

A CRITICAL EVALUATION OF THE PERCEIVED
CONFLICT BETWEEN GLOBALIZED TRADE AND
THE PROTECTION OF THE ENVIRONMENT WITH
SPECIFIC REFERENCE TO THE DISPUTE
RESOLUTION MECHANISM OF THE WORLD
TRADE ORGANISATION

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Summary

Whilst policy makers have so far been unable to effectively address most of the issues raised by the trade-environment question, the WTO as the foremost dispute resolution mechanism in this arena, has been forced to confront these issues as cases have arisen that required judicial pronouncement. The dispute resolution machinery of the WTO have furthermore been forced to re-examine their approaches in the light of the increasing importance placed on environmental issues. A much more purposive approach is becoming apparent, one in which a willingness to take the evolutionary nature of views regarding environment into account is evident. It also seems as if dispute resolution bodies such as those of the WTO are, up to a certain extent, prepared to consider measures aimed at environmental protection *per se* as justifying restrictions on free trade. In this sense, the supposed conflict between environmental protection and the liberalisation of international trade is more apparent than real.

However, it is argued that it is necessary that the importance of both liberalised international trade and the need to protect and conserve the environment should be reconsidered, and clear, substantive guidelines should be formulated. The *policy makers* – Nation States in their capacities as international legal subjects and as members of the WTO, should do this. Despite the trend towards more purposive legal analyses by the WTO dispute resolution bodies, they are not, after all, the true policy makers and should not be expected to act as such. Even at the international level, and even with a decidedly more pro-environment sentiment, the maxim *ius dicere, sed non facere* still apply to those tasked with settling disputes.

Key terms

World Trade Organisation; Dispute Settlement Understanding; General Agreement on Tariffs and Trade; Article XX; Rio Declaration on Environment and Development; treaty obligations;

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Abbreviations

CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
MEA	multilateral environmental agreement
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organisation
UN	United Nations
WTO	World Trade Organization

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1. INTRODUCTION

We are living in an increasingly globalised community, in which the transboundary nature of both environmental and trade concerns are increasingly acknowledged.

One of the international organisations that have been at the forefront of globalisation through its liberalisation of international trade is the World Trade Organisation (“*the WTO*”). Over the last few years, environmental and other lobbyists have increasingly targeted this organisation. For example, more than six hundred people were arrested in connection with “anti-globalisation” demonstrations that occurred when the WTO met in Seattle, Washington from 30 November 1999 to 3 December 1999.¹ Two years after the controversy in Seattle, environmental issues remained matters of contention at the Doha Ministerial Conference.²

During the latter half of the twentieth century, concerns about the environment and attempts at redressing these concerns have shown a steady growth. The International Court of Justice has stressed that ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn’.³

The Conference on Environment and Development held in Rio de Janeiro in June 1992 gave significant momentum to the shaping and development of the international environmental legal order. Instruments such as the Rio Declaration on Environment and Development,⁴ the Program of Action Agenda 21⁵ and the Conventions on Climate Change⁶ and on Biological Diversity⁷ have entrenched notions and principles such as “sustainable development” and the “precautionary principle”. However, it should be stressed that, ‘[u]nlike the development of domestic environmental policy,

¹ Dixon, C., “Environmental Survey of WTO Dispute Panel Resolution Panel Decisions Since 1995: ‘Trade at all Costs?’” 2000 (24) *William and Mary Environmental Law and Policy Review* 89 n 1.

² Maki, T., “Bridging the Gap between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles” 2003 (30(1)) *Ecology Law Quarterly* 113 at 115.

³ Boisson-de-Chazournes, L., “Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues” 2000 (11) *European Journal of International Law* 315 at 319 n 17.

⁴ UN Doc. A/Conf.151/26/REV.1 (Vol. I) 3.

⁵ UN Conference on Environment and Development: Agenda 21, UN Doc. A/CONF.15/4 1992.

⁶ Framework Convention on Climate Change 1992.

⁷ Convention on Biological Diversity 1992.

the nature and processes involved in the formation of international environmental law give rise to an inherent vagueness of what is to be protected, where it is to be protected, and by whom it is to be protected.’⁸

The development and increased importance of environmental awareness, coupled with an earlier bias towards free trade *sans* modern notions of environmental responsibility, have impacted on the interpretation of international law. Some authors maintain that the system is still structured in favour of free trade at the cost of sufficient and effective environmental protection.⁹ Others point out that

“[W]ith the lack of clear guidance on how to handle environment-trade questions, policy responsibility on the issue has been *de facto* delegated to...[international] tribunals. Of course, having to take decisions on controversial subjects is an intrinsic function of any judicial body, but one does get the sense that in their attempts to arrive at an acceptable balance between free trade and environmental protection, such tribunals are having to develop law where policy-makers have previously feared to tread.”¹⁰

The following analysis seeks to address two central questions: Firstly, is there a conflict between liberalised international trade and the protection of the environment, and if so, to what extent? This issue will be explored through a scrutiny of relevant environmental cases adjudicated by the World Trade Organisation and its predecessor, the General Agreement on Tariffs and Trade (“*GATT*”). Secondly, if it is taken that some conflict does exist, and when juxtaposed against the objective of free international trade, how far is the WTO willing and, in fact, able to accommodate environmental concerns?

In order to address these two issues, this paper is divided into five basic sections. The first section briefly explains the dispute resolution procedure/s and mechanism/s provided for under the auspices of GATT and the WTO. The second section provides a brief discussion of the treaty provisions of the WTO as they relate to the environment-trade issue. Against this background the third section provides a critical

⁸ Brotmann, M., “The Clash Between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp” 1999 (16) *Pace Environmental Law Review* 321 at 325.

⁹ Dixon *op. cit* 90.

¹⁰ French, D., “The Changing Nature of ‘Environmental Protection’: Recent Developments Regarding Trade and the Environment in the European Union and the World Trade Organisation” 2000 (47) *Netherlands International Law Review* 1 at 11.

discussion of the emerging case law on the trade-versus-environment polemic. The fourth section binds together the preceding sections by evaluating the role played by the WTO in its role as adjudicator in environment-versus-trade disputes. In the fifth section a few suggestions are made as to how the WTO may better address the environment/trade relationship.

Finally, a tentative conclusion is offered that a movement can be discerned from an initially predominantly legalistic approach to trade-related international environmental disputes, which tended to favour unrestricted trade, towards a more creative use of 'environmental protection' as a justification for trade restrictions. In spite of this seemingly greater willingness by the dispute resolution bodies of the WTO to interpret relevant GATT provisions in a more pro-environment manner, it is submitted that theirs should not be the task of finding a solution to the trade-versus-environment debate. This is an issue that should be addressed at the political level.

2. DISPUTE SETTLEMENT UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE WORLD TRADE ORGANISATION

2.1 Introduction

The WTO identifies itself as being "the only international body dealing with the rules of trade between nations."¹¹ Before its creation in 1994, the General Agreement on Tariffs and Trade ("*GATT*") was applied. This agreement had as its primary aim the reduction of trade barriers and the promotion of liberalised international trade¹² - an aim that GATT fulfilled successfully over the 47 years between its inception in 1948 and its succession by the WTO in 1995.¹³

The final round of multilateral trade negotiations conducted under the auspices of the GATT as an organisation was the Uruguay Round, which was launched in September 1986, and concluded in April 1994 at Marrakesh, Morocco. The Uruguay Round led

¹¹ World Trade Organization, *Trading into the Future: The World Trade Organization* 2001 at 4.

¹² Brotmann *op. cit* 330.

¹³ World Trade Organization *op. cit* 10.

to a number of agreements. In addition to the creation of the WTO¹⁴ (and the retention of the GATT as an international agreement)¹⁵ the Uruguay Round led to the Agreement on Sanitary and Phytosanitary Measures (“*the SPS agreement*”); the Agreement on Technical Barriers to Trade (“*the TBT agreement*”); the Agreement on Subsidies and Countervailing Measures¹⁶ as well as the Dispute Settlement Procedures.¹⁷

The WTO states that it has three main purposes.¹⁸ The first is to help trade flow as freely as possible, not only by removing obstacles to trade, but also by ensuring certainty concerning trade rules around the world. The second purpose of the WTO is to serve as a forum for trade negotiations. Its third purpose is dispute settlement. The importance of the latter lies in the fact that, given the conflicting interests that are often at the centre of trade disputes, having a neutral procedure, based on agreed-upon legal foundations, makes peaceful resolution possible.

2.2 Dispute Settlement before 1994

It could be argued that under GATT 1947, dispute resolution fell far short of the goals of compliance and certainty discussed above. The dispute resolution Panels had no real “teeth” as they could only suggest that the contracting parties make recommendations to the party “losing” a dispute.¹⁹ GATT did not authorise retaliation by an injured country, unless all GATT contracting parties (including the country that lost the case) unanimously consented thereto.

¹⁴ Marrakesh Agreement Establishing the World Trade Organization (hereafter “*Marrakesh Agreement*”), Article I.

¹⁵ *Ibid.*, Article II:2.

¹⁶ *Ibid.*, Annexure 1.

¹⁷ *Ibid.*, Annexure 2.

¹⁸ *Ibid.*, Article III.

¹⁹ *Cf. Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* L/6268 – 35S/98 1988 at 5.4

GATT contracting parties inevitably became aware of its enforcement shortcomings, and compliance with its rulings deteriorated. During the last few years of its existence, party compliance fell to less than sixty percent.²⁰

Another limitation of the dispute settlement procedure followed under GATT is the fact that Panels were strictly limited to an individual mandate per “case” – a Panel could not, for example, consider other relevant submissions such as references to relevant international agreements, etc.²¹ Although some progress has been made in this respect under the WTO,²² questions of procedure relating to the admissibility of third party submissions continue to be controversial.

2.3 Dispute Settlement Understanding of the WTO

In establishing the WTO the contracting members hoped to create an efficient and effective mechanism within the organisation that could handle dispute resolution. It is argued that, by having a central mechanism by which to resolve disputes, nations are afforded the opportunity to obtain a fair hearing without being subject to threats of reprisals.²³ The Dispute Settlement Understanding (“DSU”)²⁴ came into existence as a result of the Uruguay Round of Trade Negotiations on 1 January 1995, and, based on over five decades of GATT dispute settlements, sought to introduce a more legalistic adjudicatory process with reference to trade-related disputes.²⁵

The dispute settlement procedure is designed to promote consultation and mediation and resolve all disputes within a short period of time. From beginning to end, the

²⁰ Stiles, K.W., “The New WTO Regime: The Victory of Pragmatism” 1996 (4) *Journal of International Law and Practice* 9.

²¹ **Canada – Measures Affecting Exports of Unprocessed Herring and Salmon L/6268 – 35S/98 1988 paragraph 5.3 where the Panel stated that “...its mandate was limited to the examination of Canada’s measures in the light of the relevant provisions of the *General Agreement*,” (and that the Convention on the Law of the Sea could thus not be considered) (own emphasis).**

²² See the discussion of the *Asbestos* case in paragraph 4.2.4 below.

²³ Brotman *op. cit* 331.

²⁴ Marrakesh Agreement *op.cit* Annex 2 *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

²⁵ Lawson, T., “WTO Dispute Resolution: The Promotion of Diplomacy within an Adjudicative Model” 1997 (6) *Dalhousie Journal of Legal Studies* 321. See also Miller, C., “The WTO: Biting the hand that fed it” 2003 (44(5)) *William and Mary Law Review* 2324.

dispute settlement process is scheduled to take no more than one year.²⁶ Appeals can add another three months to the process.

The DSU made several significant changes to GATT dispute rules and procedures, the most important of which is that disputing parties are placed under an obligation to adopt a WTO Panel report, unless a party notifies the Dispute Settlement Body of the WTO (“*the DSB*”) that it plans to appeal, or unless the DSB decides by consensus not to adopt the report.²⁷ This is a drastic departure from the earlier GATT practice of giving any losing country the ability to veto an unfavourable Panel decision.²⁸ Finally, injured members are given stronger means with which to retaliate against non-compliance, e.g. by means of compensation and the suspension of concessions.²⁹

From the above it seems that non-compliance by a member of its GATT commitments are potentially strongly actionable, in that the DSU, and the dispute settlement mechanism created therein, provide potentially very powerful tools of enforcement to injured members. Against this background we now turn to the central underlying problem encountered in the trade-versus-environment issue, namely the way in which environmental policies and or –measures that infringe on GATT commitments are: (1) addressed in the GATT itself, and: (2) adjudicated upon by the WTO dispute resolution body.

