

Dispute resolution and “environmental” provisions in the WTO: promising developments for environmental matters

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Natalia Rodríguez Uribe*

Resumen: En la actualidad, la política internacional tiende hacia la unificación económica y cultural (globalización), en la cual la totalidad de las naciones se encuentran vinculadas por interacciones comerciales. Para que los compromisos adquiridos en materia de protección ambiental sean respetados, el derecho ambiental debe dejar de ser considerado como una disciplina separada y buscar sinergias que le permitan convertirse en un actor importante en las relaciones comerciales. En el presente ensayo se argumenta que el comercio internacional y el derecho ambiental han coevolucionado en las últimas tres décadas, hasta llegar a un balance en el concepto de desarrollo sostenible. Este artículo explora esta coevolución, mientras propone que la Organización Mundial del Comercio (OMC) puede jugar un importante rol en el cumplimiento de los objetivos internacionales de protección ambiental si sus disposiciones “verdes” y su sistema de resolución de conflictos son utilizados para promoverlos, tal como está sucediendo. Para ilustrar este punto, se presenta un breve resumen de los tratados comerciales y ambientales suscritos desde los años setenta, seguido de una explicación de las disposiciones

* LLB Universidad de los Andes (Bogotá, Colombia, 2004), Master in International Environmental Law Macquarie University (Sydney, Australia, 2008), LL.M Environmental Law Macquarie University (Sydney, Australia, 2010), PhD Law Candidate Macquarie University (Sydney, Australia). E-mail: natalia.rodriguez-uribe@mq.edu.au

legales de la OMC que pueden ser consideradas como “verdes”, con el fin de hallar puntos de convergencia que puedan ser utilizados por los países miembros no solo para justificar la adopción de normativas domésticas de protección ambiental, sino también para instar a los otros signatarios en el cumplimiento de sus obligaciones en esta área.

Palabras clave: Organización Mundial del Comercio (OMC), mecanismos de resolución de conflictos, derecho ambiental internacional, GATT, desarrollo sostenible.

Abstract: International politics are moving towards an economical and cultural unification (globalisation), in which all nations are related by trade interactions. If environmental protection commitments are to be honoured, environmental law has to cease to be considered a separate discipline and find synergies that allow it to become an important stakeholder in trade relations. In this paper it is argued that international commerce and environmental law have coevolved in the last three decades to reach a balance embodied in the concept of sustainable development.

The essay explores this coevolution, and proposes that the World Trade Organization (WTO) can play an important role in environmental protection goals if its “green provisions” and dispute resolution mechanism are to be used to promote them, as is already happening. In order to illustrate this point, a brief overview of commercial and environmental treaties signed since the seventies is presented, followed by an explanation of the WTO’s treaty suite provisions that can be considered as “green”, in the hopes of finding convergence points that can be used by the member parties in order not only to justify the passing of environmental protection domestic legislations, but also to compel other countries to comply with their obligations in this area.

Key words: World Trade Organization (WTO), dispute resolution mechanisms, international environmental law, GATT, sustainable development.

“But while conflict remains between the advocates of environmental protection and the supporters of a liberal trading system, attention is increasingly focused on so-called win-win-win outcomes, i.e. situations that provide improved market access, development, and environmental protection”.

Marc Williams¹

“It may well be time, then, for environmental NGOs to temper their traditional antipathy to the WTO, and to try working with it rather than against it”.

Elizabeth R. DeSombre and J. Samuel Barkin²

1. Introduction

It would be naïve to think of Environmental Law as a world of its own, oblivious to the realities of global trade and commerce trends.³ In reality, international politics are moving towards an economical and cultural unification called globalisation, and within it all nations, regardless of their status as “developed”, “developing” or “least developed” countries, are related in an intricate network of trade interactions.⁴

Nevertheless, international action and awareness of environmental concerns has increased in the last 30 years,⁵ with the signing of innumerable Multilateral Environmental Agreements (hereinafter MEAs) and the rapid evolution of domestic law and policy in various countries dealing with these

1 Williams, Marc. Trade and environment in the world trading system: a decade of stalemate? *Global Environmental Politics*, 1(4), November 2001, p. 2.

2 DeSombre, Elizabeth R. & Barkin, J. Samuel. Turtles and trade: the WTO’s Acceptance of Environmental Trade Restrictions. *Global Environmental Politics*, 2(1), February 2002, p. 18.

3 Oren Perez, for example, comments that people find hard to think as trade and the environment as two intertwined disciplines, often analysing them as two separate and often opposite areas. Perez, Oren. International Trade Law and the Environment. In: Richardson, Benjamin J. & Wood, Stepan (eds.). *Environmental Law for sustainability*. Portland: Hart Publishing, 2007, p. 385.

4 Ellis, Jaye & Wood, Stepan. International Environmental Law. In: Richardson, *Environmental Law...*, *ibid.*, p. 344.

5 See, eg, Maser, Chris. *Ecological diversity in sustainable development. The vital and forgotten dimension*. Boca Raton: Lewis Publishers, 1999, pp. 9-13.

issues, especially with the concept of sustainable development permeating many legislation instruments both in the international as in the domestic arenas. Some commentators go as far as to argue that the concept of Sustainable Development has gained the status of customary law, or *ius cogens*, because of its presence in a growing number of legal provisions.⁶

It is necessary to bear in mind that, no matter how idealistic one may be, the reality that trade is the motor of today’s world has to be acknowledged. This is why, instead of insisting on treating Environmental Law and Policy as an independent discipline, efforts must be made to harmonize it with trade and economy, in the hopes of creating synergies that will strengthen the enforcement of environmental provisions with the aid of powerful tools such as trade sanctions.⁷

In this respect, it is in order to review the recent use some countries have made of the World Trade Organization (hereinafter WTO) dispute resolution system to ventilate environmental disputes. Whether or not the WTO is an appropriate forum for this kind of controversies is an issue that has been raised, as will be seen in this article, however it is interesting to note that the counties involved are in many cases members of both the WTO and various MEAs.

Bearing this in mind, this essay will first present a brief overview of the state of affairs in the international environmental and trade arenas. It will secondly explain how the WTO works. Thirdly, the “greening” of the WTO –viewed as the emergence of sustainable development driving goals– will be covered, in order to emphasize that no matter how brutally capitalist this

6 “The concept of sustainable development is [enshrined in an international convention], whose integration of economic, environmental and social concerns marks a number of global legal instruments. Furthermore, it might be hard to argue that the principles of rights-based development have already become international customary law given the short timeframe since the adoption and active implementation of this approach”. Brodnig, Gernot. *The World Bank and Human Rights: mission impossible?* The Carr Center for Human Rights Policy, John F. Kennedy School of Government, Harvard University, 2000, at <<http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf>>, last accessed 9 November 2008.

