

REVIEWING THE STATE OF SUSTAINABLE ENVIRONMENTAL PROTECTION IN THE WTO: SOME SIGNS OF A SLOW BUT PROGRESSIVE PARADIGM SHIFT

Omphemetse Sibanda
Bluris LLB LLM
Associate Professor
School of Law and Justice
University of South Africa (UNISA)

SUMMARY

There has been a gradual change and paradigm shift in the multilateral trade sphere regarding the links between trade, sustainable development and the environment. Sustainable environment is no longer outside the realm of the WTO. The preamble to the Agreement Establishing the WTO has been expanded to include a specific commitment to sustainable development. The WTO approach to sustainable development seeks to balance economic development and environmental protection concerns. This approach is notable particularly in GATT Article XX, and in several of GATT's associated agreements. The decisions of the WTO dispute resolution bodies also had some ramifications for the trade-environment link debate by stating that trade interests do not exist in clinical isolation to non-trade interests such as the environment. Nevertheless, there are several challenges to the trade-environment interface, which require reforms to achieve a more coherent and balanced approach to multilateral trade policy, environmental protection and sustainable development.

1 INTRODUCTION

The issue of environmental protection in multilateral trade, particularly within the framework of the World Trade Organization (WTO),¹ continues to engender debates and controversies. The controversy is fuelled by the fact that, conceptually, trade law and environmental law are inherently conflicting, and are embodied in two distinct frameworks. Multilateral trade rules and regulation are embodied in the framework of the WTO,² whose *raison d'être*

¹ The World Trade Organization (WTO) was established on 15 April 1994 in Morocco by the Marrakech Agreement Establishing the World Trade Organization (WTO Agreement) of 1994. It came into effect on 1 January 1995. For a historical background and account on the WTO see Griesgraber and Gunter (eds) *World Trade: Toward Fair and Free Trade in the Twenty-First Century* (1997).

² See a 2 of the WTO Agreement.

is the systematic prevention and avoidance of unjustified trade barriers and to ensure “fair and equal competitive conditions for market access, and predictability of access for all traded goods and services”.³ On the other hand, environmental law and policies are largely embodied in Multilateral Environmental Agreements (hereinafter “MEAs”), which define and regulate how countries should structure their economic activities mindful of the virtues of conservation and environmental protection.⁴

Despite the distinctiveness of trade and environment, the global trading community is faced with an ongoing challenge of clarifying or forging the link between trade and the environment.⁵ The 1992 United Nations Conference on Environment and Trade (Rio Summit)⁶ has made it clear that we can no longer consider trade, environment and development policy separately.⁷ Therefore, environmental protection, regulation and sustainable development need to be fully accommodated into the trade design of economic development and growth, and not merely as the aftermath of trade.

This article explores the development of trade-environmental interaction under the WTO, as underscored by sustainable development objectives, which are aimed at “development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”.⁸ Part 2 of this article tracks and outlines the extent to which the WTO accommodates environmental issues. A general discussion on the relationship between trade and MEAs is beyond the scope of this article. The issue is extensively dealt with elsewhere.⁹

³ UNEP/ISSD *Environment and Trade – A Handbook* (2000) 26.

⁴ *Ibid.*

⁵ See UN Conference on the Environment and Development, Agenda 21 *The United Nations Program of Action from Rio* (1992) 22 par 2.19-2.21. It should be noted that Agenda 21 is neither a convention nor a treaty with legal force and effect. It generally falls under the category of “international soft law” since no organization or country is obliged by law to follow its recommendations.

⁶ The United Nations Conference on Environment and Development (Rio Summit) was held on 3-14 June 1992 in Rio de Janeiro, Brazil.

⁷ See Shaw and Cosbey *GATT, The WTO and Sustainable Development – Positioning the Work Program of Trade and Environment* (1995) 9.

⁸ *The World Commission on Environment and Development* (1987) 43. Sustainable development is not definitely explained. There are varying definitions provided. Central to all of the many definitions of “sustainable development” is that natural resources must not be used beyond the capacity of the environment to supply them indefinitely. Put succinctly by Barry “Towards Sustainable Development: Are We on the Right Track?” 1998 *The South African Journal of Environmental Law and Policy* 1 5:

“The concept of ‘sustainable development’ has been designed to encapsulate [the] new relationship between humankind and nature and creates harmony (balance) between economic development and environmental conservation. Sustainable development is not just a call for environmental protection.”

⁹ See generally WWF-CIEL: Discussion Paper *Towards Coherent Environmental and Economic Governance: Legal and Practical Approaches to MEA-WTO Linkages* (21 October 2001) (discussing the relationship between the WTO and Multilateral Environmental Agreements. And offering legal solution for the clarification of the WTO – MEAs link, and suggesting a number of practical measures to be taken to increase coherence between the WTO and MEAs); Von Moltke *Trade and Environment, the Linkages and the Politics* (25 August 1999) (a paper for the Roundtable on Canberra, giving a general discussion on trade-environment relationship); Quick *Trade Measures and Multilateral Environmental Agreements (MEAs)* (26 April 2001) (a presentation at BIAC Meeting of Management Experts on Trade and Environment, Paris, outlining conflicts between MEAs

In Part 3, the contribution made by the Dispute Settlement Body¹⁰ (hereinafter “DSB”) to the trade-environment interface debate is examined. Toward this end, this article gives account of the *Tuna-Dolphins*¹¹ and *Shrimp-Turtles*¹² disputes. Some general and critical appraisal of the WTO dispute settlement system is also made. Part 4 considers some suggested reforms to the WTO pertinent to the trade-environment interface, such as the establishment of the international environment court and the elevation of sustainable development and the precautionary principle (hereinafter “PP”) as interpretive principles in the WTO.

2 WTO AND THE ENVIRONMENT

2.1 Co-existence of trade and environmental interests

Members of GATT 1947 did recognise the need to address trade-related environmental issues. In fact, in November 1971 they established a Group on Environmental Measures and International Trade (EMIT Group), which was given a narrow mandate to examine upon request any specific matters relevant to trade policy aspects of measures to control pollution and protect the human environment especially with regard to the application of the provisions of the GATT. However, the EMIT Group has been dormant for decades.¹³ The EMIT Group dormancy may be attributed to the fact that the mandate of GATT 1947 was almost exclusively within the field of trade policy, leaving development and the environment in the realm of domestic decision making.

and WTO Agreements and possible problems and solutions); and Jackson and Brown (eds) *The Framework for Environment and Trade Disputes in Reconciling Environment and Trade* (2001) 1-37 (detailing disputes between trade and the environment in the WTO framework and discusses potential future conflicts between MEAs and the WTO). See also, Marceau “Conflict of Norm and Conflict of Jurisdiction – The Relationship Between the WTO Agreement and MEAs and Other Treaties” 2001 *Journal of World Trade* (hereinafter “JWT”) 1081; Wolf “Multilateral Environmental Agreements and the GATT: Conflict and Resolution?” 1996 *Environmental Law* 841; and Motall “Multilateral Environment Agreements (MEAs) and WTO Rules – Why the “Burden of Accommodation” Should Shift to MEAs” 2001 *JWT* 1015.