2.4 An institutional bias toward trade?

The accusation of an institutional bias in favour of free trade is often levelled against the dispute resolution mechanism of the WTO. On the one hand such an accusation might seem unreasonable, as the WTO is, after all, a *trade* organisation with a stated aim of liberalising international trade, and not an environmental protection agency.³⁰

²⁶ DSU Appendix 3: Working procedures.

²⁷ *Ibid* Article 16(4).

²⁸ Miller *op. cit* 2327. See also Wofford, C., “A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT”, 2000 (24(2)) *Harvard Environmental Law Review* 563 at 572.

²⁹ DSU Article 22.

³⁰ It must be noted, however, that an institutional trade-bias is alleged not only regarding environmental disputes but also concerning other disputes. See Greenwald, J., “WTO Dispute Settlement: An exercise in Trade Law Legislation?” 2003 (6(1)) *Journal of International Economic Law* 125. An in-depth discussion of this allegation is, however, beyond the scope of this paper.

However, the WTO itself has been at considerable pains recently to demonstrate a willingness to accommodate environmental concerns. For example, the Doha Ministerial Declaration clearly states:

“We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.”³¹

3. GATT / WTO PROVISIONS AND MEASURES RELEVANT TO THE ENVIRONMENT

3.1 Non-Discrimination: The most-favoured nation principle and the national treatment principle

Despite the changes to the organisational structure after the Uruguay Round, the fundamental principles of GATT remain unaltered. In essence, the GATT – and ultimately world trade law – is based on the notion of non-discrimination, which is expressed in two principles, viz., “most-favoured nation” (“*MFN*”) and “national treatment”. These two non-discrimination principles are essential for the full realisation of the aim of lowered tariffs, which are binding obligations under GATT Article II.

The most-favoured nation principle is found in Article I of the GATT, which provides that in respect of any ...

“customs duties and charges of any kind...[or] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Thus, if a member gives an advantage to one state, it should also be granted to all the other WTO members.³²

³¹ World Trade Organization, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001 *Ministerial Declaration* 2001 WT/MIN (01)/DEC/1 (“herein *Doha Ministerial Declaration*”), item 6.

³² World Trade Organisation *Trading into the Future* 2001 Geneva 5.

The “*national treatment*” provision found in Article III (4) of the GATT stipulates that once goods have entered a market, they must be treated no less favourably than equivalent domestically produced goods. In other words, this article demand that imported products be treated the same as “like (domestic) products”.³³

The relevant question, at this stage, is to determine what would happen if a country violates its WTO obligation of non-discrimination in order to fulfil an environmental commitment, be it domestic such as the national US legislation aimed at preserving endangered species³⁴ or in terms of another international treaty, such as the Convention on International Trade in Endangered Species (“*CITES*”). A related question is whether or not a country may impose its own environmental standard/s *extra-territorially*.³⁵ The answer lies in the correct interpretation of GATT Article XX.

3.2 GATT Article XX – The “Green Exception”

The MFN and national treatment clauses are subject to the “general exceptions” contained within Article XX of the GATT, the important provisions of which for purposes of this paper are the introductory clause (commonly referred to as the “*chapeau*”) together with paragraphs (b) and (g). They read as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption of 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 restriction on domestic production or consumption.”

³³ Article III:4 reads as follows: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

³⁴ See the discussions of the *Tuna Dolphin* and *Shrimp-Turtle* cases below in paragraph 4.

³⁵ The *Tuna-Dolphin* and *Shrimp-Turtle* cases illustrate this concept very well as both dealt with environmental Acts by the United States in which the standards of other countries were prescribed by an internal US Statute. See the discussions below in paragraph 4.

It is hoped that from the discussion of cases dealing with Article XX below two things will become clear. Firstly, in very few of the GATT 1947 cases purporting to fall under the exceptions provided in Article XX did the action complained about actually seem to have environmental protection as *primary* aim. In fact, in most instances protection of domestic producers,³⁶ or retaliation,³⁷ were clearly the main objectives of the action/s complained of.³⁸ Secondly, a definite willingness to accommodate environmental concerns while simultaneously enforcing WTO obligations can be discerned in the way the Appellate Body approached GATT 1994 disputes. This is especially clear when the results of two highly publicised “environmental” cases are compared, namely the “Tuna Dolphin” disputes³⁹ under GATT 1947, and the “Shrimp-Turtle” disputes⁴⁰ under GATT 1994.⁴¹

While Articles XX (b) and (g) identify the kind of measures that may be condoned, the chapeau sets out the tests for the *manner* in which the trade measure is applied. In the majority of cases discussed below, the dispute resolution bodies first categorised the trade measure as either falling under one of the subcategories in Article XX.⁴² If so, the threefold test contained in the chapeau is then applied.⁴³

³⁶ See, for example, the discussion of *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* L/6268 – 35S/98 1988 (hereinafter “**Fish Export Ban**”) in paragraph 4.1.2, and of *Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes* DS10/R – 37S/200 1990 (hereinafter “**Thailand: Cigarettes**”) in paragraph 4.1.3 below.

³⁷ See the discussion of *United States – Prohibition of Imports of Tuna and Tuna Products from Canada* L/5198 – 29S/91 1982 (hereinafter “**Tuna Import Ban**”) in paragraph 4.1.1 below.

³⁸ See also the discussion by Oesterle, D.A., “The WTO Reaches Out to the Environmentalists: Is It Too Little, Too Late?” 1999/2000 *Colorado Journal of International Environmental Law and Policy* 1 at 11-12 which highlights the concerns by developing countries that the US often promulgate environmental statutes and rules primarily to protect failing American industries.

³⁹ *United States – Restrictions on Imports of Tuna* DS21/R – 39S/155 (Mexican Complaint) Panel Report not adopted, but circulated in 1991 (hereinafter “**Tuna Dolphin I**”) and *United States – Restrictions on Imports of Tuna* DS29/R (EU Complaint) Panel Report not adopted but circulated in 1994 (hereinafter “**Tuna Dolphin II**”). See the discussion of these decisions in paragraphs 4.1.4 and 5.1.5 below.

⁴⁰ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R 1998 Report of the Panel and *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R 1998 Appellate Body Report (hereinafter “**Shrimp-Turtle I**”). See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* WT/DS58/RW 2001 Report of the Panel, and *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* WT/DS58/AB/RW 2001 Appellate Body Report (hereinafter “**Shrimp-Turtle II**”).

⁴¹ See the discussions of the Shrimp-Turtle disputes in paragraphs 4.2.2 and 4.2.3 below.

⁴² The notable exceptions to this methodology are *Tuna Import Ban*, *op.cit.*, and the Panel Report in *Shrimp-Turtle I* where the measure at issue was first tested against the chapeau, after which the relevant sub-articles were scrutinised. See the discussions in paragraph 4.1.1 and 4.2.2 below.

⁴³ See paragraph 3.2.3 below.

In keeping with the above, a brief theoretical exposition of the two relevant sub-articles will first be given, followed by the chapeau, providing the context for the subsequent discussions of the relevant disputes in paragraph 4. After the case discussions, Article XX will be revisited in order to highlight how far the notion of environmental protection has gained ground since the earlier environmental cases under the GATT 1947.

3.2.1 Article XX (b): “necessary to protect human, animal or plant life or health”

Article XX (b) has two requirements: (1) the trade-restricting measure must be “necessary”; and (2) it must be aimed at protecting human, animal or plant life or health. In the case discussions below it will be clear that interpretation of the word “necessary” provided the major stumbling block in the application of this sub-article.

Under GATT 1947 the word “necessary” was interpreted very restrictively. In *Thailand - Cigarettes* the Panel found that a measure could only be considered to be “necessary” in terms of Article XX (b) if there were no alternative measure consistent with the GATT, or *less inconsistent* with it, which could reasonably be employed to achieve the policy objective.⁴⁴ The same reasoning was followed in both the *Tuna Dolphin I*⁴⁵ and *Tuna Dolphin II*⁴⁶ decisions.

Under GATT 1994 the scope was widened considerably, primarily through the report of the Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*.⁴⁷ In this case it was held that, if there was an alternative measure consistent with the GATT, but such alternative measure could not deliver the same end as the GATT-*inconsistent* measure, it would not be regarded as a reasonable alternative.⁴⁸ In other words, a balancing approach is followed when testing the necessity of restrictions on trade for environmental purposes. This is

⁴⁴ *Op. cit* paragraph 75.

⁴⁵ *Op.cit* paragraph 5.27.

⁴⁶ *Op.cit* paragraph 5.35.

⁴⁷ WT/DS135/AB/R 2001 Appellate Body Report (hereinafter “*Asbestos*”).

⁴⁸ *Ibid* paragraph 172.

similar to the proportionality analysis applied by the European Community and the United States.⁴⁹

3.2.2 Article XX (g): “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption”

Paragraph (g) contains three concepts that have proven to be open to interpretation. There has been disagreement about, firstly, what exactly constitutes an “exhaustible natural resource”. Could a living, renewable thing (such as a species of animal, for example) be regarded as “exhaustible”? Although parties before a tribunal have argued the contrary,⁵⁰ the dispute settlement body of the WTO has consistently acknowledged that “exhaustible natural resource” does not exclude animals that are able to reproduce themselves.

Secondly, when can a GATT-inconsistent measure be understood to be “relating to” the conservation of such an exhaustible resource?⁵¹ Does this mean that the measure had to be primarily aimed at conservation, or would something less – such as an *incidental* environmental aim - suffice?

Thirdly, when exactly would a trade measure be “made effective in conjunction with restriction on domestic production or consumption”?

3.2.3 The chapeau

As stated above, the majority of tribunals first classified a measure as falling under one of the sub-articles of Article XX. If so, the *manner* in which the trade measure is applied is then tested against the threefold criteria of the chapeau: Whether it amounts to (1) arbitrary discrimination; (2) unjustifiable discrimination and (3) a

⁴⁹ Matsushika, M., Schoenbaum, T.J. and Mavroidis, P.C, “Environmental Protection and Trade” in *The World Trade Organization: Law, Practice and Policy* 2003 Oxford University Press 439 at 454.

⁵⁰ E.g. in *Tuna-Dolphin I* Mexico argued that the term “exhaustible natural resources” could not justifiably be extended to include “fisheries and fishery products, *nor in fact any living being*”. *Op. cit* paragraph 3.42.

⁵¹ *Ibid* at 451-452.

disguised restriction on international trade. From the case discussions below it will become clear that most of the environmental measures fail to clear this last hurdle. This is because the chapeau protects “both substantive and procedural” requirements in that it forms an expression of the good faith principle in international law.⁵²

Following this brief theoretical exposition of Article XX the relevant cases will now be examined.

4. Emerging case law under the WTO dealing with environmental issues

4.1 Historical development: Disputes under the GATT 1947

4.1.1 *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*⁵³

In 1979 Canada seized nineteen US fishing vessels and arrested several of its nationals fishing for albacore tuna, without authorisation from the Canadian government, in waters considered by Canada to be under its jurisdiction.⁵⁴ The United States did not recognise this jurisdiction. Shortly afterward it introduced an import prohibition against Canadian tuna under Section 205 (Import Prohibitions) of its *Fishery Conservation and Management Act of 1976*.⁵⁵

Upon a complaint by Canada, the Panel found that the US measure fell foul of Article XI,⁵⁶ after which it turned its attention to the question whether or not the measure could nevertheless be justified under Article XX. It started off by first examining the preamble to Article XX.⁵⁷ Without stating its reasons for doing so, it found that the US measure “might not necessarily have been arbitrary or unjustifiable”. As to the question whether the prohibition could be considered to be a disguised restriction on

⁵² *Shrimp-Turtle I* Appellate Body report, *op.cit* paragraphs 157 – 158.

⁵³ L/5198 – 29S/91 Report of the Panel adopted on 22 February 1982 (herein referred to as “*Tuna Import Ban*”).

⁵⁴ *Ibid*, paragraph 2.1.

⁵⁵ *Ibid*, paragraph 2.2.

⁵⁶ *Ibid*, paragraphs 4.4 to 4.6. Article XI deals with the elimination of quantitative restrictions.

⁵⁷ *Ibid*, paragraph 4.8.

international trade, the Panel, rather simplistically, it is submitted, found the contrary. It seems as if this conclusion was reached mainly because the US had “publicly announced” its measure.