7 “The trade-environment dilemma is complex. It is embedded in a deeply conflicted discursive landscape, consisting of highly opposing visions regarding the relationship between nature and society. These difficulties are exacerbated by deep informational scarcities, and scientific uncertainties, as to the environmental problems facing humanity, and the complex relationship between economic development and ecological degradation”. Perez, *supra* n. 3, p. 407.

body is, efforts have been made towards environmental protection. Finally, the dispute resolution system of the WTO will be explained, including the cases brought by members before the WTO panels for resolution, and their impacts in the environmental law enforcement efforts.

This essay's aim is thus to present a general review of the WTO's potential synergies with environmental protection and how they have been used in recent years. The analysis can be used to elucidate if the dispute resolution panel can be validly used to deliberate on the justification of trade measures imposed by countries in an attempt to promote environmental protection.

2. Co-evolution of Trade and Environment

I mentioned in the introduction that people tend to see trade and environment as two opposite unrelated disciplines. I argue however that there are symmetries that cannot be ignored in the evolution of these fields, making it possible to relate them even further in the collective unconscious.

As commented by Williams, the first time the trade and environment debate was recognised internationally, it was portrayed as a “clash of cultures, paradigms and judgments”; however, a compromise was reached in the form of the sustainable development concept that has been used as a catalyst to frame and limit the debate.⁸

In this sense, the twentieth century is a very illustrative case study of paradigm shifting, taking into account that the first decades were a direct result of the Industrial Revolution. After this period, countries engaged in a race of sorts towards development, where they strived to get industrialised depending heavily on the use of fossil fuels such as coal and petroleum. These new previously unexplored energy-sources allowed for the advance of technology in spite of the depletion of natural resources and increased pollution,⁹ environmental problems that would only become apparent in the century's last two decades characterised by the popularisation of environmental awareness.¹⁰

8 Williams, *supra* n. 1, p. 8.

9 See Driesen, David. Economic instruments for sustainable development. In: Richardson, *Environmental Law...*, *op. cit.*, p. 300.

10 See, Alam, Shawkat. *Sustainable development and free trade*. Abingdon: Routledge, 2008, pp. 60-61.

The recognition of environmental damage as a problem of international proportions was also spawned by the realisation of the increasing levels of the World’s population. As a matter of fact, the Industrial Revolution was coupled with advancements in the medical field as important as the quite accidental discovery of penicillin, which allowed population’s exponential growth, to extents not even conceived in Malthus’ wildest predictions. This increase created in turn further needs to exploit natural resources more fully, in utter obliviousness of the environmental harm entailed. As accurately observed by Edward O. Wilson:

The twentieth century was a time of exponential scientific and technical advance, the freeing of the arts by an exuberant modernism, and the spread of democracy and human rights throughout the world. It was also a dark and savage age of world wars, genocide, and totalitarian ideologies that came dangerously close to global domination. While preoccupied with all this tumult, humanity managed collaterally to decimate the natural environment and drown the nonrenewable resources of the planet with cheerful abandon.¹¹

Another last century’s relevant feature was the modernization of means of transport—including the invention of the plane—which contributed greatly to the increased export of goods to every corner of the planet.

In consequence, a more complete set of regulations for trade were enforced and a multilateral economic treaty was signed, the General Agreement of Tariffs and Trade (GATT),¹² that reached 128 signatory countries by 1994.¹³ The GATT was only a framework agreement, and a multiplicity of bilateral and regional treaties were signed afterwards in hopes to create

11 Wilson, Edward O. *The future of life*. New York: Alfred A. Knopf, 2002, p. 22.

12 *General Agreement on Tariffs and Trade (GATT)*, opened for signature 30 October 1947 55 UNTS 194 (entered into force 1 January 1948). N.B. The original text of the GATT had numerous amendments over the years, notably the ones enforced at the culmination of the Uruguay Round, and is now referred to as the *General Agreement on Tariffs and Trade 1994 (GATT 1994)*, opened for signature 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995).

13 The list of GATT signatories with the dates of subscription is available in the World Trade Organization official website. See, The 128 countries that had signed GATT by 1994, *World Trade Organization*, at <http://www.wto.org/english/thewto_e/gattmem_e.htm>, last accessed 11 November 2008.

better commercial opportunities for the parties in the form of reduction of tariff and non-tariff barriers to trade.¹⁴

As mentioned in previous paragraphs, in the late 1960s and early 1970s¹⁵ environmental problems such as pollution became evident, forcing countries to engage in “command and control” regulations to prevent them, and unclenching a series of national legislations. This was especially evident in the United States of America (USA) and the United Kingdom (UK),¹⁶ and the trend prompted the GATT members to form the Group on Environmental Measures and International Trade (EMIT) in 1971. The EMIT recognised the connection environment and trade have at the inter-governmental level, and a report in this respect was published by the group highlighting the need for policies in both fields to be more coherent.¹⁷

A number of international instruments related to the protection of the environment were enforced as well, such as the Stockholm Declaration,¹⁸ and the Ramsar Convention on Wetlands,¹⁹ reflecting the international community’s increased engagement in the “wise use”²⁰ of natural resources for the sake of present and future generations, a concept that would later on

14 Examples of trade agreements in regional blocs are the European Union (EU), the Comunidad Andina de Naciones (CAN), the Mercado Común del Sur (Mercosur), the North America Free Trade Agreement (NAFTA) and the Association of South East Asian Nations (ASEAN). See, European Union, <http://europa.eu/index_en.htm>; Comunidad Andina de Naciones, <<http://www.comunidadandina.org/>>; Mercado Común del Sur, <<http://www.mercosur.int/>>; NAFTA Secretariat, <<http://www.nafta-sec-alena.org/DefaultSite/index.html>>; ASEAN Secretariat, <<http://www.aseansec.org/>>. On the subject of bilateral free trade agreements (FTAs), the United States has signed over a dozen individual treaties with countries like Australia, Chile, Singapore and Israel. See, US FTAs, *Bilaterals.org*, <http://www.bilaterals.org/rubrique.php?id_rubrique=55>. All websites last accessed on 11 November 2008.

15 Richardson, Benjamin J. & Wood, Stepan. Environmental Law for sustainability. In: Richardson, *Environmental Law...*, *op. cit.*, p. 3.