¹⁰ The Dispute Settlement Body (DSB), established under Article 2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) – GATT 1994, Annex 2, is composed of all the WTO Members (General Council). Its function, amongst others, is to administer the WTO dispute settlement regime and rules inscribed in the DSU. It also adopts reports of the Panels and the Appellate Body (AB), which are its dispute resolution tribunals. The latter reviews issues of law covered by the Panel and legal interpretations developed by the Panel. See DSU, A 17.

¹¹ *In United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)* 33 *International Legal Materials* (hereinafter “ILM”) 839 (1994); (*United States – Restrictions on Imports of Tuna* 16 Aug 1992 GATT BISD (39th Supp); (*Tuna-Dolphin I*).

¹² *The United States – Import Prohibition of Certain Shrimp and Shrimp Product (Shrimp-Turtles (AB))* WT/DS58/AB/R 15 Oct 1998; *The United States – Import Prohibition of Certain Shrimp and Shrimp Product (Shrimp-Turtles)* WT/D58R 15 May 1998.

¹³ It was only activated after the February 1991 request by the European Free Trade Association to consider GATT. See GATT Council meeting of 24 April 1991, doc. C/m/247 (22 May 1991). See generally, *Trade and Environment in the GATT/WTO WTO – Background Note by the Secretariat* reproduced as Annex I in Nostrom and Vaughan *WTO – Trade and Environment* (1999) 67-71 (for an account on the EMIT Group).

There has been a gradual change and paradigm shift in the multilateral trade sphere regarding the trade, sustainable development and environment link or interface. Unlike its predecessor, the 1947 General Agreement on Trade and Tariffs (GATT 1947),¹⁴ the WTO seriously considers and acknowledges trade as having both positive and negative impacts on sustainable use of the environment. Consequently, there is a need for a serious consideration of provisions dealing specifically with the environment.¹⁵ The WTO members also acknowledged that there should be no contradiction in safeguarding the multilateral trading system on the one hand, and acting for the protection of the environment and the promotion of sustainable development on the other.¹⁶ The WTO General Council¹⁷ at its meeting held in January 1995 established a permanent Committee on Trade and Environment (CTE).¹⁸ The mandate of the CTE is to look into matters of the link between sustainable development and trade, particularly to consider appropriate ways and rules for the enhancement of mutually supportive and positive interaction between trade and environmental measures/policies.¹⁹

In principle, there is now a wide consensus that trade and the environment must be supportive.²⁰ Trade liberalization cannot continue to put stress on the environment or unfairly restrict WTO members from regulating the protection of the environment and fulfilling their sustainable development commitments, and *vice versa*.

¹⁴ General Agreement on Tariffs and Trade (GATT) of 1947 operated as both an international trade agreement and a *de facto* international trade governing institution. See 55 *UNTS* 1867 for the text of the GATT 1947. For more background information on the formation of the GATT 1947 and how it was transformed to become both an agreement and an administrative body, see Hudec *The GATT Legal System and the World Trade Diplomacy* (1975) 48-45; Keet *Integrating the World Economy* (1998) 8-10; and Jackson *Restructuring of the GATT System* (1990).

¹⁵ According to Esty "Economic Integration and the Environment" in Vig and Axelrod (eds) *The Global Environment: Institution, Law and Policy* (1990) 190, this is an interesting paradigm shift by the WTO considering that the issue of trade and environment was less significant in the original GATT 1947. The latter never mentioned the word environment in that no connection was seen between trade liberalization and the environment. See also Wallace-Bruce "Global Trade and Sustainable Development: two steps forward in the WTO" 2002 *CILSA* 236 238.

¹⁶ The WTO Trade and Environment Decision, MTN/TNC/45 (MIN) (hereinafter "Decision on Trade and the Environment"), adopted 14 April 1994. The Decision on Trade and Environment expressly took note of the Rio Declaration and Agenda 21. However, note that some developing countries in the WTO have been opposed to the introduction of environmental controls as trade barriers in disguise. That was also the essence of the complaints in both the *Tuna-Dolphin* and *Shrimp-Turtle* cases.

¹⁷ The General Council consists of all members of the WTO.

¹⁸ The WTO Committee on Trade and Environment (CTE) is in fact the reconstitution of the GATT 1947 Committee on Trade and Environment, which was established in 1971.

¹⁹ For the broad terms of reference of the CTE related to the trade-environment relationship, see Decision on Trade and Environment above. See also Report of the Committee on Trade and Environment, WT/CTE/1, and 12 Nov 1996; Shaw and Schwartz "Trade and Environment in the WTO" 2002 *JWT* 129 130-132.

²⁰ See a 12(a) of the Rio Declaration. Recently at a summit held in Johannesburg, South Africa, from 26 Aug - 4 Sept 2001 - the World Summit on Sustainable Development (WSSD or Johannesburg Summit) - representatives acknowledged that multilateral trade can play a major role in protecting the environment and achieving sustainable development goals. See *UN: Report of the World Summit on Sustainable Development (WSSD Report)*, A/CONF.199/20, 54 and par 90.

2 2 Sustainable Environment as a WTO Objective

A sustainable environment is no longer outside the realm of the WTO. The WTO has expanded the preamble to the Agreement Establishing the World Trade Organization (WTO Agreement) to include a specific commitment by WTO members to the objective of sustainable development, "seeking both to protect and preserve the environment".²¹ The inclusion of sustainability as one of the objectives of the WTO regime marks an important step towards properly reconciling developmental and environmental goals.²²

The WTO members' commitment to sustainable development as stated in the WTO Agreement's preamble was reaffirmed in the WTO Doha Ministerial Declaration (Doha Declaration).²³ The WTO members at Doha declared their awareness of the challenges they face in a "rapidly changing international environment" and which cannot be addressed through trade-specific measures alone.²⁴ The WTO approach to sustainable development seeks to balance economic development and environmental issues. The insular approach to multilateral trade, which was characterized by trade's paramountcy over other interests, is gradually being discarded. Sustainable development is now also a key dimension of the WTO's broader trade objectives and goals of economic growth and development.²⁵

2 3 Environmentally Related Provisions in GATT and Associated Agreements

GATT and several of its associated agreements contain some provisions on or related to the environment. Notable is the controversial GATT Article XX, which, by way of a general exception, allows countries to derogate from their trade obligations, and implement measures that are "necessary to protect human, animal or plant life or health"²⁶ and measures "relating to the conservation of exhaustible natural resources".²⁷ The Agreement on the

²¹ Wallace-Bruce 2002 *CILSA* 245 is of the view that the inclusion of sustainable development as WTO objective is by far the most "concrete expression" by the WTO to accommodate the environment. The problem with this WTO objective of sustainable development and preservation of the environment is that it is contained in a preamble. It is, therefore, weaker compared to the legally binding provisions that follow it in the WTO Agreement. A preamble is not generally considered as a functional part of an agreement. Interestingly, Grusswamy "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes" 1998 *Minnesota J Global Trade* 287 311 is at pains to assert that environmental protection is neither a GATT objective nor addressed in the GATT/WTO apart from the Article XX exception.