Having first dealt with the chapeau in this brief fashion, the Panel turned its attention to sub-section (g) of Article XX. It noted that, although both parties agreed that tuna stocks constituted an exhaustible natural resource, Article XX (g) demanded that such measures had to be made effective in conjunction with restrictions on domestic production or consumption. It noted that the United States had restricted the importation from Canada of *all* tuna species and –products, but that there were no correlative restrictions on the US domestic production or consumption of tuna.⁵⁸ The United States’ defence based on Article XX (g) was therefore rejected.

Even taking into consideration that this was a very early “environmental” case considered by a GATT Panel, the way in which the chapeau was dealt with seems rather weak in that any motivation for the Panel’s conclusions were either absent or formulated rather half-heartedly. Nevertheless, the Panel’s conclusion cannot be faulted. The US measure was clearly a commercial counter-measure and it is submitted that it has been given a “green veneer” purely in order to circumvent the GATT obligations freely entered into by the US.

4.1.2 *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*⁵⁹

In terms of the *Canadian Fisheries Act* of 1970, Canada prohibited the export of certain unprocessed salmon as well as unprocessed herring.⁶⁰ The United States claimed that such export restrictions were inconsistent with the obligations of Canada under Article XI of the General Agreement, and could not be justified under any of

⁵⁸ *Ibid*, paragraph 4.9.

⁵⁹ L/6268 – 35S/98 Report of the Panel adopted on 22 March 1988 (herein referred to as “*Fish export ban*”).

⁶⁰ *Ibid*, paragraphs 2.1 and 2.2: “Paragraph 6 of the Pacific Commercial Salmon Fisheries Regulations, promulgated under authority of sub-section 34(j) of the Act, provided that: ‘No person shall export from Canada any sockeye or pink salmon unless it is canned, salted, smoked, dried, pickled or frozen and has been inspected in accordance with the Fish Inspection Act...’” A similar measure was taken for herring: cf. paragraph 2.3.

the exceptions provided for in that Article or under those of Article XX.⁶¹ Canada defended itself by arguing that the measures under review, although not conservation measures *per se*, were nevertheless *components* of its fisheries conservation and management regime and, as such, justified under Article XX (g).⁶²

It was common cause between the parties that salmon and herring stocks are, indeed, “exhaustible natural resources”, and that Canada did indeed make its measure effective “in conjunction with restriction on domestic production or consumption” within the purposes of Article XX (g).⁶³ Thus having cleared two hurdles contained in sub-paragraph (g), the Panel considered the final bone of contention contained therein: the meaning of the phrase: “related to... conservation”. The question was whether this meant that any relationship with conservation would be sufficient for a trade measure to fall under Article XX (g), or whether a particular relationship is required.

On the one hand, the Panel noted that some of the other subparagraphs of Article XX state that the relevant measure had to be “necessary” or “essential” to the achievement of the policy purpose. Subparagraph (g) could therefore be taken as referring to a wider range of measures as the measure only had to be “related to” conservation. On the other hand, the Panel found that, nonetheless, this did not entail unrestrictedly wide measures to be adapted under the guise of being in some or other way “related” to conservation. It interpreted the chapeau to Article XX as indicating that the purpose of including Article XX (g) in the General Agreement was

“...not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources.”⁶⁴

As such, the Panel found that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as

⁶¹ *Ibid*, paragraph 3.1.

⁶² *Ibid*, paragraphs 3.3 and 3.5.

⁶³ *Ibid* paragraph 4.5.

⁶⁴ *Ibid* paragraph 4.6.

“relating to” conservation within the meaning of Article XX (g).⁶⁵ As Canada itself had stated that its measure was not a conservation measure *per se*, it is therefore not surprising that the Panel went on to decide that the export prohibitions were not justified by Article XX (g).

It is interesting to note that, in contrast to the Panel in *Tuna Import Ban* who considered the chapeau to Article XX before considering the Article itself, the Panel in *Fish Export Ban* started its analysis with the specific subparagraph of Article XX. The chapeau was analysed as a secondary step, and primarily in order to place the interpretation of sub-paragraph (g) in context. Having decided that the measure did not meet the requirements set out in sub-paragraph (g), the Panel found it unnecessary to also analyse the requirements set out in the chapeau.

4.1.3 Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes 66

In terms of Section 27 of its *Tobacco Act* of 1966, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorised the sale of domestic cigarettes. Cigarettes were also subject to excise, business and municipal taxes.⁶⁷

Upon a complaint by the US the Panel found that the internal taxes were consistent with Article III: 2,⁶⁸ but the import restrictions were found to be inconsistent with Article XI: 1 and not justified under Article XI: 2(c).⁶⁹

Regarding Article XX (b), the Panel agreed with the parties to the dispute and the expert evidence from the WHO that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX (b), and found that this provision “...clearly allowed contracting parties to give priority to human health over trade liberalization”.⁷⁰

⁶⁵ *Ibid.*

⁶⁶ DS10/R – 37S/200 Report of the Panel adopted on 7 November 1990 (herein referred to as “*Thailand – Cigarettes*”).

⁶⁷ *Ibid* paragraphs 6 and 7.

⁶⁸ *Ibid* paragraphs 86 and 88.

⁶⁹ *Ibid* paragraphs 67-71.

⁷⁰ *Ibid* paragraph 73.

However, the Panel continued to state that a measure such as the import restriction imposed by Thailand could only be considered to be “necessary” in terms of Article XX (b) if there were no alternative measure consistent with the GATT, or *less inconsistent* with it, which could reasonably be employed to achieve the policy objective. The Panel pointed out that there were various alternative measures consistent with the GATT which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked in Thailand and which, taken together, could have achieved the health policy goals pursued by Thailand, such as a ban on cigarette advertising, or incremental pricing increases. For these reasons the Panel found that Thailand’s practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the GATT not “necessary” within the meaning of Article XX (b).⁷¹

It is thus clear that the Panel followed a very restrictive interpretation of the term “necessary”.

4.1.4 United States – Restrictions on Imports of Tuna⁷² (“Tuna-Dolphin I”)

Despite the preceding environmental cases decided by the dispute resolution Panels of the GATT 1947, it was only after the decision in *Tuna Dolphin I* that the relationship between protection of the environment and international trade, once an “arcane specialty that attracted little attention” was catapulted into popular and academic conscience.⁷³ Uproar ensued, mostly because in this instance, other than with the previous environmental cases, a genuinely *environmental* aim was found to be inconsistent with the GATT. (The fact that the subject matter happened to be dolphins presumably also played an emotional part in the large coverage given to this case.)

⁷¹ *Ibid* paragraphs 77-81.

⁷² DS21/R – 39S/155 (Mexican Complaint) Panel Report not adopted, but circulated in 1991 (herein referred to as “*Tuna-Dolphin I*”).

⁷³ Matsushita, Schoenbaum and Mavroidis, *op.cit* 448.

Since tuna are often found swimming below dolphins in the eastern tropical Pacific Ocean⁷⁴, fishing vessels in that region commonly encircle dolphins with purse-seine nets in order to capture tuna.⁷⁵ Changes in US legislation aimed at reducing the incidental killing of dolphins due to such harvesting practices resulted in a dramatic drop in dolphin mortality, from an estimated 368 600 in 1972 to 5 083 in 1990. By 1995-96 American figures of dolphin mortality in the ETP had apparently reached zero.⁷⁶

In the *Tuna-Dolphin I* dispute, the United States passed domestic legislation regulating the capture of tuna as a means of protecting dolphins. In terms of the *Marine Mammal Protection Act* of 1972, as revised (“the **MMPA**”) the importation of commercial fish or products from fish caught with commercial fishing technology, which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards, was prohibited.⁷⁷ (This was because dolphins are a protected species under the MMPA.) In particular, the importation of yellowfin tuna harvested with purse-seine nets in the ETP was prohibited (*primary nation embargo*), unless the competent US authorities established that (i) the government of the harvesting country had a programme regulating takings of marine mammals that was comparable to that of the United States’, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such takings by US vessels.⁷⁸ Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo were also prohibited (*intermediary nation embargo*).⁷⁹

⁷⁴ Hereafter referred to as the “*ETP*”.

⁷⁵ *United States – Restrictions on Imports of Tuna* DS29/R (EU Complaint) Panel Report not adopted but circulated in 1994 (herein referred to as “*Tuna-Dolphin II*”) at paragraph 5.1. See full discussion of this case *infra*.

⁷⁶ Cheyne, I., “Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles” 2000(12(3)) *Journal of Environmental Law* 293 at 295.

⁷⁷ *Ibid*, paragraph 2.5.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* paragraph 2.10: “Section 101(a)(2)(C) of the MMPA states that for purposes of applying the direct import prohibition...the Secretary of Commerce ‘shall require the Government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such importation to the United States’”.

Upon a complaint by Mexico, the Panel found that the import prohibition under both the direct and the intermediary embargoes did not constitute “internal regulations” within the meaning of Article III. It was pointed out that the MMPA did not regulate tuna *products* as such, and in particular did not regulate the sale of either *tuna* itself or *tuna products*. Because the MMPA regulations concerned harvesting techniques that could not possibly affect tuna as a product, the ban on tuna harvested with purse-seine nets could not be justified in terms of the wording of Article III itself, which covers only measures affecting products as such.⁸⁰

The Panel further found that the import prohibition was inconsistent with Article XI: 1 (which prohibits quantitative restrictions) – an allegation that the United States did not dispute.⁸¹ Having found thus, the Panel turned its attention to the exceptions raised by the United States under Article XX.

First off, the Panel examined Article XX (b) and asked itself the question whether or not national measures deemed to fall under this subsection could be applied *extra-territorially*. The Panel examined the drafting history of the General Agreement and found that Article XX (b) did not extend to measures protecting human, animal or plant life *outside of the jurisdiction* of the country taking the measure.⁸² In addition, the Panel stated that, if the broad interpretation of Article XX (b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardising their rights under the GATT.⁸³ Using the same reasoning, the Panel rejected the possible extra-jurisdictional application of Article XX (g) too.⁸⁴

The issue of extra-jurisdictionality of Articles XX (b) and (g) apart, the Panel found that the US measures did not meet the requirements set out in these two provisions in any event. The US measure could not be considered to be “necessary” within the meaning of Article XX (b), as the United States had failed to demonstrate that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through

⁸⁰ *Ibid* paragraph 5.11.

⁸¹ *Ibid* paragraph 5.18.

⁸² *Ibid* paragraph 5.26.

⁸³ *Ibid* paragraph 5.27.

⁸⁴ *Ibid* paragraph 5.32.

measures consistent with the GATT. The Panel therefore rejected the US view that “necessary” meant “needed”, stating that a measure would only qualify as “necessary” when no other reasonable (GATT-consistent, or less GATT-*inconsistent*) alternative existed.⁸⁵ Concerning this aspect the Panel pointed out the option of negotiating international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.⁸⁶

Examining Article XX (g), the Panel confirmed the finding in *Fish Export Ban*, namely that a measure could be considered as “relating to the conservation of exhaustible natural resources” within the meaning of Article XX (g) only if it was primarily aimed at such conservation.⁸⁷ The Panel recalled that the United States linked the maximum incidental dolphin-taking rate that Mexico had to meet to the taking rate actually recorded for United States fishermen, and found that a limitation on trade based on such unpredictable conditions could not be regarded as being “primarily aimed” at the conservation of dolphins in terms of Article XX (g).⁸⁸

These findings by the Panel, in terms of which the “environmental” provisions of the GATT were interpreted very narrowly, raised a lot of criticism.⁸⁹ It is significant, however, that the Panel did find positively in favour of eco-labelling.

The United States’ *Dolphin Protection Consumer Information Act*⁹⁰ (“The **DPCIA**”) set standards relating to labelling tuna as “dolphin friendly” and criminalised any false or misleading labelling. Mexico argued that this requirement discriminated against Mexico as a country fishing in the ETP, based on the MFN requirement of Article I: 1. The Panel, however, found that the labelling provisions of the DPCIA relating to

⁸⁵ *Ibid* paragraphs 3.33 and 5.27 – 5.28.

⁸⁶ *Ibid* paragraph 5.28.

⁸⁷ *Ibid* paragraph 5.33.

⁸⁸ *Ibid*.

⁸⁹ See Matsushita, Schoenbaum and Mavroidis *op.cit* 448 n 27. See also Gaines, S., “The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures” 2001 (22(4)) *University of Pennsylvania Journal of International Economic Law* 739 at 755 where it is commented that *Tuna-Dolphin I* not only gave the idea that Article XX did not allow scope for unilateral trade measures to protect the environment, but also raised doubts about whether it would cover multilateral agreements that impose trade restrictions as core elements of their environmental protection strategies, such as CITES, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal.

