments discussed, make no specific reference to trade agreements or policy. There is therefore no definite provision catering for instances where trade agreements and policy affect the environment or how they can be integrated into the country in a manner not detrimental to the environment.

Comfort can however be derived from the fact that the RTAs Zimbabwe is party have considered environmental issues albeit not from carrying out environmental assessments. There is no information regarding how the environmental provisions were incorporated into the agreement nor how the negotiation process went. A relationship can however be noted between the environmental provisions in these RTAs with those found in multilateral agreements providing for the same. Be that as it may, laudable are being followed by blocs like SADC and COMESA pertaining to the

protection of the environment in the region. However, the extent of their provision does not clearly state the implications in the event that states prefer economic development to environmental protection. The current state however is all RTAs considered do give regard to environmental issues in one way or the other.

Nationally, Zimbabwe has been focused more on EIAs to which the implementation process is very much regulated. The regulation is to the extent that even other pieces of legislation complementary to the EMA Act make detailed provisions for EIAs as an important requirement before a project can be embarked on[149]. Concerning environmental assessments of trade agreements and policy however, serious consideration need to be given to introducing them, for the promotion of sustainable development in the country.

5.2.3 Which jurisdiction has successfully benefitted from environmental assessments of its trade agreements?

The aspect of benefits derived from environmental assessments is relative to the objectives of a given jurisdiction in carrying out the assessment in the first place. As such, it can be concluded that each jurisdiction benefitted to the extent of their objectives in carrying out the assessment. Environmental assessments in the USA for instance, were prompted by an outcry from a number of groups concerning the impact of the NAFTA on among other things, the environment. As such in carrying out the assessment, these groups were involved in the process in addition to other stakeholders that were considered pertinent to the exercise. The result identified potential effects of the NAFTA on among other areas, the NAFTA as well as ways to manage any negative identified effects. Furthermore, in carrying out an ex post assessment of the NAFTA, the USA was guided by the results from the initial assessment thereby making the process of monitoring and evaluation manageable. In this regard, it can be concluded that environmentally assessing its trade agreements has benefitted the USA in balancing the relationship between trade and environmental interests.

The same conclusions can be said of Canada and EU both of which have carried out many environmental assessments of trade related agreements following the introduction of the mandate to carry out the same in their respective jurisdictions. If the

[149] See discussion on the environmental law and policy framework for Zimbabwe in item 3.8

numbers of the assessments undertaken is anything to go by, then it highlights the importance of carrying out such environmental assessments. In Africa however, Southern Africa in particular, most countries do have legislative provisions for undertaking environmental assessments in the form of SEAs, there is however no evidence suggesting the manner in which these provisions are being implemented.

This situation in Africa is somewhat different and builds up to the probable reason why the RTAs considered above have not been subjected to environmental assessments. Parties to these agreements are yet to come to undertake environmental assessments of the agreements. The major benefit to this would be the introduction of detailed and informed environmental provisions. Benefitting from environmental assessments is therefore dependent upon the circumstances and objectives of each country in undertaking the assessments.

5.2.4 Which approach can be deemed effective in environmental assessments that Zimbabwe can employ?

Envrionmental assessments in their current stage of development do not yet have a one-size fits provision particularly when applying them to trade agreements. From the foregoing discussion, the EU applies both the SEA and the SIA in assessing trade agreements. The take home lesson from the EUs way of conducting environmental assessments, is to undertake them before negotiations are initiated, during negotiations if necessary and after the conclusion of negotiation as a way of following up on the implementation process as well as weighing the effectiveness of the remedies that were put in place to remedy negative impacts.

In addition, environmental assessments evidently vary in different jurisdictions as well as in scope, duration among other requirements. Environmental assessments are therefore a set of tools as opposed to one specific tool that can be used. There is therefore need for each country to assess its own needs and adopt a method best suited to address its needs and apply the appropriate method.

5.3 RECOMMENDATIONS

This research highlighted the need to integrate trade and environmental concerns towards achieving sustainable development. Given the impact of trade in goods on the environment, Zimbabwe should take steps to ensure that development from trade

liberalization is not negatively affecting the environment. The following recommendations are therefore made:

i) Introducing environmental assessment of trade agreements and policy as a requisite both ex ante and ex post. This enables the country to make informed decisions and avoid committing to obligations that will be detrimental to the country's environment.
ii) There is need for a study to be undertaken to establish which method of assessment best suits the country's economic and environmental landscape. The rationale for this is that there are different methods that can be employed in environmentally assessing trade agreements and policy. From the research however, the EU approach of using all methods of assessment and employing them both ex ante and ex post, seems to yield more results.
iii) Lessons from the USA and Canada indicate that an individual country can environmentally assess RTAs to inform its negotiation process and implementation of an agreement, environmental. However, provisions in the SADC and COMESA agreements speak to the effect that integrated environmental and trade laws are easy to implement at regional level as they result in an integrated policy applicable under the RTA. There is therefore need for Zimbabwe to advocate for clearly provided for provisions for environmental assessments.
iv) Given the complexity of environmental assessments particularly the groups of people involved, there is need for the establishing of an inclusive team or committee at any given time that will comprise of groups or persons most likely ot be affected by the outcome. This enables all views to be considered and possible taken into account prior to the conclusion of any agreement or policy.
v) Zimbabwe is in the process of drafting another trade policy, this could be the opportunity to include provisions relating to environmental assessments in relation to trade agreements, as well as the opportunity to consider the requirement for environmental assessments to not only be a policy issue but also a requirement of law.

Should these recommendations be adopted, Zimbabwe could be among the first country in Southern Africa to introduce this initiative relative to other countries that are still having a single provision calling for SEAs with no further guidelines and

procedure as to how to go about them. There is therefore need for Zimbabwe strengthen its legal and policy framework as a measure of promoting environmental protection.

5.4 CONCLUSIONS

Whilst the bulk of this research advocates to the carrying out of environmental assessments of trade agreements, it does acknowledge that the process is not a one size fits all. This is because economic backgrounds and geographical conditions among countries vary to the extent that a uniform method of assessment may not yield the correct result. This is why a variety of ways in which assessments can be carried out have been considered and still the door is not closed to new methods of assessments should plausible ones be introduced.

The debate between trade and the environment is still on, proponents for trade liberalization are of the view that environmental concerns are strictly a non-trade issue, the enforcement of which cannot be governed by trade agreements. This research has however highlighted that the two areas are so inextricably linked such that their complementarity needs to be acknowledged and any areas or divergence, resolved without sacrificing the other. The point of advocacy here is not to put environment issues as the core of a trade agreement or policy but rather to have them accorded due consideration in a bid to avoid any conflicts that will most likely be to the detriment of the environment.

The call for public participation in undertaking consultations during assessments is a laudable move that brings the interest of the public into play not from an assumed position. As argued before the point in environmental assessments is not to push forward the agenda of environmental protection only but rather the whole concept of sustainable development, seeking to strike a balance of all issues involved, the environment and the economic development included.

Per the concept of sustainable development discussed above, it is imperative that trade and environmental issues need to be necessarily considered in making development decisions. On the environmental side, environmental assessments therefore become a key tool to aid the successful consideration of development decisions that are trade related. Legislating environmental assessments as one of the tools to achieve sustainable development, cements the obligations that players in

policy making have in ensuring all points of contention are given due consideration before the final policy is in place. These is synonymous with the provisions of Principle 17 of the Rio Declaration and Chapter 8.3 of Agenda 21 which summarily point to the fact that, tangible ways of considering the environment in policymaking, are not automatic, hence the need for definite structures and frameworks.

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