²² The WTO Agreement's preambular statement on sustainable development is not an innovative step by the WTO. The North American Free Trade Agreement (NAFTA) has a preambular statement that contains the objective of sustainable development.

²³ *Doha Ministerial Declaration* (Doha Declaration), WT/MIN (01)/DEC (20 Nov 2001) 3 par 6. The Doha Declaration was adopted on 14 November 2001 at the Fourth WTO Ministerial Conference held in Doha, Qatar.

²⁴ Doha Declaration 3 par 5. It was also agreed to negotiate on the relationship between existing trade rules and specific trade rules as set out in the MEAs.

²⁵ See the *Report of the United Nations Conference on Environment and Development* (Rio Summit Report), UN Publication, Sales No. E.93.I.8 (on the importance of sustainable development considerations in economic activities).

²⁶ GATT, A XX(b).

²⁷ GATT, A XX(g).

Application of Sanitary and Phytosanitary Measures (SPS Agreement)²⁸ and the Technical Barriers to Trade Agreement (TBT Agreement)²⁹ explicitly deal with issues of the environment, public health and safety standards.

Furthermore, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) provided for non-actionable subsidies designed to promote the adaptation of existing facilities to new environmental laws and requirements.³⁰ Other environmentally related provisions are found in the Agreement on Agriculture (AoA) and in the Agreement on Trade-related Aspects of Intellectual Property (TRIPS). The AoA stated that agricultural reform negotiations should take into account non-trade concerns, such as the environment, as included in the WTO Agreement preamble.³¹ TRIPS permits exclusions from patentability some inventions in order to protect plant or animal life or health, or to avoid serious prejudice to the environment.³²

3 CONTRIBUTION OF DISPUTE SETTLEMENT BODIES

3.1 Legal basis of disputes

The WTO dispute settlement system needs to ensure that non-trade concerns, such as the environment, are properly evaluated by its panels and the appellate body. Debates on environmental issues in the GATT/WTO were heightened by two closely related issues, namely the extra-territorial (ET) application of trade law measures aimed at conduct or activities relevant or incidental to natural conservation or the environment, and the application of measures that address process and production methods (PPMs).³³ The ET and PPMs disputes in the GATT/WTO mainly centered on the clarification of the intent and purpose of GATT Article XX,³⁴ and how it can be used to meet environmental concerns.³⁵

GATT Article XX provides in part:

"[General Exceptions]

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*

²⁸ Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) preamble read with A 2.

²⁹ Technical Barriers to Trade Agreement (TBT Agreement), A 5.4.

³⁰ Agreement on Subsidies and Countervailing Measures (SCM Agreement), A 8.2(c).

³¹ Agreement on Agriculture (AoA), A 20.

³² Agreement on Trade-related Aspects of Intellectual Property (TRIPS), A 27.2.

³³ See ISSD/CIEL Working Paper: *The State of Trade Law and Environment Law* (February 2003) 6.

³⁴ For a discussion on the interpretation of GATT, A XX. See, Bowen "The World Trade Organization and its interpretation of the Article XX Exception to the General Agreement on Tariffs and Trade, in the Light of Recent Developments" 2001 *Georgia J Int'l & Comp L* 181.

³⁵ Other relevant provisions are GATT A XI on quantitative restrictions; and GATT A III on non-discrimination.

restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures:

- (a) necessary to protect human, animal or plant life or health;
- (b) necessary to protect public morals;
- (g) relating to the *conservation of exhaustible natural resources* if such measures are made effective in conjunction with restrictions on domestic production and consumption” (my emphasis).

3 1 1 *Tuna-Dolphin dispute*

The *Tuna-Dolphin II* and *I* disputes arose from a complaint by Mexico against the United States (US) marine mammal protection legislation, the Marine Mammal Protection Act (MMPA) of 1972.³⁶ The MMPA provisions empowered the US to ban importation of yellow fin tuna harvested with purse-seine nets³⁷ in the Eastern Tropical Pacific Ocean and certain yellow fin tuna products from Mexico (and intermediary countries handling the tuna) since Mexico had failed to establish a dolphin-protection regime comparable to that of the US. The ban sought to discourage the practice of encircling dolphins with purse-seine nets in order to catch schools of tuna swimming below, thereby drowning dolphins caught in the net.³⁸ The US system imposed a statutory limit on importing countries of not more than 1.25 times higher than the average incidental taking by the US fleet during the same time by their fleets. The objective was to reduce accidental killings to “insignificant levels approaching a zero mortality and serious injury rate”.³⁹

Though accepting the conservation objective of the US fishing policy pursuant to Article XX(g), the Panel in *Tuna-Dolphin II* found the ban to be in violation of the GATT. One of the basic GATT provisions found to be violated by the tuna embargo was the National Treatment⁴⁰ provision, which prohibits discrimination against imported products because of process and production methods. The Panel held that the tuna embargoes/measures were just efforts to “force countries to change their policies with respect to persons

³⁶ Marine Mammal Protection Act (MMPA) of 1972, 16 USC § 1371 (1997). For more on the *Tuna-Dolphin* case see Housman and Zaelke “The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision” 1992 22 *Environmental Law Report* (hereinafter “*Env’t L Rep*”) 268.

³⁷ Purse-seine nets are long nets which encircle fish by closing them in with drawstrings, much like a drawstring purse.

³⁸ US legislation towards dolphin protection includes the International Dolphin Conservation Act of 1992 (16 USC § 1471(a)(1) (1994)) re prohibiting the sale, purchase, shipment or transport in the US of tuna not classified as “dolphin-safe” and the Dolphin Protection Consumer Information Act of 1990 (16 USC § 1385 (1994)) re setting tuna labeling standards and prohibiting the use of the “dolphin-safe” label on tuna caught by dolphin netting.