⁹⁰ *Ibid* paragraph 2.12.

tuna caught in the ETP were not inconsistent with this Article as they did not restrict the sale of tuna products as such, and were applied without distinction between domestic and foreign products.⁹¹

A second Panel was thereafter called upon by different complainants than in *Tuna Dolphin I* to examine basically the same issue.

4.1.5 United States – Restrictions on Imports of Tuna⁹² (“Tuna-Dolphin II”)

The facts of this case are similar to the ones described above in *Tuna-Dolphin I*. The EEC and the Netherlands (on behalf of the Netherlands Antilles) complained that both the primary and the intermediary nation embargoes, enforced pursuant to the MMPA, did not fall under Article III, were inconsistent with Article XI:1, and were not covered by any of the exceptions of Article XX.⁹³ The United States argued that the intermediary nation embargo was consistent with the GATT since it was covered by Article XX, paragraphs (g), (b) and (d).⁹⁴

The first significant change in direction from *Tuna Dolphin I* was that, on Article XX (b) and (g), the Panel found that there was no basis for the contention that Article XX applied only to policies related to the protection of human, animal or plant life and health or to the conservation of natural resources located within the territory of the contracting party,⁹⁵ and concluded that the policy pursued within the jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (b) and (g).⁹⁶ In other words, it was found that national measures could also be applied extra-territorially.

Although permissive on the “extraterritoriality issue”, the Panel found that measures taken so as to force other countries to change their policies could not be considered

⁹¹ *Ibid* paragraphs 25.42-5.44.

⁹² DS29/R (EU Complaint) Panel Report not adopted but circulated in 1994.

⁹³ *Ibid* paragraphs 3.3 to 3.4.

⁹⁴ *Ibid* paragraph 3.7.

⁹⁵ *Ibid* paragraphs 5.16-5.17, and 5.32.

⁹⁶ *Ibid* paragraphs 5.20 and 5.33.

"necessary" for the protection of animal life or health in the sense of Article XX (b),⁹⁷ or primarily aimed at the conservation of exhaustible natural resources, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX (g).⁹⁸

Concerning Article XX (d), the Panel found that since the *primary* nation embargo was inconsistent with Article XI: 1, it could not serve as a basis for the justification of the *intermediary* nation embargo.⁹⁹

The two *Tuna Dolphin* cases constituted the first time that the GATT Panels really had to come to terms with protection of the environment.¹⁰⁰ Although they were never adopted and could not set a precedent for subsequent Panels,¹⁰¹ reaction was far-reaching and cut across several disciplines, putting the WTO firmly at the front of International Law and popular consciousness of globalisation, and eventually culminating in the protests in Seattle and Genoa.¹⁰²

4.1.6 United States – Taxes on Automobiles¹⁰³

In this case, three US measures on automobiles were under examination: the luxury tax on automobiles ("luxury tax"), the gas consumption tax on automobiles ("gas guzzler"), and the Corporate Average Fuel Economy regulation ("CAFE").¹⁰⁴ The European Communities argued that these measures were inconsistent with Article III and could not be justified under Article XX (g) or (d).¹⁰⁵

The Panel found that both the luxury tax and the gas-guzzler tax were consistent with Article III: 2. However, it found the CAFE regulation (which required the average

⁹⁷ *Ibid* paragraph 5.39.

⁹⁸ *Ibid* paragraph 5.27.

⁹⁹ *Ibid* paragraph 5.41.

¹⁰⁰ As already stated, the preceding three cases dealt primarily with thinly disguised protectionism or retaliation.

¹⁰¹ See *Japan – Alcoholic Beverages* WT/DS11 1996 Appellate Body report at 14 where it is stated that "Panel reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute."

¹⁰² Pauwelyn, J., *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* 2003 Cambridge University Press 35.

¹⁰³ DS31/R Panel Report not adopted but circulated on 11 October 1994, reprinted in 1994 *ILM* 1397 (herein referred to as "*Car Taxes*").

¹⁰⁴ *Ibid* paragraphs 2.1 – 2.24.

¹⁰⁵ *Ibid* paragraph 3.105.

fuel economy for passenger cars manufactured in the US or sold by any importer not to fall below 27.5 miles per gallon¹⁰⁶) to be inconsistent with Article III: 4, as the separate foreign fleet accounting discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers (i.e. based on origin), rather than on the basis of factors directly related to the products as such.¹⁰⁷

The Panel found that a policy to conserve gasoline was within the range of policies covered by Article XX (g), mainly because gasoline is produced from petroleum, which is an exhaustible natural resource.¹⁰⁸ However, the Panel further found that the separate foreign fleet accounting was not justified under Article XX (g) because the measure did not contribute directly to fuel conservation in the US. In other words, a measure that did not further the objectives of conservation of an exhaustible resource could not be deemed to be primarily aimed at such conservation.¹⁰⁹

4.2 Cases dealt with under the WTO and GATT 1994

In contrast to the decisions discussed above, a reading of the decisions referred to below makes it clear that “...the WTO Appellate Body is fashioning its own approach to Article XX that makes significantly greater allowance for *legitimate* measures of environmental protection”.¹¹⁰

4.2.1 *United States – Standards for Reformulated and Conventional Gasoline*¹¹¹

On 23 January 1995, days after the WTO and its new dispute settlement procedure came into being, Venezuela requested consultations as it contended that the US was applying rules that discriminated against gasoline imports by imposing stricter criteria

¹⁰⁶ *Ibid* paragraphs 2.15 – 2.16.

¹⁰⁷ *Ibid* paragraph 5.55.

¹⁰⁸ *Ibid* paragraph 5.57.

¹⁰⁹ *Ibid* paragraph 5.61.

¹¹⁰ Matsushika, M., Schoenbaum, T.J. and Mavroidis, P.C, “Environmental Protection and Trade” in *The World Trade Organization: Law, Practice and Policy* 2003 Oxford University Press 439 at 451. Emphasis added.

¹¹¹ WT/DS2/AB/R 1996 Appellate Body Report (herein referred to as “*Gasoline*”). Text of this report was downloaded from http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm (last visited 1 January 2004). As no paragraph numbers are given in the downloaded text, reference is made to its page numbers instead.

than demanded of domestic fuel. A couple of months later, the matter was referred to the dispute resolution Panel of the WTO.

In accordance with a 1990 amendment to the United States' *Clean Air Act*, the US Environmental Protection Agency ("*the EPA*") promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the US and to ensure that pollution from the combustion of gasoline did not exceed 1990 levels.¹¹²

From 1 January 1995, the Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold.¹¹³ The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. The EPA regulation provided two different sets of baseline emissions standards, with a stricter burden on *foreign* gasoline producers.¹¹⁴

Upon the complaint by Venezuela and Brazil, the Panel found that imported and domestic gasoline were "like products", and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefiting from sales conditions as favourable as domestic gasoline were afforded by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.¹¹⁵ The baseline establishment rules of the Gasoline Rule was accordingly inconsistent with Article III: 4.¹¹⁶

The Panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of human, animal and plant life or health mentioned in Article XX (b).¹¹⁷ However, the Panel found that the baseline establishment methods were not "necessary" under Article XX (b) since

¹¹² *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/R 1996 Panel Report, paragraphs 2.1 – 2.13.

¹¹³ *Ibid* paragraph. 2.2.

¹¹⁴ *Ibid* paragraphs 2.6 and 2.8.

¹¹⁵ *Ibid* paragraph 6.16.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* paragraph 6.21.

there were other consistent or less inconsistent measures reasonably available to the US for the same policy objective.¹¹⁸ In so finding, it followed the narrow interpretation favoured by the GATT 1947 Panels discussed above.

Finally, the Panel considered that a policy to reduce the depletion of clean air was, indeed, a policy to conserve a natural resource within the meaning of Article XX (g).¹¹⁹ However, the Panel found that the less favourable baseline establishment methods at issue in this case were not *primarily aimed at*¹²⁰ the conservation of natural resources and could therefore not be justified under Article XX (g) as a measure “relating to” the conservation of exhaustible natural resources.¹²¹

The Panel concluded that the Gasoline Rule could not be justified under Article XX (b), (d) or (g). In light of these findings, it was not deemed necessary by the Panel to determine whether the measure met the conditions set out in the chapeau of Article XX.¹²²

The United States appealed the Panel report but limited its appeal to the Panel's interpretation of Article XX of the GATT 1994.¹²³

Findings by the Appellate Body

The Appellate Body referred to the general rule of treaty interpretation contained in Article 31 of the *Vienna Convention on the Law of Treaties* which states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”¹²⁴ and concluded that the phrase “primarily aimed at” is “not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from

¹¹⁸ *Ibid* paragraph 6.28.

¹¹⁹ *Ibid* paragraph 6.37.

¹²⁰ First used in the *Tuna Import Ban* case discussed above.

¹²¹ *Ibid* paragraph 6.40.

¹²² *Ibid* paragraph 6.41.

¹²³ *Gasoline* Appellate Body Report *op.cit* 9. The US did not appeal the findings on Article XX(b) and Article XX(d).

¹²⁴ *Ibid* 14.

Article XX(g)”.¹²⁵ The Appellate Body agreed with the Panel that the words “relating to” contained in Article XX (g) should be interpreted as meaning “primarily aimed at” the conservation of natural resources,¹²⁶ but disagreed with the Panel’s view that the establishment rules were not primarily aimed at the conservation of natural resources.¹²⁷

The Appellate Body then considered whether the measures were “made effective in conjunction with restrictions on domestic production or consumption”,¹²⁸ the second condition contained in Article XX (g). The Appellate Body found that

“[w]e believe that the clause ... is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”¹²⁹

The Appellate Body also stated that:

“[t]he baseline establishment rules affect both domestic gasoline and imported gasoline... Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of "dirty" gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded "less favourable treatment" than the domestic gasoline in terms of Article III: 4, *is not material for purposes of analysis under Article XX (g)*.”¹³⁰

The Appellate Body therefore clearly found that the baseline establishment rules contained in the Gasoline Rule fell within the scope of Article XX (g), and in so doing, it widened the scope of Article significantly.

¹²⁵ *Ibid* 18. See Jackson, J.H., “Comments on the Shrimp/Turtle and the Product/Process Distinction” 2000(11(2)) *European Journal of International Law* 303 at 305 where the WTO approach of placing the analysis of the GATT in a wider international law context, as compared to the approach in *Tuna Dolphin I* where the Panel refused to widen the scope on the product versus process issue as being a subject more appropriate to the GATT contracting parties themselves, in isolation to broader international law rules/notions.

¹²⁶ *Ibid* 14 – 18.

¹²⁷ *Ibid* 10.

¹²⁸ The Panel did not address this issue as it had already found that the measure did not fall under Article XX(g).

¹²⁹ *Ibid* 20-21.

¹³⁰ *Ibid* 21, own emphasis.

The Appellate Body went on to find that the measures under scrutiny failed to meet the requirements of the chapeau of Article XX. It noted that the chapeau addressed not so much the questioned measure or its specific contents as such, but rather the *manner* in which that measure is applied. Accordingly, the chapeau is animated by the principle that while members have a *legal right* to invoke the exceptions of Article XX, they should not be so *applied* as to “...frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*”.¹³¹

It concluded that the application of the US regulation amounted to unjustifiable discrimination and to a disguised restriction on trade because of two omissions on the part of the United States.¹³² First, the United States had not adequately explored means, including in particular cooperation with Venezuela and Brazil, of mitigating the administrative problems that led the United States to reject individual baselines for foreign refiners. Second, the United States did not count the costs for foreign refiners that would result from the imposition of statutory baselines. The resulting discrimination must therefore have been foreseen, and was not merely inadvertent or unavoidable.

The *Reformulated Gasoline* report placed Article XX in a new light. As one commentator put it:

“Future Article XX cases, it now appeared, would not turn on whether the trade measure addressed and environmental issue covered by Article XX (b) or (g) (*“Tuna Dolphin I”*), or even whether the effect of the measure on environmental quality was direct or indirect (*“Tuna-Dolphin II”*). The major issue would become whether the challenged government had applied a measure within the scope of (b) or (g) in a way that resulted in ‘arbitrary or unjustifiable discrimination’ contrary to the conditions in the chapeau to Article XX.”¹³³

In the next environmental case adjudicated by the WTO dispute resolution body, we find that protection of the environment was given even more prominence.