16 *Ibid.*, pp. 4-5.

17 Alam, *supra* n. 10, p. 61.

18 *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, signed at Stockholm, Sweden in 16 June 1972. UN Doc. A/CONF/48/14/REV.1 (1972).

19 *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

20 The “wise use” concept is enshrined in Article 3 of the *Stockholm Declaration*, *supra* n. 18, and throughout the *Ramsar Convention*, *supra* n. 19, as a principle to be followed both in the managing of wetlands and of stocks of migratory birds.

become the notion of sustainable development. It is safe to state that it was at this time that environmental law was born as a discipline.²¹

The 1990s brought a turning point not only in the history of multilateral world trade, but also in environmental engagement. For commerce, 1994 marked the culmination of the Uruguay Round –started in 1986– resulting in the formal creation of the WTO, which counts today with 153 member countries and 30 observers.²²

For the environment, 172 governments were represented at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro which resulted in the signature of two soft law documents –the Rio Declaration on Environment and Development, and Agenda 21– as well as two binding instruments, namely the United Nations Framework Convention on Climate Change²³ –96 signatories, counting members and observers–,²⁴ and the United Nations Convention on Biological Diversity²⁵ –191 parties–.²⁶

It is important to note that these two major milestones shared a common denominator: the recognition of sustainable development –that is, “development that meets the needs of the present without compromising the ability of future generation to meet their own needs”–²⁷ as the principle

21 “[T]he so-called ‘modern era’ of environmental law dates from the 1960s, when a liberal political climate in Western nations, coupled with changing economic conditions and improved scientific understanding of humanity’s ecological impacts, created the conditions for heightened public awareness and willingness to speak out about environmental deterioration”. Richardson & Wood, *supra* n. 15, p. 3.

22 Observer countries have to undertake accession negotiation within five years after becoming observers. See, Understanding the WTO: The Organization. Members and observers. *World Trade Organization*, 23 July 2008, at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, last accessed 11 November 2008.

23 *United Nations Framework Convention on Climate Change (UNFCCC)*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 24 March 1994).

24 Parties to the Convention and Observer States. *United Nations Convention on Climate Change*, at <http://unfccc.int/parties_and_observers/parties/items/2352.php>, last accessed 11 November 2008.

25 *Convention on Biological Diversity (CBD)*, opened for signature 5 June 1992, 1760 UNTS 243 (entered into force 29 December 1993).

26 List of parties. *Convention on Biological Diversity*, at <<http://www.cbd.int/convention/parties/list.shtml>>, last accessed 11 November 2008.

27 Brundtland, Gro Harlem. *Our common future. Report of the World Commission on Environment and Development*. Oxford: Oxford University Press, 1987.

to guide both economy growth, on WTO standards,²⁸ and environmental protection in years to come.²⁹

After the Uruguay Round, environmental protection and sustainable development became part of the Agreement Establishing WTO – as a guiding principle on the Preamble, to which I will refer more fully in the part of this essay devoted to the “greening” of the WTO – and the Trade and Environment Committee was created. Later on, the principle was reiterated on the Doha Ministerial Conference held on 2001.³⁰

The Doha Declaration, although modest in its reach, attempts to sooth the possible tensions between multilateral environmental agreements (MEAs) and the WTO, and promotes the establishment of information exchange procedures between the MEAs secretariats and the WTO Committees of Trade and Environment, and Trade and Development.³¹ This information exchange can be harnessed by both MEAs’ secretariats and conference of the parties (COP) in order to create synergies that will allow the MEAs to be implemented in accordance to their goals, while minimising the risk to be challenged by WTO members that may view the implementation as a barrier to trade.

A year later the follow up of the Earth Summit, also known as Rio + 10, was held on Johannesburg, South Africa, from which flowed the Johannesburg Declaration on Sustainable Development, a pledge to attain sustainable development while ending world poverty.³²

To finish this chapter, a word of caution: although there have been changes in perception, it is not wise to be over optimistic about these parallel developments. There is still a bitter discussion about the dangers trade poses to the environment and vice versa,³³ which can be illustrated by these antagonistic views: on the trade side Ederington and Minier voice the opi-

28 World Trade Organization. *Understanding the WTO*. 6th ed. Genève: WTO Publications, 2007, p. 67.

29 As stated in the introduction, the principle of sustainable development has permeated legal provisions both in international as in national legislations.

30 *Doha Ministerial Declaration* WT/MIN(01)/DEC/1, 20 November 2001.

31 Perez, *supra* n. 3, p. 410.

32 *Johannesburg Declaration on Sustainable Development, from our Origins to the Future*, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4 September 2002. UN Doc. A/CONF.199/20 (2002).

33 For a full discussion on this subject presenting both arguments, see Williams, *supra* n. 1, and Perez, *supra* n. 3, pp. 384-388.

nion of many commentators contending that countries use environmental law and policy as a secondary trade barrier, sometimes with the hidden agenda of protecting domestic industries.³⁴ On the environment side, authors such as Brack note that trade can magnify environmental harm and unsustainable practices if the costs of pollution and over-consumption are not internalised.³⁵

In my opinion, more than an irreconcilable difference, what these arguments evidence is a lack of linkages between trade and environmental law and policy. In fact, none of these authors question the convenience of stringent environmental regulations or the increased liberalisation of trade, what they purport is that the seemingly unrelated policies clash when not implemented in tandem.

Thus, in order to soften other sectors of the population’s biased conceptions, I will now show that there has indeed been a recent approach from the WTO towards sustainability-oriented positions that may mean a big step towards reconciliation between these two fields.

3. WTO General Features

The reason why the WTO is such a successful organism is that it has two unique features that set it apart in the realm of international treaties: when the Uruguay Round negotiations concluded in 1994, one of the conditions required for countries in order to apply for full membership was that the signing of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the Marrakesh Agreement)³⁶ would not accept reserves.³⁷

34 See generally, Ederington, Josh & Minier, Jenny. Is environmental policy a secondary trade barrier? An empirical analysis. *Canadian Journal of Economics*, 36(1), February 2003.

35 Brack, Duncan. Introduction: the trade and environment debate. Guide to the issues. In: Brack, Duncan (ed.). *Trade and environment: conflict or compatibility?* London: Royal Institute of International Affairs, 1998, p. 3.

36 *Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement)*, opened for signature 15 April 1994, 1867 UNTS 154, Preamble (entered into force 1 January 1994).