³⁹ (MMPA § 1371(A)(2).

⁴⁰ The national treatment (NT) clause is a non-discrimination provision that requires that imported goods, foreign service providers, or an item of immaterial property be treated the same as local goods, local service providers, or local items of immaterial property once they have entered the local market. NT is contained in GATT, A 3; GATS, A 17, TRIMS, A 2 and TRIPS, A 3. A similar non-discrimination clause in the WTO agreements is called the most favoured nation (MNF) clause. The MNF is found in GATT, A 1; GATS, A 2 and TRIPS, A 3.

and things within their own jurisdiction".⁴¹ ET goals of the MMPA showed that measures taken by the US were not primarily aimed at either the conservation of natural resources or at rendering domestic restrictions effective within the ambit of Article XX(g).⁴² The Panel further noted a policy argument that such recourse to Article XX(g) would impair access to markets.⁴³ The MMPA measures were not good faith environmental measures by the US.⁴⁴

3.1.2 Shrimp-Turtles dispute

The Appellate Body ruling in *Shrimp-Turtles (AB)*,⁴⁵ reviewing the Panel ruling,⁴⁶ is arguably one of the most important decisions on the trade and environment link debate. Like the *Tuna-Dolphin* cases, *Shrimp-Turtles* disputes involved the US environmental protection regulation, pursuant to section 609 of the Endangered Species Act (ESA) of 1973,⁴⁷ which, without geographical limitations, required commercial shrimp trawlers operating in sea turtle habitats to use turtle excluder devices⁴⁸ (TEDs). The TEDs were required in that they would allow sea turtles to escape from shrimp nets before drowning. Shrimp boats use trawling nets that are dragged behind the

⁴¹ *Tuna-Dolphin II* par 5.24. The Panel effectively shut a door on ET measures and unilateral actions. See Bowen fn 33 above 201. For a contrary view see Palmer "Environment and Trade: Much Ado About Little?" 1993 *JWT* 5 66.

⁴² *Tuna-Dolphin II* par 5.24. For discussions on the MMPA tuna embargoes and extraterritoriality of the measures, see Trachtman "GATT Dispute Settlement Panel" 1992 *American J Int'l L* 142; and Cheyne "Environmental Unilateralism and the WTO/GATT System" 1995 *Georgia J Int'l & Comp Law* 433. See also Yoshida "Yellow Tuna Fishery and Dolphin Conservation: International Free trade Meets Environmentalism" 1998 *Environ's Env't'l L & Pol'y J* 57; Whiteman "Caught in the Net of Environmental Law and Policy: Moral Outrage Versus Cool Analysis in the ETP Tuna-Dolphin Controversy" 1998 6 *University of Baltimore J of Environmental L* 163; and Bartels "Article XX of GATT and the Problem of Extraterritorial Jurisdiction" 2002 *JWT* 353 (looking at the issue of ET from human rights perspective).

⁴³ *Tuna-Dolphin II* par 5.26 and 5.27.

⁴⁴ Fortunately, both the *Tuna-Dolphin II* and *Tuna-Dolphin I* were not adopted. GATT 1947 required a positive consensus to adopt reports. The positive consensus adoption system was fraught of political manipulation and any member could prevent the adoption. Under the WTO system "reverse consensus" is required. All reports are automatically adopted (or "deemed" adopted) unless there is a full consensus of the DSB members to the contrary. See DSU A 16. See generally Reitz "Enforcement of the General Agreement on Tariffs and Trade" 1996 *University of Pennsylvania J Int'l Econ L* 555.

⁴⁵ *The United States – Import Prohibition of Certain Shrimp and Shrimp Product (Shrimp-Turtles (AB))*, WT/DS58/AB/R 15 Oct 1998.

⁴⁶ *The United States – Import Prohibition of Certain Shrimp and Shrimp Product (Shrimp-Turtles)*, WT/D58R 15 May 1998.

⁴⁷ The Endangered Species Act (ESA) of 1973, 16 USC §§ 1531-1544 (1994) (as amended by s 609 of Public Law 101-162 of 1989).

⁴⁸ The Turtle Excluder Device (TEDs) consists of a simple grid of bars with an opening at either the top or the bottom, installed into the neck of a shrimp net. The TEDs entrap small animals like shrimp when they slip through the bars at the bag end of the net. Large animals like turtles are guided to a trap door to escape. When caught, the large animal strikes the grid bars and is ejected through the opening. See, NOAA Technical Memorandum NMFA-SEFSC-36: The Turtle Excluder Device (TED) – a guide to Better Performance <http://www.nmfs.noaa.gov/pro/_res/readingrm/Turtles/fedman.pdf> (accessed 02/04/2003). See also Sam "World Trade Organization Caught in the Middle: Are TEDs the only Way Out?" 1999 29 *Environmental Law* 185 192.

vessel, entangling everything in their path. When entangled, the turtles are unable to surface to breathe and they drown.⁴⁹ ESA banned the importation of shrimps harvested contrary to the regulation or harvested through methods harmful to certain sea turtle species.

The Appellate Body (AB) confirmed the Panel ruling that the US shrimp import ban pursuant to the ESA regulation “undermined” and was a “risk” and clear “threat” to the multilateral trading system. According to the AB, the ban was “unjustifiable” and “arbitrary discrimination,” with “intended and actual coercive effect”⁵⁰ contrary to the good faith requirements of the chapeau of Article XX.⁵¹ The coercive effect of the involved measure came through requiring other WTO members to adopt “not merely comparable but rather essentially the same” measures.⁵² The Appellate Body was concerned that the measure taken by the US did not take into account different conditions of WTO members⁵³ nor did it take into account equally effective measures by these other members.⁵⁴ Furthermore, the US did not negotiate with other members before imposing the ban.⁵⁵ According to the Appellate Body:

“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 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 breach of the treaty rights of the other members and, as well, a violation of a treaty obligation of the member so acting.”⁵⁶

Most importantly, the Appellate Body held that any member claiming any of the exceptions under Article XX is subject to compliance with the requirements of the chapeau,⁵⁷ since “exceptions in paragraphs (a) to (j) of Article are a *limited and conditional* exception from the substantive

⁴⁹ See generally Yaninek “Turtle Excluder Device regulations: Laws Sea Turtles Can Live With” 1995 21 *North Carolina Central LJ* 256; and Kibel “Justice for the Sea Turtle: Marine Conservation and the Court of International Trade” 1996 *UCLA J Env’t L & Pol’y* 57.

⁵⁰ *Shrimp-Turtles (AB)* par 161 read with par 184.

⁵¹ *Shrimp-Turtles (AB)* par 184.