¹³¹ *Ibid* 22.

¹³² *Ibid* 29.

¹³³ Gaines, *op.cit* 761.

4.2.2 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*¹³⁴ (“*Shrimp-Turtle I*”)

Certain endangered sea turtles are characterised as highly migratory species, and as such they have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). In 1998, all species of sea turtles were included in Appendix I of CITES.¹³⁵

Accordingly, the US *Endangered Species Act of 1973* (“*the ESA*”) lists as endangered or threatened the five species of sea turtles found in US waters and prohibits their take within the United States, within the US territorial sea and the high seas. Pursuant to the ESA, the United States required that shrimp trawlers used "turtle excluder devices" (“*TEDs*”) in their nets when fishing in areas where there was a significant likelihood of encountering sea turtles.

Section 609 of the United States’ *Public Law 101-162* (hereafter "*Section 609*"), enacted in 1989 by the United States, was intended to, *inter alia*, develop bilateral or multilateral agreements for the protection and conservation of sea turtles. Section 609 prohibited the importation into the United States of shrimp harvested with technology that might adversely affect certain sea turtles, unless the harvesting nation was certified to have a regulatory programme for the conservation of sea turtles and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

India, Malaysia, Pakistan and Thailand charged that the United States’ regulations were inconsistent with its obligations under Articles I: 1,¹³⁶ XI: 1,¹³⁷ and XIII: 1, because it restricted the importation of shrimp and shrimp products from countries which had not been certified, while like products from other countries which had been

¹³⁴ WT/DS58/R 1998 Panel Report and WT/DS58/AB/R 1998 Appellate Body Report (herein referred to as “*Shrimp-Turtle I*”).

¹³⁵ Panel Report paragraph 2.3.

¹³⁶ *Ibid* paragraph 7.18.

¹³⁷ *Ibid* paragraph 7.11.

certified could be imported freely into the US.¹³⁸ The US claimed that the measures at issue were justified under Article XX (b) and (g), because these provisions did not contain jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved.¹³⁹ The complainants argued to the contrary that Article XX (b) and (g) could not be invoked to justify a measure applying to animals outside the jurisdiction of the Member enacting the measure.

The Panel found that the ban imposed by the United States was inconsistent with Article XI (General Elimination of Quantitative Restrictions),¹⁴⁰ and found that the US ban could not be justified under Article XX as it constituted unjustifiable discrimination between countries where the same conditions prevail and thus was not within the scope of measures permitted under Article XX.¹⁴¹ The Panel therefore started off its analysis with the chapeau to Article XX, and since it had found that the measure under scrutiny did not pass the test posed therein, it did not find it necessary to examine whether the US measure was covered by paragraphs (b) and (g) of Article XX.¹⁴²

Findings by the Appellate Body

On appeal, the US raised, *inter alia*, the issue of whether the Panel erred in finding that the measure at issue constituted unjustifiable discrimination between countries where the same conditions prevail and, thus, was not within the scope of measures permitted under Article XX of the GATT 1994.¹⁴³

The Appellate Body rejected the methodology followed by the Panel in first considering the chapeau of Article XX before moving on to its sub-articles and instead invoked the two-tiered analysis as first established in *Reformulated Gasoline*. It went so far as to indicate that the sequence of steps followed in *Reformulated Gasoline* (first, characterization of the measure under Article XX (g); second, further

¹³⁸ *Ibid* paragraph 7.20.

¹³⁹ *Ibid* paragraph 7.24.

¹⁴⁰ *Ibid* paragraph 7.17.

¹⁴¹ *Ibid* paragraph 7.49.

¹⁴² *Ibid* paragraphs 7.62-63.

¹⁴³ Appellate Body Report paragraph 98.

appraisal of the same measure under the introductory clauses of Article XX) reflected not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.¹⁴⁴

India, Pakistan and Thailand argued that if “all” natural resources were considered to be exhaustible, the term “exhaustible” itself would become superfluous. Malaysia contended that “living creatures” should be interpreted as falling within the scope of Article XX (b) and “nonliving exhaustible natural resources” within the exemption contained within Article XX (g) and that therefore paragraphs (b) and (g) of Article XX should be regarded as being mutually exclusive.¹⁴⁵

The Appellate Body distinctly recognised the evolving importance of environmental protection by contrasting the preambles to both the WTO agreement and its “predecessor”, the GATT.¹⁴⁶ It also noted that a number of international agreements and other important documents, such as the 1992 Convention on Biological Diversity¹⁴⁷ and Agenda 21,¹⁴⁸ all make broad references to natural resources.¹⁴⁹

The report notes:

“[O]ne lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.”¹⁵⁰

The Appellate Body therefore found that the sea turtles involved constituted “exhaustible natural resources” for purposes of Article XX (g),¹⁵¹ and that Section 609 was a measure “relating to” the conservation of an exhaustible natural resource,¹⁵² as Section 609, *cum* implementing guidelines, was not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of

¹⁴⁴ *Ibid* paragraph 119.

¹⁴⁵ *Ibid* paragraph 127.

¹⁴⁶ *Ibid* paragraph 129.

¹⁴⁷ UN Conference on Environment and Development: Agenda 21, UN Doc. A/CONF.15/4 1992.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Shrimp-Turtle I* Appellate Body Report, *op.cit*, paragraph 130.

¹⁵⁰ *Ibid* paragraph 128.

¹⁵¹ *Ibid* paragraph 134.

¹⁵² *Ibid* paragraph 142.

sea turtle species. The means, in principle, were therefore reasonably related to the ends.¹⁵³

Having categorised the measure as qualifying under Article XX (g), the Appellate Body proceeded to examine it under the conditions stated in the chapeau. First off, it examined the reasoning behind the inclusion of the chapeau into the GATT 1994, and the general context of the Article, and stated the following:

“The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably... An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.”¹⁵⁴

Having already included other rules of international law, further placing the WTO regime and its constituting agreements within the framework of a wider, inter-related “system” of international law, is a significant change from previous disputes where a narrow focus on GATT rules in isolation were evident.

The Appellate Body found that the task of interpreting and applying the chapeau is essentially one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.¹⁵⁵ It noted that the application of a measure may be characterised as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or

¹⁵³ *Ibid* paragraph 141.

¹⁵⁴ *Ibid* paragraph 158.

¹⁵⁵ *Ibid* paragraph 159.

unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner.¹⁵⁶

The Appellate Body stated that discrimination resulted, not only when countries in which the same conditions prevail were treated differently, but also when the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting countries.¹⁵⁷ Thereby, the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before unilaterally enforcing the import prohibition against the shrimp exports of those Members, was also taken into account.¹⁵⁸ Tellingly, the Appellate Body stated:

“Perhaps the most conspicuous flaw in this measure’s application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO.”¹⁵⁹

The Appellate Body found that the United States negotiated seriously with some, but not with other WTO members that export shrimp to the United States. The effect was plainly discriminatory and, in the opinion of the Appellate Body, unjustifiable.¹⁶⁰ As it is stated on the WTO website:

“The US lost the case, not because it sought to protect the environment but because it discriminated between WTO members. It provided countries in the western hemisphere – mainly in the Caribbean – technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices. It did not give the same advantage, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.”¹⁶¹

¹⁵⁶ *Ibid* paragraph 160.

¹⁵⁷ *Ibid* paragraph 165.

¹⁵⁸ *Ibid* paragraph 166.

¹⁵⁹ *Ibid* paragraph 161.

¹⁶⁰

Ibid paragraph 172, where the Appellate Body provides further clarification of its stance: ” The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.”

¹⁶¹ WTO *Environment: Disputes 8: India etc versus US: ‘shrimp-turtle’* http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm (Last visited 20 January 2004) 2-3.

4.2.3 *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*¹⁶² (“*Shrimp-Turtle II*”)

A few years after the Appellate Body Report in *Shrimp-Turtle I* discussed above, and in accordance with Article 21.5 of the DSU,¹⁶³ Malaysia requested that the DSB refer to a Panel its complaint with respect to whether the United States had complied with the recommendations and rulings of the DSB handed down in that case, which were adopted on 6 November 1998. The DSB referred the matter to the original Panel.

Findings by the Panel

In order to implement the recommendations and rulings of the DSB, the United States issued the *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations* (the “**Revised Guidelines**”).¹⁶⁴ These Revised Guidelines replaced the guidelines issued in April 1996 that were part of the original measure at stake. The Revised Guidelines set forth criteria for certification.

The Panel noted that in *Shrimp-Turtle I*, the Appellate Body concluded that Section 609 was provisionally justified under Article XX (g). Therefore, since the implementing measure before the Panel was identical to the measure examined by the Appellate Body in relation to paragraph (g), the Panel likewise held that the implementing measure was provisionally justifiable under Article XX (g).¹⁶⁵

The Panel then reiterated the Appellate Body's finding in *Shrimp-Turtle I* concerning the nature of the chapeau of Article XX, namely that the task of interpreting and applying the chapeau essentially entails the delicate one of locating and marking out a

¹⁶² WT/DS58/AB/RW 2001 Appellate Body Report (herein referred to as “*Shrimp-Turtle II*”).

¹⁶³ Article 21.5 of the DSU reads as follows: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original Panel. The Panel shall circulate its report within 90 days after the date of referral of the matter to it. When the Panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report".

¹⁶⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* WT/DS58/RW 2001 Panel Report, paragraph 2.22.

¹⁶⁵ *Ibid* paragraphs 5.39-5.42.

line of equilibrium between the right of a member to invoke an exception under Article XX and the rights of the other members under varying substantive provisions of the GATT 1994.

The Panel concluded that the recognition that the protection of migratory species was best achieved through international cooperation significantly moved the line of equilibrium towards a bilaterally or multilaterally negotiated solution, thus rendering recourse to unilateral measures less acceptable.¹⁶⁶ On this basis, the Panel proceeded to determine whether the line of equilibrium in the field of sea turtle conservation and protection was such as to require the *conclusion* of an international agreement or only “efforts to negotiate”, and found that the obligation of the United States was an obligation to negotiate, as opposed to an obligation to *conclude* an international agreement. It also concluded that the US had made serious good faith efforts to negotiate an international agreement.¹⁶⁷

Findings of the Appellate Body

Malaysia appealed against this decision, arguing that the US should have *concluded* an international agreement on the protection and conservation of sea turtles before imposing an import prohibition.¹⁶⁸ The Appellate Body upheld the Panel's finding and rejected Malaysia's contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX required the *conclusion* of an international agreement on the protection and conservation of sea turtles.¹⁶⁹

Malaysia also argued that the measure at issue resulted in "arbitrary or unjustifiable discrimination" because of the lack of flexibility of the US measure. The Appellate Body upheld again the Panel's finding and agreed with the reasoning of the Panel that conditioning market access on the adoption of a programme *comparable in*

¹⁶⁶ *Shrimp-Turtle II* Panel Report, paragraph 5.59.

¹⁶⁷ *Ibid* paragraph 5.67.

¹⁶⁸ *Shrimp-Turtle II* Appellate Body Report paragraph 8.

¹⁶⁹ *Ibid* paragraph 134. See also paragraph 123 where the Appellate Body remarks: “Requiring that a multilateral agreement be *concluded* by the United States in order to avoid “arbitrary or unjustifiable discrimination” in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfil its WTO obligations.”

effectiveness, (as opposed to conditioning market access on the adoption of *essentially the same* programme) allowed for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination".¹⁷⁰

This part of the decision in *Shrimp-Turtle* has drawn the most praise from commentators because of its “new-found” sensitivity to environmental considerations and reliance on sources of public international law outside the WTO.¹⁷¹ Some commentators, however, argue that this is not enough, and that *Shrimp-Turtle* continues the “tradition” of trade jurisprudence that “has almost completely closed off the policy space Article XX should leave open for national trade measures designed to protect the environment”.¹⁷²

Nevertheless, in the next matter before the DSB, further progress was made in the trade-versus-environment polemic.

4.2.4 *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*¹⁷³

A dispute arose between Canada and France over French decree No. 96-1133 of 24 December 1996 (“*the Decree*”), banning

“[t]he manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres...regardless of whether these substances have been incorporated into materials, products or devices.”¹⁷⁴

Canada claimed that the decree was inconsistent with a number of obligations of the EC under Article 2 of the TBT Agreement, and with Articles III and XI of the GATT 1994.¹⁷⁵

¹⁷⁰ *Ibid* paragraph 144.

¹⁷¹ Gaines *op.cit* 772.

¹⁷² *Ibid* 773.