37 “Article XVI. Miscellaneous Provisions: [...] 5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement”. *Marrakesh Agreement, ibid.*

The second *sui generis* feature is that the subscription also entailed the automatic acceptance of the WTO treaty suite in its entirety.³⁸

Today the Marrakesh Agreement has more than 60 complementary agreements;³⁹ I will just mention here the ones negotiated in the Ministerial Decisions and Declarations adopted by the Uruguay Round Trade Negotiations Committee on December 15, 1993, unless otherwise noted:⁴⁰

- a) Multilateral Agreements on Trade in Goods
 - i. General Agreement on Tariffs and Trade 1994
 - ii. Agreement on Agriculture
 - iii. Agreement on the Application of Sanitary and Phytosanitary Measures
 - iv. Agreement on Textiles and Clothing
 - v. Agreement on Technical Barriers to Trade
 - vi. Agreement on Trade-Related Investment Measures
 - vii. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

38 “Article II. Scope of the WTO: 1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as “GATT 1994”) is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as “GATT 1947”). *Marrakesh Agreement, ibid.*

39 All the WTO legal texts for the Agreements are available at “WTO legal texts”, in *the World Trade Organization Official Website*, at <http://www.wto.int/english/docs_e/legal_e/legal_e.htm>, last accessed 9 November 2008.

40 All these documents –except the ones with a different date in brackets that entered into force automatically–, are contained in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 15 December 1994).

- viii. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
- ix. Agreement on Preshipment Inspection
- x. Agreement on Rules of Origin
- xi. Agreement on Import Licensing Procedures
- xii. Agreement on Subsidies and Countervailing Measures
- xiii. Agreement on Safeguards
- xiv. Information Technology Agreement (ITA) (March 26, 1997)
- b) General Agreement on Trade in Services
 - i. Basic Telecommunications Services Agreement (February 15, 1997)
 - ii. Financial Services Agreement (March 1, 1999)
- c) Agreement on Trade-Related Aspects of Intellectual Property Rights
- d) Plurilateral Trade Agreements

It is to be noted then that MEAs and their domestic implementation have a “disadvantage” when confronted to the trade regimes under the umbrella of the Marrakesh Agreement, given the fact that MEAs generally admit reserves. Anticipating to the occurrence of reserves, most MEAs’ provisions get “watered down” during the negotiation process, in order to achieve a bigger number of signatories.

The downside of course is that the end result is the signature of somehow weak treaties that lack stringent enforcement mechanisms. Thus, when divergent law and policy is enforced at a domestic level that can lead to an international dispute, chances are that the treaty with better enforcement mechanisms will come out victorious; cases illustrating this issue will be analysed in section 5.2 of this essay.

4. WTO Treaty Suite “Green” Provisions

Although it may seem as an oxymoron to talk about a “green” World Trade Organization as outlined in the previous chapter, changes have been made inside the institution in order to at least attempt to make environmental concerns a functional part of it. These include the protection of the environment in several soft and hard law provisions in the WTO treaty suite, as well as the Committee of Trade and Environment (CTE).

These inclusions have had mixed critiques from the part of commentators because at one end of the spectrum, the environmentalists consider

them too soft, whereas on the other side blind supporters of commerce freedom consider them yet another de facto trade barrier.⁴¹

Nevertheless, the inclusion of environmental protection driven provisions inside the treaties can be considered a great first step towards a bigger synergy between this organization and the plethora of international instruments dealing with the environment.⁴² On their part, some MEAs such as CITES,⁴³ the Montreal Protocol,⁴⁴ and the Basel Convention,⁴⁵ use trade sanctions widely as an enforcement mechanism⁴⁶ while the widespread support to environmental treaties and declarations endorsed by the United Nations (UN) suggests that it is no longer possible to see them as an isolated discipline.⁴⁷

In order to evidence the fact that the WTO has made some steps to include sustainability into its regime, and that these steps can potentially be harnessed by environmental law and policy drafters, I will mention in the following paragraphs the most important mentions to the environment made in the WTO treaty suite texts.

4.1. Marrakesh Agreement, Establishing the WTO

Preamble

The *Parties* to this Agreement, [...].

41 See generally Perez, *supra* n. 3.

42 Among these instruments are milestone treaties such as the *Ramsar Convention* (*supra* n. 19), the *UNFCCC* (*supra* n. 23), and the *CBD* (*supra* n. 25). It is to be noted that three of these conventions already use trade sanctions widely in order to enforce their provisions: *CITES* (below n. 43), the *Montreal Protocol* (below n. 44), and *Basel* (below n. 45).

43 *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, opened for signature 3 March 1973, 14537 UNTS 993 (entered into force 1 July 1975).

44 *Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)*, opened for signature 16 September 1987, 26 ILM 1550 (entered into force 1 January 1989).

45 *Basel Convention on the Control of Transboundary Movements of Hazardous Waste (Basel Convention)*, opened for signature 22 March 1987, 1673 UNTS 126 (entered into force 29 December 1993).

46 A very good analysis on this subject can be found in Alam, *supra* n. 10, Chapter 8 “Trade restrictions pursuant to multilateral environmental agreements”, pp. 183-204.

47 Barfield, Claude E. Free trade, sovereignty, democracy: the future of the World Trade Organization. *Chicago Journal of International Law*, 2001, p. 405.

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

Agree as follows: [...].⁴⁸ (Emphasis added).

Although preambles to treaties are considered soft-law and are thus non-binding to the parties, they are nevertheless the parameters of interpretation for the mandatory stipulations of the agreement. Thus, this inclusion in the very core of the WTO can be seen as a provision to be invoked when disputes dealing at least marginally with the environment arise. However, the interpretation of this part of the instrument can swing dangerously between the goal of environmental protection and its sacrifice in the name of progress, the key then is to review the concept of sustainable development as a balance of equal values.

This balance can nevertheless be inferred from the wording of the preamble, which includes important sustainability principles consistent with the Rio Declaration.⁴⁹ Such principles include the recognition of humans as the “centre of concerns for sustainable development”,⁵⁰ the common endeavour to end poverty while protecting the environment,⁵¹ and the special protection granted to developing and least-developed countries acknowledging the common but differentiated responsibility of nations.⁵² Of special relevance is Principle 12, which recognises the need for international consensus—as opposed to unilateral actions—to address transboundary en-

48 *Marrakesh Agreement*, Preamble, *supra* n. 36.

49 *Rio Declaration on Environment and Development (Rio Declaration)*, signed at Rio de Janeiro, Brazil on 13 June 1992, Brazil/UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

50 *Ibid.*, Principle 1.

51 *Ibid.*, Principles 4 and 5.