⁵² *Shrimp-Turtles (AB)* par 163.

⁵³ *Shrimp-Turtles (AB)* par 164.

⁵⁴ *Shrimp-Turtles (AB)* par 165.

⁵⁵ *Shrimp-Turtles (AB)* par 166.

⁵⁶ *Shrimp-Turtles (AB)* par 158.

⁵⁷ In *United States – Standards for Reformulated and Conventional Gasoline (Reformulated Gasoline (AB))*, WT/DS2/9 20 May 1996 20-21 (which modified the Panel decision in *United States – Standards for Reformulated and Conventional Gasoline (Reformulated Gasoline)*, WT/DS2/R 29 Jan 1996), its first decision under the WTO system, the Appellate Body held the A XX chapeau statement as a “requirement of *even-handedness* in imposition of restrictions, in the name of conservation”. See Waincymer “Reformulated Gasoline Under reformulated WTO Dispute Settlement Procedure: Putting Pandora out of the Chapeau” 1996 *Mich J of Int’l Law* 141 146 (describing A XX as arising out of the concern that GATT provisions should not act as a “blanket prohibition” on government policy-making in areas such as the environment and a concern that important non-trade areas such as the environment “should not become an umbrella for blanket exemptions from GATT principles”).

obligations contained in the other provisions of the GATT 1994".⁵⁸ The US measure qualified only for provisional Article XX justification pending it being brought into compliance with the AB recommendations.⁵⁹

In arriving at its decision the Appellate Body stressed that its ruling should not be understood as regarding environmental issues as unimportant in the WTO system. In particular, it stated that:

"In reaching these conclusions, we wish to underscore what *we have not* decided in this appeal. *We have not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. *We have not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And *we have not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do"⁶⁰ (my emphasis).

Another important development from the ruling is that maintenance of the WTO's trade objectives is not an absolute task or an interpretive rule when considering GATT/WTO consistency in the use of exceptions. The Appellate Body stated that:

"Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretive rule which can be employed in the appraisal of a given measure under the chapeau of Article XX."⁶¹

The Appellate Body further stated that:

"It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, render a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."⁶²

The above Appellate Body statements should have come as a sigh of relief to those concerned that Article XX could be interpreted to close a door on trade-related environmental measures.⁶³ Irrespective of its going against

⁵⁸ *Shrimp-Turtles (AB)* par 157.

⁵⁹ *Shrimp-Turtles (AB)* par 187(c) and 188. The US measures complained against were later held by the AB, in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to A 21.5 of the DSU By Malaysia*, AB-20014, WTO/AB/ 6 (22 Oct 2001), par 134, as having been seriously and in good faith revised by the US so as to apply "in a manner that no longer constitutes a measure of unjustifiable discrimination or arbitrary discrimination, as identified by the AB in its reports".

⁶⁰ *Shrimp-Turtles (AB)* par 185.

⁶¹ *Shrimp-Turtles (AB)* par 116.

⁶² *Shrimp-Turtles (AB)* par 122.

⁶³ Appleton "Labeling of GMO Products Pursuant to International Trade Rules" 2002 *New York University Environmental LJ* 566 578 argues that the *Shrimp-Turtles* case ruling is evidence of the WTO's "ability to balance social and legal considerations in order to reach a potentially acceptable solution".

the US environmental measure, the *Shrimp-Turtles (AB)* ruling was significant for several reasons. Firstly, it set the unprecedented and very controversial, but short-lived, practice of receiving *amicus curiae* briefs, including unsolicited briefs, from non-governmental organizations (NGOs) and other interested parties.⁶⁴ Secondly, the ruling paved the way for the imposition of extra-territorial environmental protection trade measures upon meeting three requirements, namely: (1) sufficient “nexus” between the state and those extra-territorial resources; (2) the measure be “even-handed” in its treatment of foreign and domestic products (non-discrimination); and (3) the measure came after “serious” negotiation attempts with affected states according to “transparent rules and procedures” that “take into account” competing foreign interests.⁶⁵ Thirdly, the ruling gave credence to arguments that the WTO system skewed towards trade and other commercial interests may no longer be maintained.⁶⁶ Fourthly, the Appellate Body defined “exhaustible natural resources” broadly to include both living and non-living resources, and renewable and non-renewable resources.⁶⁷

4 CHALLENGES AND BARRIERS

The *Tuna-Dolphin* and *Shrimp-Turtles* disputes presented themselves as crunch moments for the GATT/WTO to carve a way forward in making environmental and trade issues mutually supportive. The disputes are also illustrative of the contradictions that may arise between trade rules and environmental protection. The following are points of concern relevant to the trade-environment interface endeavours.

4.1 Lack of proper balancing of interests

The WTO dispute settlement system must adopt a review procedure that evaluates pure trade measures and trade measures designed to protect global resources based on the balance between competing trade and environmental interests. The balancing should not be trade interests biased,

⁶⁴ See *Shrimp-Turtles (AB)* par 102-109. There have been several cases in which the Appellate Body found that it had discretionary authority in terms of A 13 read with A 17.9 of the DSU and A 16.1 of the Working Procedures for Appellate Review (AM Working Procedures) to accept and consider/or solicit *amicus* briefs following *Shrimp-Turtles (AB)*. Eg, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (British Steel), WT/DS138/AB/R, 10 May 2000; and *British Steel, European Communities – Measures Affecting Asbestos-Containing Products* (Asbestos) WT/DS135/8, 12 March 2001. *Asbestos* attracted a lot of criticism from the WTO General Council in that the Appellate Body adopted rules for how it was to accept *amicus* briefs and published these on the WTO website. The General Council felt that the adoption of the rules of *amicus* procedures were beyond the authority of the Appellate Body, and that the issue of non-governmental participation in dispute settlement was supposed to be settled by members as the executive authority of the WTO. For more on *Asbestos* and *amicus curiae* generally, see Zonnekeyn “The Appellate Body’s Communication on *Amicus Curiae* Briefs in the *Asbestos* Case – An Echtermach Procession?” August 2001 IIL Working Paper No 10.

⁶⁵ See *Shrimp-Turtles (AB)* par 121 read with par 122.

⁶⁶ See *Shrimp-Turtles (AB)* par 116.