¹⁷³ WT/DS135/R 2000 Report of the Panel and WT/DS135/AB/R 2001 Report of the Appellate Body (herein referred to as “*Asbestos*”).

¹⁷⁴ Article 1.

¹⁷⁵ *Asbestos* Report of the Panel paragraphs 1.1 and 1.2.

A threshold question confronting the Panel was whether to analyse the decree under Article XI, as argued by Canada, or Article III, as argued by the EC.¹⁷⁶ The Panel agreed with the EC and tested the decree under Article III: 4, which channelled the Panel's analysis towards the national treatment standard. This in turn tested whether Canadian asbestos was being treated less favourably than "like products" produced in France.¹⁷⁷ The Panel found that chrysotile-fibre products and fibro-cement products were, indeed, "like products" with the meaning of Article III: 4.¹⁷⁸ The Panel further found that the provisions of the decree relating to the prohibiting of the marketing of chrysotile fibres and chrysotile-cement products violated Article III: 4.

Nevertheless, the Panel decided that the violation of Article III: 4 was justified under Article XX (b),¹⁷⁹ and that the measure did not conflict with the chapeau of Article XX,¹⁸⁰ as the application of the Decree did not constitute arbitrary or unjustifiable discrimination,¹⁸¹ and had no protectionist objectives.¹⁸²

Findings of the Appellate Body

On appeal¹⁸³ the following relevant issues were raised:¹⁸⁴

- (a) Whether the Panel erred in its interpretation and application of the term "like products" in Article III: 4 in finding that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and in finding that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres; and

¹⁷⁶ Palmer, A. & Werksman, J., "World Trade Organization, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Panel Report" 2001 (10(1)) *Review of European Community and International Environmental Law* 125 at 126.

¹⁷⁷ *Ibid.*

¹⁷⁸ The Panel's finding regarding this aspect has been criticised, mainly because in the process of analysis, the Panel specifically found the acknowledged toxicity of asbestos to be an inappropriate basis for distinguishing between products. Cf. Palmer & Werksman, *op.cit.*, 127: "...toxic building materials (chrysotile asbestos) were found to be "like" non-toxic building materials (PVC and cellulose)..."

¹⁷⁹ *Asbestos* Report of the Panel *op.cit.*, paragraph 8.194 where the Panel noted that the experts consulted confirmed the health risks associated with exposure to chrysotile asbestos in its various uses and, therefore, that a prohibition of chrysotile asbestos fell within the range of policies designed to protect human life or health.

¹⁸⁰ *Ibid* paragraphs 8.240-241.

¹⁸¹ *Ibid* paragraph 8.230.

¹⁸² *Ibid* paragraph 8.238.

¹⁸³ *Asbestos* Report of the Appellate Body *op.cit.*

¹⁸⁴ *Ibid* paragraph 58.

- (b) Whether the Panel erred in finding that the measure at issue is necessary to protect human life or health under Article XX (b) of the GATT 1994.

The Appellate Body reversed the Panel's finding that white asbestos is "like" PCG fibres.¹⁸⁵ The Body confirmed that "like" products under Article III: 4 have a variable meaning, and should be assessed on a case-by-case basis¹⁸⁶. No evidence, including a possible risk to health, should be excluded from the "like" product analysis, and therefore the Panel had erred by not taking into account the carcinogenic nature of white asbestos in its examination of the products' physical properties.¹⁸⁷

The Appellate Body noted that WTO members have an undisputed right to determine the appropriate level of health protection in a given situation,¹⁸⁸ and therefore rejected Canada's arguments against the necessity of the measure. In order to evaluate whether the measure was necessary, the Appellate Body mentioned the interpretation of "necessity" formulated in *Thailand - Cigarettes*, namely whether there was an alternative GATT-consistent, or less inconsistent measure, which a Member could reasonably be expected to employ.¹⁸⁹ Based on evidence before the Panel that raised doubts as to the efficacy of measures prescribing controlled use of asbestos, the Appellate Body concluded that 'controlled use' was not a *reasonably available* alternative that would achieve France's objective of stopping the spread of asbestos-related health risks.¹⁹⁰

Although the Appellate Body used the same terminology as in *Thailand: Cigarettes*, the scope of Article XX (b) namely "reasonably available alternative", the test for whether another measure is, indeed, *reasonable* was formulated much wider. The Appellate Body stated that a weighing and balancing process must be followed by which it is evaluated whether a WTO-consistent alternative measure is "reasonably

¹⁸⁵ *Ibid* paragraph 131. In doing so, the Appellate Body had taken the opportunity to "correct much of the flawed legal conclusions" in the Panel Report – cf. Palmer, A., "World Trade Organization, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body" 2001 (10(3)) *Review of European Community and International Environmental Law* 340.

¹⁸⁶ *Ibid* paragraphs 88 – 89.

¹⁸⁷ *Ibid* paragraphs 113-116.

¹⁸⁸ *Ibid* paragraph 168.

¹⁸⁹ *Ibid* paragraph 170.

¹⁹⁰ *Ibid* paragraph 174.

available” is the extent to which the alternative measure "contributes to the realization of the end pursued."¹⁹¹

5. Critical evaluation of the WTO as adjudicator in environment-trade disputes

5.1 Introduction

From the case law discussed *supra* it seems as if environmental awareness and the concomitant willingness to accommodate environmental concerns in trade-related disputes *are* gaining some ground among the Panels of the WTO. This becomes apparent when one compares the findings in disputes adjudicated under GATT 1947 with those under GATT 1994. In this section, the progress made in the interpretation and application of Article XX through the cases discussed above will be briefly summarised before moving on to other areas of concern in the trade-environment debate.

5.2 Article XX revisited

A parallel movement can be discerned in the “environmental” cases submitted for dispute resolution before GATT 1947 and WTO dispute resolution bodies: Firstly, the kind of cases have moved from those attempting to use the Article XX exception to disguise protectionism or retaliation¹⁹² to instances where environmental concerns really did constitute the rationale for a specific trade measure.¹⁹³ Secondly, since the inception of the WTO and its revised dispute resolution procedure, there has been a marked widening of scope when interpreting the Article XX exceptions. The main areas of progress are briefly summarised below.

5.2.1 Article XX (b): “Necessary”

¹⁹¹ *Ibid* paragraph 172.

¹⁹² Such as the *Tuna Import Ban*, *Fish Export Ban* and *Thailand: Cigarettes* cases.

¹⁹³ From *Tuna Dolphin* onward, all the cases discussed here have been primarily aimed at environmental protection in some or other manner.

In *Thailand: Cigarettes* the test whether a trade measure was “necessary” in order to protect human, animal or plant life was formulated as follows: If there is no alternative measure consistent with the GATT, or *less inconsistent* with it, which could reasonably be employed to achieve the policy objective, then the measure could not be regarded as “necessary”.¹⁹⁴ In essence, the same was decided in the *Tuna Dolphin* disputes where the United States’ interpretation of “necessary” was rejected,¹⁹⁵ as well as in *Reformulated Gasoline*, the first environmental measure decided under the WTO.¹⁹⁶ A change in the way this test is applied came in *Asbestos* where a “balancing approach” was introduced, whereby the question is not merely whether there are GATT consistent or least inconsistent alternative measures, but also whether such alternative could be reasonably expected to achieve the aim of the trade-restricting measure.¹⁹⁷

5.2.2 Article XX (g): “Exhaustible natural resources”

A debate ensued as to whether or not the phrase “exhaustible natural resource” contained in Article XX (g) should be understood as referring to non-living finite resources, such as oil and coal only.

In both the *Tuna Import Ban* and *Fish Export* cases discussed above, it was agreed between the parties to the dispute (being the United States and Canada in both instances) that fish such as tuna, salmon and herring could be regarded as “exhaustible natural resources”, and therefore there was no need for the respective Panels to interpret this phrase.

However, in *Tuna-Dolphin I*, Mexico argued that the term “exhaustible natural resources” could not be justifiably extended to include “fisheries and fishery products, *nor in fact any living being*” (emphasis added). It further argued that living beings could reproduce themselves and could therefore not fall within the definition of

¹⁹⁴ *Thailand: Cigarettes op.cit* paragraph 75.

¹⁹⁵ See *Tuna Dolphin I op.cit* paragraph 5.27.

¹⁹⁶ *Op. cit* paragraph 6.28.

¹⁹⁷ *Asbestos Appellate Body Report op.cit* paragraph 172.

“exhaustible”.¹⁹⁸ Unfortunately the Panel did not deem it necessary to address this issue.

In *Reformulated Gasoline* and *Shrimp-Turtle I*, both the Panel and the Appellate Body agreed with the broad interpretation of Article XX (g) put forward by the United States. In *Reformulated Gasoline*, for example, the Panel made the points that, firstly, clean air is a “resource”, secondly, that such a resource is “natural” and thirdly, that it could be depleted.¹⁹⁹ The Appellate Body in *Shrimp-Turtle I* noted:

“The words of Article XX (g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment...From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term ‘natural resources’ in Article XX (g) is not ‘static’ in its content or reference but is rather, by definition, evolutionary.”²⁰⁰

5.2.3 Article XX (g): “relating to”

Although a trade measure does not have to be “necessary”, (as required in Article XX (b)) to natural resource conservation, the GATT/WTO dispute resolution bodies have interpreted the words “relating to” to mean “primarily aimed at” conservation.²⁰¹ Phrased like this, it constitutes a difficult obstacle, and seeing as the terms “relating to” and “primarily aimed at” are not synonyms, it also seems unfairly burdensome. The Appellate Body itself pointed out in *Reformulated Gasoline* that the phrase “primarily aimed at” is not itself treaty language, and was not designed as a litmus test for Article XX.²⁰²

5.2.4 The chapeau to Article XX

¹⁹⁸ *Op.cit* paragraph 3.42.

¹⁹⁹ *Reformulated Gasoline*, *op. cit* at 299.

²⁰⁰ *Shrimp-Turtle I*, *op.cit* paragraph 129.

²⁰¹ The “primarily aimed at” interpretation of “relating to” was first formulated in *Fish Export Ban* and subsequently followed in both *Tuna Dolphin* cases, in *Car Taxes*, and even, to a certain extent in *Reformulated Gasoline*.

²⁰² *Ibid* 19.

As pointed out above, there are three benchmarks that an environmental measure must clear under the chapeau, namely that of arbitrary discrimination, unjustifiable discrimination, and a disguised restriction on international trade.

In *Tuna-Dolphin I* the Panel ruled in favour of Mexico on the grounds that the embargo was inconsistent with GATT obligations because the use of trade measures to protect the environment outside a nation's sovereign territory was not permitted under the Agreement. In contrast, the Panel modified its position in *Tuna-Dolphin II*, and recognised that, for Article XX (g) purposes, the United States action was a policy to conserve exhaustible natural resources. This mixed reading of Article XX of the GATT provided the foundation for the WTO Dispute Resolution Panel's subsequent interpretations of similar cases.

In 1992 the GATT Secretariat stated, concerning Article XX: "GATT rules...place essentially no constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported products."²⁰³ However, despite this seeming strength that the WTO's promoters promised the Article XX exceptions would have, the chapeau to the Article provides the greatest hurdle for environmental measures challenged before the WTO. The language of the chapeau itself gives no indication as to what would constitute "arbitrary" or "unjustified" discrimination. This led some commentators to note that, therefore, "the standard is what the Appellate Body says it is."²⁰⁴

The decisions in both *Shrimp Turtle I* and *Shrimp Turtle II*, however, demonstrated that overcoming the conditions set in the chapeau is not impossible. As a matter of fact, all it seemed to entail was adherence to the universally accepted natural law requirement of good faith. When the United States engaged in multilateral negotiations with the complainants (instead of imposing its measure unilaterally and

²⁰³ Charnovitz, S., "Environment and Health under WTO Dispute Settlement" 1998 (32) *International Lawyer* 901 at 902.