52 *Ibid.*, Principles 6 and 7.

vironmental problems and specifically mentions the necessity of synergetic law and policy with the field of trade.⁵³

4.2. GATT 1994 and GATS

Both the General Agreement on Tariffs and Trade (GATT 1994)⁵⁴ and the General Agreement on Trade in Services (GATS)⁵⁵ have “General Exceptions” articles that state that countries can adopt and enforce measures contrary to these two treaties as long as “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”,⁵⁶ and as long as they are listed in the articles’ exhaustive list.

Article XX of the GATT includes three exceptions that can be considered “environmental”, namely measures that are “(b) necessary to protect human, animal or plant life or health; ... (d) necessary to secure compliance with laws or regulation which are not inconsistent with the provisions of th[e] Agreement; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...”.⁵⁷ However, GATS is less permissive, allowing only the first exception present in GATT 1994.⁵⁸

The aforementioned GATT exceptions were invoked in the Dolphin-Tuna and Turtle-Shrimp cases, which will be discussed at the end of this essay. As can be seen the GATS provision, although similar, is weaker in the sense that it only accepts the invocation of protection of human, animal

53 “... Trade policy measures for environmental purposes should not constitute means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade...”. *Ibid.*, Principle 12.

54 *GATT 1994*, *supra* n. 12.

55 *General Agreement on Trade in Services (GATS)*, opened for signature 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1994).

56 The text is identical in both treaties. *GATT 1994*, Article XX, *supra* n. 12; *GATS*, Article XIV, *supra* n. 55.

57 *GATT 1994*, Article XX, *supra* n. 12.

58 The wording of this exception is identical to the exception present in Article XX(b) of the GATT. *GATS*, Article XIV (b), *supra* n. 55.

and plant health, with no mention to natural resources or special domestic legislation, an omission noted by Charnovitz.⁵⁹

4.3. Agreement on Technical Barriers to Trade (TBT)

The primary objective of the Agreement on Technical Barriers to Trade (TBT)⁶⁰ is that the WTO members cease to use technical standards and regulations as a form of protectionism for their domestic products that distorts commerce.⁶¹

The preamble to this agreement determines its scope and specifically allows countries to enforce internal legislation to protect the environment, with the caveat that said protections cannot constitute a disguised restriction.⁶²

For this purpose, Article 2 specifies the duties of central government bodies, clarifying that technical regulations applied to products imported from Member countries shall not be treated less favourably than like products of national origin, or originated in any other country.⁶³

The article also prompts Members to “ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”, and by this token Members should ensure that any of these measures have to be proportionate to their legitimate objective and take into account the risks non-compliance can create.⁶⁴ These objectives include, but are not limited to, “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment”,

59 Charnovitz, Steve. The WTO's environmental progress. *Journal of International Economic Law*, 10(3), 2007, p. 689.

60 *Agreement on Technical Barriers to Trade (TBT)*, Preamble. See, *Final Act...*, *supra* n. 40.

61 Alam, *supra* n. 10, p. 75.

62 “... *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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. [...]”. *TBT*, Preamble, *supra* n. 60.

63 *TBT*, Article 2.1, *supra* n. 60.

64 *Ibid.*, Article 2.2.

and the risk-assessment can take into consideration any relevant elements, such as the scientific and technical information currently available, and the processing technology and the product's intended uses.⁶⁵

Finally, the article specifies that when international standards exist or “their completion is imminent”, the Members can use them in whole or in part to structure their domestic regulations except when said standards are ineffective or inappropriate to fulfil the regulation's legitimate objective.⁶⁶

Both the Preamble and the regulations of Article 2 can be valuable in a dispute in order to justify, for example, a domestic legislation that implements one or more MEAs. The other side of the coin is that this agreement seeks to protect poor countries that can see their exports hampered by sophisticated standards promoted by developed countries that may strive to protect the environment.⁶⁷

The great difficulty however, is that the TBT does not allow to discriminate a product by its manufacturing process with the result that a country cannot stop the import of a good made, for example, using a polluting process. It has been proposed that since the TBT “only covers technical regulation and standards that constitute *related* processes and production methods (PPMs)... related the final characteristics of the product... non-product related PPMs, such as pollution emission standards would not be covered”.⁶⁸ This suggestion has not been raised yet before the WTO panels.

4.4. Agreement on Sanitary and Phytosanitary Measures

The justification of the Agreement on Sanitary and Phytosanitary Measures Standards (hereinafter SPS),⁶⁹ on the same lines as the TBT, is that the unrestricted use of sanitary and phytosanitary standards in member countries can create de facto barriers to trade.

Nevertheless, the treaty allows member states to take all the measures necessary to protect their environment from external agents, and lists in Annex A what valid measures can be undertaken under the agreement. These

65 *Ibid.*

66 *Ibid.*, Article 2.4.

67 Alam, *supra* n. 10, p. 78.

68 *Ibid.*, p. 75.

69 *Agreement on Sanitary and Phytosanitary Measures Standards (SPS)*. See, *Final Act...*, *supra* n. 40.

include any measure applied to protect animal or plant life or health within a Member’s territory from risks arising from “(a) [...] the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) [...] additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) [...] diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests”.⁷⁰

Quarantine laws are a direct application of this provision, which can be a valuable tool in order to protect biodiversity from the harm caused by alien or invasive species. For example one of the interesting features of the agreement, and its further panel developments,⁷¹ is the direct application of the precautionary principle: under Article 5.7 a government may adopt a precautionary restriction in case of lack of sufficient scientific evidence to support it, but it has to justify it in a reasonable period of time.⁷²

4.5. Agreement on Agriculture

The Agreement on Agriculture,⁷³ which pursues the gradual elimination of subsidies and quotas in agricultural production, includes nevertheless some exemptions in Annex 2.⁷⁴ Of special note is clause 12, which regulates payments granted under environmental programmes, specifying that “(a) [e]ligibility for such payments shall be determined as part of a clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs” and that “(b) [t]he amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme”.⁷⁵

70 *Ibid.*, Annex A.

71 Charnovitz refers to the application of the precautionary principle in *EC-Hormones*. See generally, Charnovitz, Steve. The supervision of health and biosafety regulation by World Trade Rules. *Tulne Environmental Law Journal*, 13, 2000.

72 Alam, *supra* n. 10, p. 79.

73 *Agreement on Agriculture*. See, *Final Act...*, *supra* n. 40.

74 *Ibid.*, Annex 2 *Domestic support: the basis for exemption from the reduction commitments*.