⁶⁷ See *Shrimp-Turtles (AB)* par 130 and 131.

as is the case with the existing balancing formulation in the GATT.⁶⁸ In the absence of a clear interest balancing approach, the current interpretation and application of the new GATT rules may create a serious hindrance to efforts to find an appropriate link and balance between trade and the environment or to the protection of the environment within the framework of the WTO. Hansen is of the view that the WTO often employs a bifurcated and paradoxical approach to the issue of balancing trade and environment interests. The WTO calls on governments to incorporate a balancing approach in their decision-making while the WTO itself seldom does the same in evaluating environmental trade measures.⁶⁹

Although having adopted a conciliatory and promising approach at review in *Shrimp-Turtles (AB)*, in my view the Appellate Body finds itself wanting in balancing of trade and environmental interests. Firstly, the disputed US shrimp harvest regulation applied to its own comparable fleet operations.⁷⁰ Secondly, the importation ban protected turtle species that are recognized as endangered species by international agreements such as the Convention on International Trade In Endangered Species of Wild Fauna and Flora (CITES).⁷¹ In fact, it is a line of argument used by the US after its defeat in the *Tuna-Dolphin* disputes, and which was accepted by the Appellate Body, that sea turtles are part of the common heritage of mankind that needs global protection and therefore may justify a member state's protectionist measures. Thirdly, the ruling could rattle the principle of sustainable development, a declared objective of the WTO, which recognizes the shared interest by all countries in the protection of the global environment natural and resources (in and outside their national boundaries).⁷²

4 2 Judicial uncertainty and the lack of *stare decisis*

The lack of a system of precedence in the WTO dispute settlement system may undermine the potential for appropriate developments towards trade-environment linkage. It puts into doubt the predictability of the multilateral trading system towards sustainable development and environmental issues. Adopted reports do not create precedent or "subsequent practice" within the

⁶⁸ See Jackson "World Trade Rules and Environmental Policies: Congruence or Conflict?" 1992 *Washington & Lee LR* 1227 (arguing that the present WTO standard of review needs "clarification").

⁶⁹ Hansen "Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment" 1999 *Virginia J of Int'l L* 1016 2021. Hansen bases this view on the *Reformulated Gasoline (AB)* ruling.

⁷⁰ See *Shrimp-Turtles (AB)* par 144.

⁷¹ Other international laws/agreements protecting turtles and other endangered species are: The Convention on Biological Diversity (Biodiversity Convention) of 1993, 31 *ILM* 822 (1993) which requires the enactment of laws protecting endangered and threatened species; the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) of 1983, 19 *ILM* 15 (1983) which prohibits the taking, intentional or incidental, of endangered migratory animals; the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, 21 *ILM* 1261 (1982) which requires protection of the living resources in the exclusive economic zone from over-exploitation endangerment, through proper conservation and management measures; and others.

⁷² See *Shrimp-Turtle (AB)* par 135. The Appellate Body noted that the problem of endangered sea turtles is a global problem.

meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. In 1998, the Panel in *India – Pharmaceutical*⁷³ concluded that “Panels are not [legally] bound by previous decisions of panels or the Appellate Body even if the subject matter is the same”.⁷⁴ They may only be taken into account because they created a “legitimate expectation” among WTO members.⁷⁵

Problems resulting from the lack of a system of precedence are compounded by the often varying and divergent interpretations of the same GATT provisions and/or clauses by the same and different Panels and the Appellate Body, which in turn breed uncertainty. A typical example is the interpretation of Article XX(g) of GATT. The *Tuna-Dolphin I* Panel found the US ban complained of was not excused under the GATT XX (g) exception because it was not “necessary” to achieve the conservation objective. In addition, it suggested the use of less restrictive measures such as “dolphin-safe” labeling on tuna cans.⁷⁶ What the Panel did, by implication, was to read the “necessary” requirement that is contained in the introductory statement into Article XX(g).

The *Tuna-Dolphin I* ruling was rather an interesting interpretation because, unlike clauses (a), (b) and (d) of Article XX, clause (g) does not contain the “necessary” requirement. Article XX(g) only requires that the measure be “relating to” conservation. “Necessary” has been interpreted by GATT/WTO panels in differing ways. For instance, to be necessary a measure must: have been resorted to after exhausting all options reasonably available,⁷⁷ have been among “reasonably available” measures that “entail the least degree of inconsistency with core GATT obligations”.⁷⁸ The words “relating to” in clause XX(g) were in *Tuna-Dolphin II* taken to mean “primarily aimed at”.⁷⁹ “Primarily aimed at” has been explained as analogous to “necessary or essential” by the Panel in *Reformulated Gasoline*.⁸⁰ However, a different conclusion was reached by the Appellate Body in *Reformulated Gasoline (AB)*. It was stated that while “relating to” does mean “primarily aimed at”, “primarily aimed at” does not mean “necessary” or “essential”. According to the Appellate Body, “relating to” should be interpreted as requiring the existence of “substantial relationship” between the measure and the goal of conservation.⁸¹ In this case, the Appellate Body was reluctant to read “necessary” into clause (g).⁸²

⁷³ *India – Patent Protection for Pharmaceutical and Agricultural Chemical products (India – Pharmaceutical)*, WT/DS50/AB/R 19 Dec 1997 (adopted 16 Jan 1998).

⁷⁴ *India – Patent Protection for Pharmaceutical and Agricultural Chemical products (India – Pharmaceutical)*, WT/DS50/AB/R 19 Dec 1997 (adopted 16 Jan 1998) par 7.30.

⁷⁵ See *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R 4 Oct 1996 (adopted 1 Nov 1996) par 13; and *European Economic Community – Restrictions on Imports of Dessert Apples*, BISD 36S/93 (adopted 22 Jun 1989) par 12.1.

⁷⁶ *Tuna-Dolphin I* par 5.28.

⁷⁷ *Ibid.*

⁷⁸ *Tuna-Dolphin II* par 5.35.

⁷⁹ *Tuna-Dolphin II* par 5.21-5.22.

⁸⁰ *Reformulated Gasoline* par 6.40.

⁸¹ *Reformulated Gasoline (AB)* par 19.

⁸² See generally Schoenbaum “International Trade and Protection of the Environment: the Continuing Search for Reconciliation” 1997 *American J Int'l L* 268 277 for a four-step analysis of A XX(g).

5 THE NEED FOR REFORMS

There is a justifiable need for a more coherent and balanced approach to multilateral trade policy, environmental protection and sustainable development. Rule, policy and institutional reforms are crucial. The present framework and operation of the WTO may hinder efforts to find synergies and compatibility between trade and environmental law. Several reform proposals are outlined below.