²⁰⁴ *Ibid* 912.

without consultations) the Appellate Body in *Shrimp Turtle II* found that it had met the conditions set in the chapeau.²⁰⁵

5.2.5 The extra-jurisdictional issue

The GATT Panels in the two *Tuna Dolphin* cases came to different conclusions regarding the territorial application of Article XX (b) and (g). The Panel for *Tuna Dolphin I* found that protection was accorded only to those things and beings found within the jurisdiction of the country concerned.²⁰⁶ The *Tuna Dolphin II* Panel found that Article XX may have extra-territorial but not extra-jurisdictional effect.²⁰⁷

In *Shrimp-Turtle I*, however, the Appellate Body gave clear extra-territorial scope to article XX (g): It applies without distinction to exhaustible resources beyond areas of national jurisdiction as well as to domestic resources.²⁰⁸

From an analysis of the cases it is therefore clear that, as far as the interpretation of Article XX is concerned, the DSB have increasingly shown a willingness to accommodate environmental concerns, especially when compared to GATT 1947 rulings. As some commentators put it:

“The approach...now mandated by the Appellate Body is substantially different from the restrictive and somewhat illogical interpretations of GATT Panels, particularly the *Tuna Dolphin* decisions. In fact, the US restrictions on the harvesting of tuna would now pass Article XX (g) with flying colours.”²⁰⁹

There is only so much the DSB can do, however. Even though it may be very accommodating towards environmental concerns, it is still bound by the treaty regime it serves. Against this background other areas impacting on the environment/trade debate relating to the WTO will now be briefly examined.

²⁰⁵ *Shrimp Turtle II* Appellate Body Report *op.cit* paragraphs 134 and 123.

²⁰⁶ *Op.cit* paragraphs 5.26 and 5.31.

²⁰⁷ *Op.cit* paragraph 5.20. For an explanation of the difference between these two concepts, see Schoenbaum, T.J., “International Trade and Environmental Protection” in Birnie, P., & Boyle, A., *International Law & the Environment* 2002 (2 ed) 697 at 708-709.

²⁰⁸ *Op. cit* paragraphs 132-133.

²⁰⁹ Matsushita, Schoenbaum and Mavroidis *op.cit* 453.

5.3 Committee on Trade and Environment

As stated, the initial aim of the GATT was mainly focused on the liberalisation of international trade. It is only within the last three decades that the importance of international environmental regulation had been recognised.²¹⁰ At its conception, the GATT gave little if any consideration to environmental concerns. The preamble to the 1947 GATT declares that states should conduct “their relations in the field of trade and economic endeavour...with a view to...developing the *full use* of the resources of the world”. Compare this with the language of the 1994 WTO Agreement preamble, which exhorts Contracting Parties to “allow...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*”.²¹¹

In addition, the GATT Council had established a Working Group on Environmental Measures and International Trade in 1971,²¹² but, as some commentators pointed out, this group did not even meet for over 20 years.²¹³

Increased cognisance of the environment, especially in the wake of the *Tuna Dolphin* disputes, was not restricted to the constituting documents of the world’s foremost trade-related institution. Aside from the WTO itself, another offshoot of the Uruguay Round was the creation of the WTO Committee on Trade and Environment (“*CTE*”). This Committee’s mandate was to address, amongst others, the following matters:

1. “the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements”;
2. “the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system”;
3. “the relationship between the provisions of the multilateral trading system and (a) charges and taxes for environmental purposes (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling”;

²¹⁰ French, D., “The Changing Nature of ‘Environmental Protection’: Recent Developments Regarding Trade and the Environment in the European Union and the World Trade Organisation” 2000 (47) *Netherlands International Law Review* 4.

²¹¹ Emphasis added.

²¹² Decision of the GATT Contracting Parties C/M/71 1971.

²¹³ Matsushita, Schoenbaum and Mavroidis *op.cit* 448.

4. “the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects”;
5. “the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements”;
6. “the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions”;
7. “the issue of exports of domestically prohibited goods”;
8. ...;
9. “the work programme envisaged in Decision on Trade in Services and the Environment”;
10. “input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organizations”.²¹⁴

The CTE therefore mainly came into existence as a result of a decision to formulate a more international approach to environmental problems. It has been commented that there has been little progress in the CTE on the environmental issues it was tasked to address. There are deep divisions between the most economically developed members such as the European Union (“*the EU*”) and the US, who support introducing environmental measures more explicitly into trade agreements, and the majority of developing member states, who see this as a cover for discrimination against their products.²¹⁵ Therefore, resorting to the CTE as a source of hope for environmentalists may prove to be futile. However, and it is suggested, because of this,²¹⁶ a work programme on Trade and Environment was adopted at the Doha Ministerial Conference in November 2001.

5.4 Doha Trade and Environment Work Programme

²¹⁴ World Trade Organization “Decision on Trade and Environment” 1999 *WTO, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 411.

²¹⁵ Schoenbaum *op.cit* 703. See also Matsushita, M., Schoenbaum, T.J. and Mavroidis, P.C, “Environmental Protection and Trade” in *The World Trade Organization: Law, Practice and Policy* 2003 Oxford University Press 439 at 443 in which it was commented that no significant decision has been taken by the CTE.

²¹⁶ Matsushita, Schoenbaum & Mavroidis *op.cit* 443.

In November 2001 the Doha Ministerial Conference included a Trade and Environment Work Programme in its Ministerial Declaration.²¹⁷ With a view to enhancing the “mutual supportiveness of trade and environment”, the following items for negotiation were identified:

- “(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)... ;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;” and
- “(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.”²¹⁸

Furthermore, the CTE was instructed to give particular attention to the effect of environmental measures on market access.²¹⁹ The importance of technical assistance and capacity building in the field of trade and environment to developing countries was recognised, and sharing of expertise and experience with Members wishing to perform environmental reviews at the national level was encouraged.²²⁰

These developments augur well for those who wish to see environmental concerns elevated, but also serve to highlight the fact that the accommodation of the environment and trade is incomplete and ongoing.²²¹

5.5 Problems with enforcement of dispute rulings

It has been argued above that the dispute settlement procedure followed by the WTO is theoretically far more effective than that of the GATT. Rulings are binding, and compensation could be provided in cases of non-compliance. Compensation, however, must be agreed upon. In the final instance, if compensation could not be agreed upon, non-compliance could be met by retaliatory measures. However, it is highly questionable whether countries would be keen to attempt enforcing rulings through retaliation, simply because the economic effects which inevitably accompany

²¹⁷Doha Ministerial Declaration *op.cit* paragraphs 31 - 33.

²¹⁸*Ibid* paragraph 31.

²¹⁹*Ibid* paragraph 32.

²²⁰*Ibid* paragraph 33.

²²¹Matsushita, Schoenbaum & Mavroidis *op.cit* 443.

trade barriers would probably not make it worth their while.²²² For many export-dependent countries, the withdrawal of concessions is simply not an option.

A related problem is the seeming inability of the WTO to attain the compliance of superpower nations. The Tuna-Dolphin rulings, for example, which created such a furore, were effectively ignored by the United States.²²³ The more powerful nations successfully ignore DSB rulings, the less confidence the global community as a whole will have in the ability of the WTO dispute resolution procedure to provide consistent and reliable outcomes.

5.6 The precautionary principle

A further indication of the seemingly more accommodating attitude towards environment-based trade restrictions can be found in the application of the so-called “precautionary principle”. Article 15 of the Rio Declaration²²⁴ defines the precautionary principle as follows:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”²²⁵

In short, the precautionary principle states that even in cases of scientific uncertainty, when the environmental risks are predicted but not provable in scientific terms, precautionary action should be taken. However, the question arises as to how *far* environmental action may be sanctioned under the admittedly vague notion of “scientific uncertainty”.

²²² Cf. Miller *op.cit* at 2330 where he points out that, “[b]y reciprocating for injurious trade policies, a country will likely cross the line between convincing other nations to reduce their trade violations from harming their own consumers and escalating international disputes.”

²²³ Miller *op.cit* 2332 to 2333, where it is pointed out that Mexico, at the time engaged with NAFTA negotiations, had a strong incentive to avoid antagonising its powerful neighbour. See also Oesterle *op.cit* at 7.

²²⁴ *Op.cit.*

²²⁵ UN Conference on Environment and Development: Agenda 21, 1992 UN Doc. A/CONF.15/4.

The WTO Appellate Body's decision in the *Beef Hormones*²²⁶ case examined the application of the precautionary principle as it is contained in Article 5 of the SPS Agreement.²²⁷ When no full scientific certainty exists, the SPS Agreement envisages the possibility of provisionally adopting precautionary measures that are to be reviewed as soon as possible – which entails a strict interpretation of the precautionary principle.²²⁸ It would be interesting to see whether the precautionary principle will find application outside the SPS Agreement in the WTO regime.

5.7 The product versus process debate

One of the major reasons why the US failed in defending its trade-restrictive measure in the *Tuna-Dolphin* cases was the fact that the Panels found it beyond the scope of Article III to examine the process involved in harvesting tuna, and instead only focused on the product as such. The TBT and SPS Agreements cover process and production methods (“*PPMs*”) and allow trade measures based on direct PPMs where the product is affected thereby.²²⁹ More difficult is the question as to whether PPMs that do not directly impact on the final product (such as the *way* in which tuna is harvested) could also form the basis of a trade-restrictive environmental measure.

It must be borne in mind that, with respect to the product/process debate, “the issue is not so much whether this distinction can be justified in all contexts, but rather how to develop some constraints on the potential *misuse* of process-oriented trade barriers.”²³⁰ Or, as was also stated:

“Allowing trade restrictions on the basis of PPMs, however well intended, would allow trade to be restricted willy-nilly on the basis of any Member’s pet peeve and ultimately would favour only large countries able to throw their weight around.”²³¹

²²⁶ *European Communities - Measures Concerning Meat and Meat Products (Hormones)* WT/DS48/AB/R 1997.

²²⁷ In this case, the European Community invoked the precautionary principle as justifying its import restrictions. Its application was challenged by the United States before the dispute settlement bodies of the WTO and led to the exercise of WTO-authorized countermeasures under Article 22 of the Dispute Settlement Understanding.

²²⁸ Douma, W.T. and Jacobs, M., “The Beef Hormones Dispute and the WTO Rules” 1999 (E18.3(8)) *European Environmental Law Review* 137 at 140.

²²⁹ E.g. contaminated food as a result of the use of pesticides.

²³⁰ Jackson *op.cit* 304.

²³¹ Matsushita, Schoenbaum & Mavroidis *op.cit* 463.

It seems, though, as if the WTO Appellate Body has formulated a limited way in which PPMs can be taken into account, in that it will be permitted if it meets the conditions for the application of Article XX.²³² Once again this is a significant departure from the strictness evident in the *Tuna Dolphin* disputes.

6. Suggestions

6.1 Align the WTO agreements with MEAs

One of the greatest challenges facing the WTO is the question as to how it will accommodate multilateral environmental agreements (“MEAs”) that employ trade restrictions.²³³

One of the proposed options for resolving those issues that may exist between the WTO and Multilateral Environmental Agreements (“MEAs”) is for Members to avoid using trade measures in MEAs that are inconsistent with their WTO obligations.²³⁴

But, as one commentator puts it:

“This is somewhat like trying to lower the murder rate by legalizing murder. The result may look like an improvement on paper but the end result will be the same. While this ‘solution’ will result in fewer complaints for the DSB, it will not help the environment.”²³⁵

So, what could be done? It is suggested that, should the WTO actively start to implement a paradigm shift in favour of increased environmental co-operation, the potential on a global scale is tremendous. There are various reasons for this statement.

Firstly, the broad membership of the WTO lends it very favourably to global implementation of standardised measures. If one accepts the belief that international trade and global environmental protection are opposite sides of the same coin, it makes sense that the policies driving both should be formulated and co-ordinated by

²³² Charnovitz, S. “The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality” 2000 (27) *Yale Journal of International Law* 59.

²³³ Such as the *Montreal Protocol on Substances that Deplete the Ozone Layer*, which adopts trade controls that are more restrictive as to non-parties than parties.

²³⁴ Brotman *op. cit* 334.

²³⁵ *Ibid.*

the same body in order to effect a balance between trade liberalisation and responsible environmental stewardship.