75 *Ibid.*

This is one of the agreements that present most difficulties for implementation, because although one of the goals of the WTO is to reduce subsidies and eliminate quotas and other non-tariff measures,⁷⁶ it paradoxically allows a high level of subsidies for agriculture granted to farmers in developed countries, especially the United States and the European Union (EU).⁷⁷

The Agreement has been highly criticised because, in order to compete with developed countries that subsidise their farmers, Third-World nations' agricultural workers may be forced to adopt environmentally harmful practices like deforestation just in order to compete with their developed counterparts.⁷⁸ This asymmetry has still no end in sight but it would be interesting to see it raised before a panel linked to environmental goals such as biodiversity protection against monocultures.

4.6. Agreement on Trade-Related Aspects of Intellectual Property Rights

A thorough analysis of the Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁷⁹ agreement is beyond the scope of this paper by its complex issues involving powerful stakeholders like transnational pharmaceutical corporations, and delicate problems such as the protection of Indigenous Peoples' traditional ecological knowledge, which is technically part of the public domain and thus not subjected to typical intellectual property regimes.

However, it is worthy of noting that in order to address these issues, the Agreement strives in Article 27 to accept the exclusion of the patentability regime of inventions when such prevention is “necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment”.⁸⁰

The Article also accepts the exclusion from patentability of “(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentialia-

76 *Understanding the WTO*, *supra* n. 28, p. 29.

77 Alam, *supra* n. 10, p. 84.

78 *Ibid.*

79 *Agreement on Trade-Related Aspects of Intellectual Property-Rights (TRIPS)*, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

80 *Ibid.*, Article 27.2.

lly biological processes for the production of plants or animals other than non-biological and microbiological processes”.⁸¹ The caveat to this exclusion however, is that the Members need to comply with the protection of these plant varieties “either by patents or by an effective *sui generis* system or by any combination thereof”.⁸² Suffice to say that this *sui generis* regime is yet to be created.

5. WTO Dispute Resolution Mechanism

Now, before reviewing some of the cases brought before the WTO panels that deal with environmental matters, it is necessary to ascertain in which cases said panels can be the suitable forums to ventilate these issues. In order to do this, this part will first present an overview of the evolution of the dispute settlement system under the GATT and the changes implemented by the WTO, and why these changes –along with the “green” provisions mentioned in the previous chapter– allowed for the raising of environmental issues in recent years.

5.1. GATT v WTO Dispute Settlement Systems

5.1.1. The GATT 1947 System

Before the signing of the Marrakesh Agreement, culmination of the Uruguay Round, dispute resolution was the responsibility of the system set forth within the GATT in two brief articles.⁸³

The reason for this lack of development in the dispute resolution regime was that the signatories of the GATT were waiting for the birth of the International Trade Organization (ITO), one of whose tasks was to refine said regime.⁸⁴ Alas, the negotiation of the ITO never came to a positive conclusion, and the GATT system –being the only one available– was used

81 *Ibid.*, Article 27.3.

82 *Ibid.*, Article 27.3(b).

83 *GATT 1947*, Articles XXII and XXIII, *supra* n. 12.

84 See, Palmetier, David & Mavroidis, Petros C. *Dispute settlement in the World Trade Organization, practice and procedure*. 2nd ed. Cambridge: Cambridge University Press, 2004, pp. 1-6.

since the entering into force of the GATT in 1947, until the emergence of the WTO the first of January 1995.⁸⁵

The Dispute Resolution Mechanism (DSU) implemented by GATT leaned towards the reaching of a negotiated solution⁸⁶—rather than a judicial or adjudicative one,⁸⁷ as does the WTO DSU—and was actually referred to as “conciliation” instead of “dispute settlement”.⁸⁸ Broadly, Article XXII provided in its first paragraphs that parties to the agreement had to “accord sympathetic consideration” to each other and “afford adequate opportunity for consultation... in respect to any matter affecting the operation of [the] Agreement”; the second paragraph opened the possibility for the parties of the dispute to consult with the other GATT signatories in the eventuality that an agreement was not reached *inter se*.

Additional to the Consideration resort, Article XIII set forth the mechanism of Nullification or Impairment, that gave any of the parties the possibility to make written representations or proposals to other signatories for their consideration, in the event that the Agreement was perceived by the affected country to have been nullified or impaired.⁸⁹

If the situation persisted, the matter could be referred to the Contracting Parties,⁹⁰ who would investigate it and give a ruling on the issue.

85 The WTO in Brief, Part III: The WTO Agreements. *The World Trade Organization Official Website*, at <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm>, last accessed 8 November 2008.

86 Consensual mechanisms include negotiation, mediation and conciliation, and their key feature is that the outcome depends on the will of the parties to reach a mutually convenient solution. For a concise explanation of these methods, refer to Spencer, David & Altobelli, Tom. *Dispute resolution in Australia*. Pyrmont: Lawbook Co., 2005.

87 Adjudicative or judicial mechanisms are those in which the resolution of the dispute is entrusted to a third party. They include domestic judicial systems and arbitration. Refer to *ibid*. Also, Hon. Justice Brian Preston presents an interesting comparison between consensual and adjudicative mechanisms in Limits to environmental dispute resolution mechanisms. *Australian Bar Review*, 13, 1995.

88 Palmeter & Mavroidis, *supra* n. 84, p. 7.

89 *GATT 1947*, Article XXIII, paragraph 1 defines three situations in which the agreement can be nullified, impaired or any of its objectives impeded: “(a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation”. *Supra* n. 12.

90 The capital letter on Contracting Parties is used in order to identify them as all the signatories of the agreement.

Said ruling constituted a non-mandatory set of recommendations that could be consulted further with the Economic and Social Council of the United Nations or “any appropriate inter-governmental organization”.⁹¹ In case the Contracting Parties concluded that the situation was “serious enough”, they could authorize the suspension of the obligations of the Agreement towards the defaulter, that was then in liberty to withdraw from the GATT altogether if it failed to comply after suspension.⁹²

This process developed to eventually adopt the form of an *ad hoc* panel of experts, composed of five members appointed by the Contracting Parties –no doubt as a reaction to the limited procedural rules, or lack thereof, provided by the GATT. The panellists usually were diplomats instead of lawyers, a choice that had the effect of having rulings drafted in the characteristic vagueness of *attachés*.⁹³

One of the major critiques to this political system was the liberty of the parties not only to refuse to implement the recommendations, but to oppose the formation of the panel. This generated a trend to “block” adoptions of adverse reports that hampered the enforceability of the GATT, and was ultimately the motor to negotiate the implementation of a fully fledged dispute resolution method.⁹⁴

It is to be noted that commentators do not necessarily agree on the convenience of an adjudicatory system, arguing that it can restrict freedom of trade, while abandoning the good faith that should govern commercial relations. It is thus contended that negotiated solutions should be encouraged instead, following the rationale that the parties would be more prone to adopt these solutions because of their very involvement.