5.1 Environmental sustainability approach in rule making

From the environmental sustainability point of view, the WTO system needs to incorporate environmental considerations beyond the implicit consideration in GATT Article XX. This can, amongst others, be achieved through the establishment of a trade-related environment modeled on TRIPs. A more specific agreement on the environment will enhance environmental protection in the WTO and ensure that members and signatories may not easily challenge measures adopted in accordance with it.⁸³

5.2 Discarding the CTE and CTD

The International Institute for Sustainable Development (IISD) has berated the CTE and the Commission on Trade and Development (CTD) as products of the WTO's "institutional incest", having the "problem of lack of expertise in assessment [of trade negotiations impacts on environmental concerns]".⁸⁴ The CTE lacks the teeth to carry out its task as a "watchdog" during WTO negotiations, which will remove discussions about trade and environment

⁸³ In a manner consistent with the international principle of interpretation of specific treaties, *lex specialis* principle, A 104 of NAFTA unprecedentedly declares that:

"In the event of any inconsistencies between this agreement and the specific trade obligations set out in [the Convention on International Trade in Endangered Species, the Montreal Protocol, and the Basel Convention] such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement."

In a case of conflict between NAFTA and MEAs regarding an environmental dispute the latter prevails. For an extensive discussion on *lex generalis* see Marceau 2001 *JWT* 1092-1095. Marceau and Trachman "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade – A Map of the WTO Law of Domestic Regulation of Goods" 2002 *JWT* 811 847 point out that WTO adjudication proceeds only on the basis of the general provisions though *lex specialis* has been considered "as a principle of interpretation".

⁸⁴ In *Taking the Doha Language Seriously: The WTO as if Sustainable Development Really Mattered*, an address prepared for the Royal Institute for International Affairs Conference: *Sustainable Development in the New Trade Round: Trade, Investment and Environment after Doha* held at Chatham House, London, 13-14 May 2002. See Dunoff "Institutional Misfits: The GATT, the ICJ & Trade Environment Disputes" 1994 *Mich J Int'l L* 143 (arguing that trade bodies can not properly deal with "linkage" issues due to their lack of experience and expertise). See Runge "A Global Environment Organization (GEO) and the World Trading System" 2001 *JWT* 399 422-423 (arguing that the creation of a world environmental organisation could relieve many problems associated with environmental issue adjudication in the WTO, such as lack of expertise of adjudicators).

from the margins of the WTO to the centre stage.⁸⁵ As a cure, the IISD suggested turning these committees into forums for considering national efforts towards sustainable development rather than being assessors of sustainable development.⁸⁶

The other suggestion is to establish a highly skilled and expert independent advisory group on sustainable development similar to the Joint Public Advisory Group of NAFTA. Also suggested is the creation of a body responsible for ongoing systematic review of the WTO.⁸⁷

5.3 Establish the international environmental court

The establishment of a separate specialist international environmental court is one of the proposed changes that are seen as important in accelerating the trade and environment interface.⁸⁸ The call for the international environmental court was especially born out of the frustration with the way the GATT/WTO deals with environmental issues.⁸⁹ Included in the arguments for the creation of such a court is the need to depoliticise environmental decision-making; the need to have a bench consisting of specialists in international environmental law; and the need to have a court that is accessible to all those seeking environmental justice, be they private individuals or groups. Is there real substance in these arguments for the creation of a specialist environmental court?⁹⁰

Firstly, one will have to admit that the WTO dispute settlement tribunals lack specialists in environmental law. However, the WTO seeks to maintain the dispute settlement system staffed with adjudicators knowledgeable in international law. The Dispute Settlement Understanding (DSU) requires that members of the WTO Panels must be "well-qualified government and/or

⁸⁵ Doha Declaration 21 par 51 states:

"The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, act as a forum to identify and debate developmental and environmental aspects of negotiations, in order to help achieve the objective of sustainable development appropriately reflected."

⁸⁶ *Ibid.*

⁸⁷ Cosbey *Taking the Doha Language Seriously: The WTO as if Sustainable Development Really Matters*. An address prepared for the Royal Institute of International Affairs conference: *Sustainable Development in the New Trade Round: Trade, Investment and Environment after Doha*, Chatham House, London, 13-14 May 2002. The International Institute for Sustainable Development (IISD) suggests a name change of the CTE to Committee of Trade and Sustainable Development (CTSD). *The World Trade Organization and Sustainable Development* (1996) 30. Nevertheless, how will a mere name change contribute to the trade-environment interface?

⁸⁸ See Hey *Reflections on an International Environmental Court* (2000) (exploring the arguments for and against the establishment of an international environmental court).

⁸⁹ Particularly the *Tuna-Dolphin* decisions.

⁹⁰ The suggestions for a separate specialist international environmental court pose more questions than answers. Is this a suggestion to de-link environmental issues from the WTO? Alternatively, is the international environmental court to become a specialist WTO court or a court of deference for the DSB? If the environmental court was to become separate to the WTO DSB structure, are we not risking the proliferation of international courts and tribunals in environmental law that may result in the fragmentation of environmental law? There are currently several tribunals and agencies dealing with environmental disputes/ issues, eg, the Environmental Chamber of the International Court of Justice; Tribunal for the Law of the Sea (ITLOS); and the Permanent Court of Arbitration (PCA).

non-governmental individuals”.⁹¹ Panelists are selected taking into account their experience, independence and diversity of background.⁹²

The DSU further states that the Appellate Body shall “comprise of persons of recognized authority with demonstrable expertise in law, international trade and the subject matter of the WTO agreements generally”.⁹³ Though Appellate Body members – original and current – are renowned law scholars and esteemed individuals, none of their credentials seem to suggest that they possess the necessary expertise to address the resolution of trade disputes affecting environmental law and environmental issues. However, the apparent lack of expertise of the WTO Panelists and Appellate Body members does not disqualify them from adjudicating over environmental issues. In fact, the existing WTO system and rules can well-equip Panelists and Appellate Body members to deal with cases involving environmental issues in the same way they would deal with cases involving other aspects of international law.⁹⁴

The tribunals can, in terms of Article 13 of the DSU, “seek information and technical advice from any individual or body which it deems appropriate” or “from any relevant source”. Recourse to Article 13 of the DSU by the tribunals should dispel any fear of lack of skilled and specialist participants in the dispute resolution processes. *Amicus curiae* information may also be solicited from other relevant people and sources.

5 4 Precautionary decision making

Principle 15 of the Rio Declaration urges states to apply a precautionary approach in protecting the environment. It is now canvassed that the WTO should adopt PP⁹⁵ as a guide to dispute resolution and decision-making.⁹⁶ PP is an ever-evolving decision-making approach, which entails that the lack of scientific proof does not preclude a tribunal or a body from taking measures to prevent threats to the environment.⁹⁷

⁹¹ DSU, A 8.1. A list of possible Panelists maintained by the WTO Secretariat includes lawyers, economists, and academics from different fields, Geneva-based representatives of members and senior trade officials of the members.

⁹² DSU, A 8.2.

⁹³ DSU, A 17.3.