Secondly, it is recognised that one of the main problems experienced with international treaties is the lack of enforcement. Should the WTO actively accommodate even a few of the major international environmental treaties, its dispute resolution mechanism could prove instrumental in harmonising environmentally sound trade practices, as it could be argued that the dispute resolution mechanism of the WTO is already a powerful and mostly effective tool for most Members.²³⁶

In the context of the work on trade and environment, the GATT, and subsequently the WTO, has already undertaken a number of initiatives aiming to promote greater coherence and mutual supportiveness of trade and environmental policies.²³⁷ These include the hosting of information sessions, regional workshops and other side events at various MEA meetings.²³⁸ The Trade and Environment Work Programme adopted during the Doha Ministerial Conference also promises “without prejudice” negotiations on the increased status of MEAs *vis-à-vis* the WTO, as well as procedures for regular information exchange.²³⁹

It is important to keep in mind that the Vienna Convention on the Law of Treaties (“*the Vienna Convention*”) contains provisions in Articles 31 and 32 that may require a reference to rules of international law other than those set out in the treaty itself or in agreements or instruments signed in connection with its conclusion, namely:

- “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”²⁴⁰ and
- “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”²⁴¹

²³⁶ The efficacy of the dispute resolution system can be seen from the fact that overall, over the life of the GATT 1947, the success rate of cases addressed by GATT – that is, disputes settled – was well over 90 percent. See Hoekman & Kosteci, *The Political Economy of the World Trading System: The WTO and Beyond* 2001 (2) Oxford University Press 75. See, however, also the criticism levelled at the efficacy of the WTO’s dispute resolution system discussed above in paragraph 5.6 and the suggestions below in paragraph 6.3.

²³⁷ World Trade Organization *Environment: Cooperation with other international organizations* http://www.wto.org/english/tratop_e/envir_e/coop_inter_org_e.htm (Last visited 9 Sept 2004).

²³⁸ *Ibid.*

²³⁹ Doha Ministerial Declaration *op.cit* paragraph 31(i) and (ii). See paragraph 5.6 *supra*.

²⁴⁰ Article 31(3)(a).

²⁴¹ Article 31(3)(b).

- “any relevant rules of international law applicable in the relations between the parties”²⁴² and
- the non-exhaustive category of “supplementary means of interpretation” including other norms part of the background of the relevant treaty.²⁴³

In the context of Article 31 of the Vienna Convention, criticism has been levelled at the decision in *Tuna Dolphin II* where the Panel read Article 31(3)(a) as allowing reference only to treaty provisions other than those in the GATT that had been accepted by all GATT contracting parties. Since CITES was not accepted by all GATT contracting parties, the Panel refused to take it into account.²⁴⁴ It has been argued that this finding is inconsistent with Article 31(3)(c), as the wording of the latter would seem to refer to the parties to the particular dispute, not to the parties to the multilateral agreement.²⁴⁵ Subsequently, in *Shrimp-Turtle II* the Panel found that “Malaysia and the United States have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body” (in *Shrimp-Turtle I*).²⁴⁶ It has been argued that,

“[e]ven though a particular treaty provision may not be legally binding on all WTO members, or not even on all disputing parties in a particular case, such treaty may still play a role under Art. 31(3)(c), if it can be said to reflect the ‘common intentions’ of WTO members, or under Art. 31(1) if it can be said to reflect the ‘ordinary meaning’ of a WTO treaty term.”²⁴⁷

A very valid opinion therefore exists that other treaties, even those not acceded to by all WTO members or even the parties to a particular dispute, may be taken into account by the dispute resolution body. It has also been suggested that Article XX could specifically be amended by adding a provision on MEAs. Another alternative is to adopt a collective interpretation of Article XX that would validate existing MEAs as well as setting out criteria that they would have to fulfil to receive approval.²⁴⁸ GATT Article XX (h) could easily be taken as a model for such a collective interpretation. In *Shrimp-Turtle I* the Appellate Body upheld the right of WTO members to legislate for the protection of natural resources beyond national boundaries, provided they do so pursuant to an MEA (or pursuant to good faith

²⁴² Article 31(3)(c).

²⁴³ Article 32.

²⁴⁴ *Tuna Dolphin II op.cit* paragraph 5.19.

²⁴⁵ Palmetier, D. and Mavroidis, P., *Dispute Settlement in the WTO: Practice and Procedure* 1999 Kluwer at 57.

²⁴⁶ *Shrimp Turtle II* Report of the Panel *op.cit* paragraph 5.57.

²⁴⁷ Pauwelyn *op.cit* 260.

²⁴⁸ Schoenbaum *op.cit* 706.

negotiations aimed at concluding an MEA).²⁴⁹ Other options that could be explored include increased involvement of MEA Secretariats in WTO dispute resolution procedures²⁵⁰; setting up an environmental advisory board; or referring to the International Court of Justice.²⁵¹

6.2 Allow for greater transparency and participation in dispute settlement and improve the enforcement of rulings

In the WTO, liberal economists and transnational corporate interests have dominated the discourse to advance free trade. Among international organisations, the WTO is often regarded as among the most closed to stakeholder participation in its activities, with a “hostility” towards involvement of any kind, including other intergovernmental organisations, which are often prohibited even from participating as *observers* in WTO proceedings that concern their mandate.²⁵²

A strongly worded critique of the way disputes are settled under the auspices of the WTO reads as follows: “[a] highly politicised and arbitrary dispute resolution system relying on the personal whims of an ever-changing cast of characters is no way to operate the enforcement of the most powerful international agreement now in force.”²⁵³ It is suggested that some steps that could change this situation include:

“(1) empowering other institutions to provide substantive expertise to which dispute Panels are bound (for instance the World Health Organization, through a public process, and not three trade lawyers meeting in secret, should determine whether a country’s...system actually serves a public health goal); (2) instituting venues for outside-of-WTO appeals of WTO Panel reports; and (3) explicitly forbidding decisions on

²⁴⁹ *Op.cit* paragraphs 171 and 172. See also the discussion *supra* in paragraph 4.2.2.

²⁵⁰ See the discussion of the criticism of insularity levelled at the WTO in paragraph 6.2 below.

²⁵¹ Gonzalez, C. and Marceau, G. “The Relationship between the Dispute Settlement Mechanisms of MEAs and those of the WTO” 2002 (11(3)) *Review of European Community and International Environmental Law* 275 at 284 – 285. Cf. 284 where it is pointed out that “[b]ased on the model of the International Trade Organization (Havana Charter) of 1948 (which never came into force) trade disputes involving a pre-determined list of environmental treaties could be subject to final review by the ICJ”.

²⁵² Howse, R., “Membership and its Privileges: the WTO, Civil Society, and the *Amicus* Brief Controversy” 2003(9(4)) *European Law Journal* 496 at 496 – 497 where the author comments that “[t]he situation has reached new heights of absurdity with the Doha agenda – while one item on this agenda is the relationship between multilateral environmental regimes and the WTO, the relevant intergovernmental environmental organisations have rarely and provisionally managed to obtain access to the discussions of their own treaties at the WTO Committee on Trade and Environment!”.

²⁵³ Wallach, L. “Transparency in WTO Dispute Resolution” 2000 (31) *Law and Policy in International Business* 773 at 777.

the merits of non-commercial claims (for example, the notion of three trade lawyers making subjective judgements about the quality of the science on beef hormone residues.)”²⁵⁴

Another problem with the procedure followed by the DSB is that awards are drafted without the presence of the parties – Individual opinions of arbitrators are anonymous and, whenever dissenting, are excluded from the award. It is commented that this situation serves to mask the true deliberations of the Panel and unfairly disadvantages the defeated party as regards the merits and changes of an eventual appeal.²⁵⁵

It is therefore suggested that procedural rules should be revised to “[e]nhance third party rights in order to facilitate participation of both Northern NGOs and Southern sovereigns in WTO dispute settlements.”²⁵⁶

Finally, it is suggested that the enforcement of DSB rulings should be made practicable as the current situation makes it too easy for superpowers to not comply with unfavourable rulings.²⁵⁷ It seems as if, in certain circumstances, the EU and possibly others, may prefer to see the imposition of sanctions rather than comply with the WTO ruling.²⁵⁸ The suggestion by Miller²⁵⁹ that the DSU be amended to make compensation not just a voluntary option, but also a compulsory measure, may be favourably viewed. A proper interpretation of the precautionary principle discussed above, as well as the necessity to seek a political solution to problems with interpretation of Article XX is therefore essential.

6.3 Seek political solutions

One of the well-established principles of international law, namely that of state responsibility, should be given more prominence. It has been suggested that one of

²⁵⁴ *Ibid.*

²⁵⁵ De Noronho Goyous, D.jr. “The threat posed by the World Trade Organisation to Developing Countries” 2002 (25(1)) *CILSA* 53 at 54.

²⁵⁶ Maki, *op.cit* 119.

²⁵⁷ Cf. Brimeyer, B.L., ”Bananas, Beef and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations” 2001 (10(1)) *Minnesota Journal of Global Trade* 133 at 134 where it is pointed out that the European Union failed to lift its ban on beef imported from the US after the WTO Appellate Body had found the ban invalid in terms of the *Beef Hormones* decision.

²⁵⁸ Brimeyer *op.cit* 163.

²⁵⁹ *Op.cit* 2335.

the primary difficulties with the current WTO dispute resolution system is that it appears as though the contracting parties have empowered the Panels and the Appellate Body to act as a developer or creator of international trade law, similar to the common law court systems of England and the US.²⁶⁰ The problem with this approach is that much of the subject matter that end up before the DSB contain a large *political* element, and in this sense the issue of state sovereignty should also be kept in mind.

It is far more preferable to have the GATT contracting parties negotiate difficult issues, rather than to have the DSB develop case law on them. It is therefore suggested that the Council or the Conference of Ministers should adopt an interpretive statement on Article XX, as this is the proper forum for an exercise of policy-making authority.²⁶¹ Having clear guidelines will assist the DSB tremendously in its application of Article XX.

6.4 Utilise alternative measures such as eco-labelling

From the case discussions *supra* it is clear that there is no inherent conflict between the dual aims of trade liberalisation and protection of the environment. In many of the cases, it seems as if the wording, or the way in which a trade-restrictive environmental measure was applied led to its invalidation by the GATT/WTO dispute resolution bodies.²⁶²

A simple way of avoiding this situation altogether is to carefully word and apply such measures right from the start, but also to explore alternative, GATT-consistent environmental protection policies, such as in the controversial *Tuna Dolphin I* case where the Panel declared the use of eco-labels valid.²⁶³ The reason for this is that a reasonable non-discriminatory labelling requirement preserves both freedom of trade and freedom of consumer choice.²⁶⁴

²⁶⁰ Oesterle *op.cit* 18.

²⁶¹ Gaines *op.cit* 860.

²⁶² Cf. the discussion of the *Shrimp-Turtle* disputes in paragraph 4 above.

²⁶³ *Op.cit* paragraph 2.12.

²⁶⁴ Bentley, P, Q.C. "A Re-Assessment of Article XX, paragraphs (b) and (g) of GATT 1994 in the Light of Growing Consumer and Environmental Concern about Biotechnology" 2000 (24(1/2)) *Fordham International Law Journal* 107 at 109.

7. Conclusion

Despite there being a certain amount of truth in the idea that international tribunals are solely concerned with questions of implementation, it ignores the political reality that policy-creation and policy-implementation are integrally linked. The decisions of international tribunals as to whether or not the measures an individual state takes in implementing its environmental policy are compatible with the rules of free trade will necessarily have important implications for the policy itself. Seen from a different perspective, one may point out that, whilst policy makers have so far been unable to effectively address most of the issues raised by the trade-environment question, the WTO as the foremost dispute resolution mechanism in this arena, has been forced to confront these issue as cases have arisen that required judicial pronouncement.

From the analyses highlighted in this paper it could be seen that the dispute resolution machinery of the WTO have furthermore been forced to re-examine their approaches in the light of the increasing importance placed on environmental issues. A much more purposive approach is becoming apparent, one in which a willingness to take the evolutionary nature of views regarding environment into account is evident. It also seems as if dispute resolution bodies are, up to a certain extent, prepared to consider measures aimed at environmental protection *per se* as justifying restrictions on free trade. In this sense, the supposed conflict between environmental protection and the liberalisation of international trade is more apparent than real.

It is of crucial importance to remember that political concerns have historically been inseparable from international law. It is submitted that the argument raised by the United States in *Tuna Dolphin II*²⁶⁵ still holds true: “If the rules of the General Agreement should be re-examined in the light of the increasing complexity of issues regarding trade and the environment, that re-examination had to be conducted by the contracting parties, not a Panel.” What would then be needed is that the relative importance of both aspects – liberalised international trade and the need to protect and conserve the environment – should be reconsidered, and clear, substantive guidelines should be formulated. The *policy makers* – Nation States in their capacities as

²⁶⁵ *Op.cit* paragraph 3.11.

international legal subjects and as members of the WTO, should do this. Despite the trend towards more purposive legal analyses by the WTO dispute resolution bodies, they are not, after all, the true policy makers and should not be expected to act as such. Even at the international level, and even with a decidedly more pro-environment sentiment, the maxim *ius dicere, sed non facere* still apply to those tasked with settling disputes.