On the other hand, defenders of the WTO mechanism claim that a judicial solution promotes equity in countries that have asymmetrical realities, it is resolved in a neutral non-politic fashion, and the added pressure of facing trade sanctions is a powerful tool for compliance.⁹⁵

91 *GATT 1947*, Article XXIII, paragraph 2, *supra* n. 12.

92 *Ibid.*

93 Palmeter & Mavroidis, *supra* n. 84, p. 7.

94 *Ibid.*, pp. 8-9.

95 For instance, the Chicago Journal of International Law published in the same volume an interesting set of academic papers, one defending the WTO system and one defending the previous political GATT 1947 system: Claude Barfield views the WTO dispute settlement mechanism as a leap forward, while Alan Wolff responds to his paper as an acrimonious

5.1.2. The Settling of Disputes under the WTO

This system is contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereto DSU) –Annex 2 of the Marrakesh Agreement– which incorporates Articles XXII and XXIII rules and procedures “as further elaborated and modified”.⁹⁶

Its objective is to provide the WTO members with a trustworthy method very similar to domestic judicial jurisdictions –with even the option to appeal the decision– that can reach a binding verdict. The procedures are carried out by the Dispute Settlement Body (DSB) Panels and Appellate Body,⁹⁷ which operate on a “negative consensus” basis stating that panels will be “established automatically, *unless* there is consensus to the contrary”.⁹⁸ The document offers other possibilities for dispute resolution, such as Consultations –confidential and previous to the establishment of the panel–⁹⁹ and Good Offices, Conciliation and Mediation, to be requested at any time, even when a panel is underway.¹⁰⁰

opponent to the adjudicative system. See, Barfield, Claude E. *supra* n. 47. Wolff, Alan. Problems with WTO Dispute Settlement. *Chicago Journal of International Law*, 2, 2001.

96 *Understanding on Rules and Procedures Governing the Settling of Disputes (DSU)*, Annex 4 *Marrakesh Agreement*, Article 3.1., *supra* n. 36.

97 The DSB consists of representatives of every WTO member, and its functions are governed by Article 2 of the *DSU*, *ibid.*, including the faculty to determinate an Appellate Body in case the decision reached by the panel is challenged by one of the parties on procedural, not substantive grounds (*DSU*, Article 17).

98 Palmeter & Mavroidis, *supra* n. 84, p. 15. See article 6 of the *DSU*, *supra* n. 96. Note also the difference with the “positive consensus” that governed the GATT 1947 procedure.

99 *DSU*, Article 4, *supra* n. 96.

100 *Ibid.*, Article 5. For a better understanding of the procedure, here are its stages:

- Consultations.
- Review of the matter by the appointed Expert Panel.
- The Expert Panel issues a report that can be adopted by the parties or appealed.
- In case of appeal, an Appellate Body is appointed by the DSU.
- Appellate Body decision report.
- Adoption of reports (by Expert Panel or Appellate Body) by the DSU.
- Surveillance of implementation of the recommendations contained in the adopted ruling (article 21).
- In case of non-compliance in the period granted by the adopted report, the DSU can authorise countermeasures (article 22).

The characteristics that make this procedure efficient and successful are: (a) the clear and detailed procedures that follow strict timelines;¹⁰¹ (b) the process is automatic and the only way to disregard the panel’s decisions is in the event the DSB so decides by consensus, thus preventing the undesired “block” previously discussed;¹⁰² (c) the Appeal Tribunal; the fact that it abides by the principles of International Public Law –such as *non ultra petita*¹⁰³ and *ratione materiae*¹⁰⁴ while endeavouring to protect the rights and obligations of the WTO members instead of increase or diminish them;¹⁰⁵ (d) the affirmative action provision that protects least-developed countries from indiscriminate compensation claims¹⁰⁶ and allows developing countries the possibility to have extended time periods to prepare their arguments

101 Appendix 3 of the *DSU*, Article 12, proposes for instance a timetable for panel work. *Ibid.*

102 See *ibid.*, Article 16.4 in the case of DSB panel reports, and Article 17.14 in the case of the Appellate Body decisions.

103 “[P]anels address only claims that are put before them, either by the complaining party through its request for the establishment of a panel, which is incorporated into the terms of reference, or by the defending party”. Palmetier & Mavroidis, *supra* n. 84, p. 19.

104 “The Dispute Settlement Understanding applies to disputes brought pursuant to its consultation and dispute settlement provisions concerning the ‘covered agreements’... These are: the *Agreement Establishing the World Trade Organization*; the 13 individual multilateral agreements on trade in goods; GATS; TRIPS; and the two plurilateral agreements”. *Ibid.*, pp. 21-22.

105 *DSU*, Article 3.2, *supra* n. 96.

106 *DSU*, “Article 24. Special Provisions Involving Least-Developed Country Members. 1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate”. *Ibid.*

when the dispute is against a developed country.¹⁰⁷ The developing country can ask the DSU for the appointment of a member of the panel from a developing country;¹⁰⁸ finally, (e) the reports of the DSB and the Appellate Body are mandatory, and failure to comply entails strict sanctions for the defaulter such as lawful retaliation by the complaining state, and the payment of compensations.¹⁰⁹

5.2. Environmental Panels

Although there have been a number of panels constituted to deal with environmental issues in the GATT and WTO jurisdiction –such as the U.S.-Mexico Tuna-Dolphin¹¹⁰ and the U.S.-Thailand Importation of Cigarettes¹¹¹– the most important¹¹² one was the U.S.-Malaysia Shrimp-Turtle case.¹¹³

It is to be noted that, in order to access the panels, the claim has to contain alleged violations of provisions contained in any of the WTO agreements. This presents a problem for “environmentalist” countries that want their domestic green policies respected: they cannot go before a panel to constrain another member to abide by their laws, but have to wait instead for other countries to challenge their legislation, whether applied extraterritorially or domestically. This can prevent the development of doctrine by the panels which, albeit not treated as precedent in the Common Law sense of the word, can be used as a guide for further cases.

In this sense, the panels’ usefulness for the ventilation of environmental matters is restricted to the raising of a dispute by an aggrieved Member of the WTO, instead of by the Member that wishes to enforce or maintain

107 *Ibid.*, Article 12.10.