⁹⁴ See Ehlermann “Six Years on the Bench of the World Trade Court – Some Personal Experiences as a Member of the Appellate Body of the WTO” 2002 *JWT* 605 providing insider knowledge and critical comments on the use of experts in the WTO dispute settlement system and other relevant matters.

⁹⁵ The PP originates from the German concept of *Voorgeprinzip* – literally meaning “foresight” or “precaution” principle. See Gullet “Environmental Protection and the ‘Precautionary Principle’: A Response to Scientific Uncertainty in Environmental Management” 1997 *Environmental Protection Law Journal* 52 55; Von Moltke *The Precautionary Principle* (2000).

⁹⁶ *Greenpeace Comments and Annotations on the WTO Doha Ministerial Declaration* (Greenpeace Comments), 2002, WT/MIN (01) 1 Dec 10. See also Fisher “Precaution, Precaution Everywhere: Developing a Common Understanding of the Precautionary Principle in the European Union” 2002 *Maastricht Journal* 7 9.

⁹⁷ For a critical discussion on the PP, its application, meaning and core concepts, see Cameron and Aboucher “The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of Global Environment” 1991 *Boston College International and Comparative Law Review* 1; Fisher “Is the Precautionary Principle Justiciable?” 2001

PP has been at the centre of GATT/WTO disputes and is yet to be generally accepted as part of international trade law. The Appellate Body in *Beef Hormone*⁹⁸ rejected the PP as a justifiable basis upon which health protection measures pursuant to the SPS Agreement might be established. In *casu*, it had to consider the status of PP following the argument by the European Community that PP is now part of the customary international law (or at least a general principle of international law), which should override non-consistent provisions of the SPS Agreement. The Appellate Body acknowledged that PP is reflected in Articles 5.7 and 3.3 of the SPS Agreement, but held that it could not rule that it was part of customary international law despite some arguments that it is.⁹⁹ Important, though, is the recognition by the Appellate Body of the role PP can play as a relevant aid to interpretation and being precautionary in approach to trade-related environmental disputes.¹⁰⁰

5.5 Sustainable development as an interpretive principle for environmental disputes

There are suggestions that sustainable development has been or should now be elevated to an interpretive principle of WTO agreements. Such an elevation would be important in achieving mutual supportiveness between trade and the environment.¹⁰¹ This suggestion follows the following Appellate Body statement in *Shrimp-Turtles (AB)*:

Journal of Environmental L 315; Cameron "The Precautionary Principle" in Sampson and Chambers (eds) *Trade, Environment and the Millennium* (1999); Morris *Rethinking Risk and the Precautionary Principle* (2000); and Adler "More Sorry than Safe: Assessing the Precautionary Principles and Proposals for an International Biosafety Protocol" 2000 *Texas Int'l LJ* 173.

⁹⁸ *EC Measures Concerning Meat and Meat Products* (Beef Hormone), WT/DS26/AB/R and WT/DS48/AB/R, 16 Jan 1998. Other DSB decisions addressing PP are *Australia – Measures Affecting Importation of Salmon*, WT/DS18AB/R, 20 October 1998; and *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, 22 February 1999).

⁹⁹ *Beef Hormones*, par 123 and 144. The International Court of Justice in *Case Concerning the Gabcikovo-Nagymoros Project (Hungary/Slovakia)*, ICJ JUDGEMENT, 25 September 1997, par 111-114 and 140, also rejected an assertion that PP is now *erga omnes* a principle of international law capable of overriding treaty provisions. Note, however, that PP is widely used in national and international environmental law. See *eg*, *UN Framework Convention on Climate Change*, A 33; preamble to the *Convention on Biological Diversity*; *Convention for the Protection of the Marine Environment of the North East Atlantic*, A 2. In support of the view that PP is now part of customary international law Gerhing and Segger *Precaution in World Trade Law: The Precautionary Principle and its Implications for the World Trade Organization* (undated and unpaginated research paper) 9 and fn 27 quote decisions of the Supreme Court of Canada (in *Canada Ltee (Spraytech, Societe d'arrosage (v Hudson (Town))* [2001] SCJ No. 42 ((Quicklaw)) and the Supreme Court of India (in *Vellore Citizens Welfare Forum v Union India* [1996] Supp. 5 SCR 241). For scholarly assertions that PP has now been crystallized into a norm of customary international law, see Weintraub "International Environmental Regulation, and Precautionary Principle: Setting Standards and Defining Terms" 1992 *New York University Environmental LJ* 173 178-180; and McIntyre and Mosedale "The Precautionary Principle as a Norm of Customary International Law" 1997 *J Env't'l L* 221 241.

¹⁰⁰ See Gerhing and Segger 13 and fn 45-46 (discussing the definition of PP and confusion surrounding precaution as a principle and precaution as an approach). See also, Marceau and Trachman 2002 *JWT* 848 (on the precautionary approach ("action") in the WTO).

¹⁰¹ UNEP/ISSD. *Environment and Trade – A Handbook* (2000) 27.

"As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case GATT 1994."¹⁰²

This statement of the Appellate Body was in line with the Vienna Convention on Treaties. The Appellate Body recognises that the WTO Agreement preamble may be consulted for its interpretation.¹⁰³

6 CONCLUSION

The trade-environment interface is one of the most controversial and difficult issues that will continue to haunt the WTO system. Despite some noted concerns about the accommodation of environmental issues in the WTO, there are reasons for one to be optimistic about the prospects of progress on key trade and environment issues, particularly after the *Shrimp-Turtle (AB)* decision.¹⁰⁴ As once stated by the Appellate Body in *Reformulated Gasoline (AB)*, trade can no longer be considered in "clinical isolation" to other disciplines of international law.¹⁰⁵ The WTO can be revamped and fashioned in such a manner that it is also an arbiter on matters that do not fall squarely within the realm of trade policy as envisaged by the original GATT 1947 members.

It is hoped that in time the WTO will ensure that its regime – policy-making and dispute resolution – properly reflects the objectives and virtues of the trade-environment interface and sustainable development. Moreover, the WTO will also have to settle the dust on whether sustainable development has become an interpretive principle of WTO dispute settlement.

¹⁰² *Shrimp-Turtles (AB)* par 153 read with par 129.

¹⁰³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), 8 *ILM* 697 (1980), A 3. Article states that:

"1. 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;

2. The context for the purpose of the *interpretation of a treaty shall comprise*, in addition to the text, ... its *preamble* and annexes."

¹⁰⁴ Wallace-Bruce 2002 *CILSA* 429 is of the view that it was mainly because of the *Shrimp-Turtles* ruling that sustainable development and environmental protection received its best recognition yet in the WTO.

¹⁰⁵ *Reformulated Gasoline (AB)* 18.