108 *Ibid.*, Article 12.11.

109 *Ibid.*, Article 22 regulates compensation and suspension of concessions.

110 *United States - Restriction on Imports of Tuna (“Tuna I”)*, 30 ILM 1594 (1991); and *United States - Restriction on Imports of Tuna (“Tuna II”)*, 33 ILM 839 (1994).

111 *Thailand - Restriction on importation of and internal taxes on cigarettes (“Thai-Cigarettes”)*, GATT Doc DS10/R - 37S/200, 7 Nov 1990.

112 See especially, DeSombre & Barkin, *supra* n. 2.

113 *United States - Import prohibition of certain Shrimp and Shrimp Products*, WT/DS58/R, 12 May 1998 (Panel Report), WT/DS58/AB/R, 12 Oct 1998 (Appellate Body Report); *United States - Import prohibition of certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, 15 June 2001 (Panel Report), WT/DS58/AB/RW, 22 Oct 2001 (Appellate Body Report).

environmental provisions in its legal system. However, the fact that the panels have analysed the arguments in favour of environmental measures can be seen as a positive step towards synergy between the WTO and environmental domestic and international legislation.

5.2.1. The Dolphin-Tuna Cases

The Dolphin-Tuna cases¹¹⁴ arose because the United States banned the imports of Mexican tuna, hoping to put pressure on the fishing industry to implement dolphin-safe techniques. The rulings on both panels determined that the trade measure was a prohibition inconsistent with the GATT that targeted the PPMs of imported products, a measure clearly inconsistent with the TBT Agreement commented in section 4.4 of this essay. The importance of these cases is that they were the first in which an environmental consideration arose before the dispute resolution panels.

5.2.2. The Thai-Cigarettes Case

The Thai-Cigarettes ruling¹¹⁵ dealt with the limitation set forth by the Thai government to the import of certain cigarettes, invoking reasons of public health caused by the increasing of tobacco consumption due to the opening of the market. The panel ruled that the exception of article XX did not apply because the Thai government could use alternative policies such as labelling and internal taxes, and thus deemed the restriction to be inconsistent with the GATT as it would favour a domestic product over a foreign one, in contravention of the National Treatment principle.¹¹⁶

5.2.3. The Turtle-Shrimp Panels

The dispute on the Turtle-Shrimp panels¹¹⁷ was similar to the Tuna-Dolphin one, in the sense that the United States banned the import of shrimp caught

114 *Tuna I and Tuna II*, *supra* n. 110.

115 *Thai-Cigarettes*, *supra* n. 111.

116 *GATT 1994*, Article III.

117 *Supra* n. 113.

with fishing methods considered harmful to sea turtles, endangered animals protected by domestic law.¹¹⁸

The interesting aspect on this case is that the Appellate Body applied new framework for the interpretation of article XX, a two-tiered model test stating that for a measure to be in compliance with said article, it must not only come under one of the exceptions listed, but most also satisfy the requirements of the opening clause –the *chapeau*.¹¹⁹

Following the previous rationale, the Panel determined that the prohibition satisfied the three requirements of Article XX(g) of the GATT –namely, that it must target exhaustible natural resources, be related to the conservation of exhaustible natural resources, and be in conjunction with restrictions on domestic production or consumption–.¹²⁰ This was verified by the fact that turtles can be considered an exhaustible natural resource, that the United States was protecting them, and that the same strict regulations were being applied to the American fishing industry.

However, the final recommendation determined that the U.S. did not meet the requirement of the opening clause *chapeau*,¹²¹ because it discriminated between developed and developing countries, when it did not take into account the particular conditions of Malaysia. The U.S. was thus recommended to enter into private negotiations with Malaysia to implement the use of turtle-excluding devices (TEDs), a reasonably cheap option already used by the U.S. shrimp boats.

Commentators agree that the “innovative reading of Article XX reflects a deep recognition of the linkage between the trade and environment domains”,¹²² that opens the door for more cases to be brought and

118 The U.S. wanted the extraterritorial application of an internal regulation that made the use of Turtle-Excluding Devices (TEDs) mandatory in the shrimp catchment industry. It is to be noted that all species of sea turtles are deemed as endangered.

119 Perez, *supra* n. 3, p. 401.

120 See section 4.4 of this essay for a longer comment on Article XX(G).

121 *GATT 1994*, *supra* n. 12, Article XX: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...”.

122 Perez, *supra* n. 3, p. 403. See also DeSombre & Barkin, *supra* n. 2.

conscientiously analysed by panel experts that now take the environment more seriously.¹²³

6. Conclusion

Although it would appear at first glance that the WTO is not an appropriate forum for environmental disputes, in my point of view the DSM is a very powerful and effective system that would be very useful if harnessed to promote environmental protection.

Even though it is admittedly necessary to wait for an environmental provision to be challenged by another WTO member, and bearing in mind that only matters covered by the WTO agreements may be brought before the DSB according to the principle of *ratione materiae* mentioned in the previous chapter,¹²⁴ it is nevertheless useful to be aware that not every environmental regulation implemented domestically is doomed to be rejected by the panels.

Having seen not only the WTO’s “green” provisions, and the development occurred before the panels, it is safe to note that members who wish to enforce environmental legislations within their territories, can do so if they are careful to abide by the strict exceptions set forth by the various treaties under the Marrakesh Agreement.¹²⁵ Also, before panicking by the prospect of one of these regulations being challenged, the parties can consider implementation strategies that seek to create synergies between trade and environment instead of sacrificing one or the other.

In a parallel effort, the CTE Committee created at the Doha Declaration has to be strengthened to have more than a consultative capacity in very specific issues –namely the effect of environmental issues on market access, the TRIPS provisions and the labelling requirements for environmental purposes—¹²⁶ to include, for example, a function as expert witnesses in cases brought before the DSU, on the same lines as GATS related disputes adjudication panel have to be experts on the field of the dispute.¹²⁷

123 *Ibid.*

124 See *supra* n. 104.

125 *Marrakesh Agreement, supra* n. 36.

126 Alam, *supra* n. 10.

127 Charnovitz, Steve. The WTO’s Environmental Progress. *Journal of International Economic Law*, 10(3), pp. 685-9.

When environmental concerns permeate every level of the WTO, countries will be able to use the DSM to solve disputes related to the subject with more freedom. The Appellate Body on the Shrimp-Turtle panel has opened interesting possibilities, and it is about time that other countries start using them to be more confident in the enforcement of domestic environmental regulations.

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