Chapter 5
The World Trade Organization Dispute Settlement Mechanism

Stephanie Switzer

Contents

Abstract The relationship between trade and environmental protection is one that has provoked much by way of debate. While there is recognition within WTO legal texts that trade liberalisation can have an impact upon environmental protection, much of the more contentious issues pertaining to the relationship between trade and the environment have been left to the WTO dispute settlement system to pronounce on. This chapter assesses the strengths and weaknesses of the WTO dispute settlement system as a forum for resolving disputes involving environmental matters. This chapter argues that while the jurisprudence of the WTO dispute settlement system has been sensitive to the idea that countries should have sufficient policy space to enact measures for environmental purposes, significant question marks remain over a number of questions such as how non-WTO law should be treated within the WTO dispute settlement system. With an increasing range of environmental threats facing the world, not least the spectre of climate change, change is needed within the WTO to better ensure a mutually supportive relationship between trade and environmental protection.

Keywords Trade and environment · exhaustible natural resources · WTO dispute settlement · renewable energy · Appellate Body

S. Switzer (✉)
Centre for Environmental Law and Governance, University of Strathclyde, Glasgow, Scotland
e-mail: Stephanie.switzer@strath.ac.uk

E. Sobenes et al. (eds.), *The Environment Through the Lens of International Courts and Tribunals*, https://doi.org/10.1007/978-94-6265-507-2_5

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

5.1 Introduction

The origins of the modern trading system, as encompassed in the World Trade Organisation (WTO), lie in the aftermath of the 2nd World War with the formation of the General Agreement on Tariffs and Trade (GATT) in 1947. With 23 original contracting parties, the GATT was to act as a provisional agreement to liberalise tariffs prior to the introduction of a permanent entity for the governance of international trade, the International Trade Organisation (ITO).[1] Due to reluctance on the part of the US Congress to ratify the Havana Charter that would have brought the ITO in effect, the ITO failed to come into being. The result of this was that the 'temporary' GATT developed over time an institutional structure, increased its Membership and oversaw eight rounds of trade negotiations. The last of these rounds was the so-called Uruguay Round. Launched at Punta del Este in 1986, the Uruguay round encompassed negotiations on a wide range of areas relevant to trade, including intellectual property, agriculture and subsidies. Perhaps the most important act of the Uruguay Round, however, was the decision to form a World Trade Organisation, which entered into force as an institution in 1995.[2] The WTO incorporates the original GATT 1947 as part of the GATT 1994,[3] which is one of the so-called 'covered agreements' of the WTO.

The WTO has, as at December 2020, 164 Members and with the accession of Russia in 2012, includes all major trading nations as Members. The foundational source of WTO law is the Marrakesh Agreement Establishing the World Trade Organisation which, while relatively short, notes that all 'agreements and associated legal instruments included in Annex 1, 2 and 3 … are integral parts of this Agreement.'[4]

The central focus of this chapter is the operation of the Dispute Settlement Understanding (DSU), particularly with respect to how the WTO dispute settlement system has dealt with disputes involving environmental matters. The WTO does not have unrestrained free trade as its goal.[5] Indeed, the preamble to the Marrakesh Agreement Establishing the WTO recognises that relations 'in the field of trade and economic endeavour' should allow for 'the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so'.[6] The compromise recognised in this preambular provision—that growth, whether it be economic

[1] For a background on the formation of the GATT, see Trebilcock and Howse 2005, pp. 23–24.

[2] Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, 1867 UNTS 154, entered into force 1 January 1995 (WTO Agreement).

[3] General Agreement on Tariffs and Trade Article XX, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194, as amended by Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, Annex 1A, 1867 UNTS 154, 33 ILM 1125 (hereinafter GATT 1994).

[4] Annex 1A at present contains 13 agreements relevant to trade in goods, including the GATT 1994; Annex 1B contains the General Agreement on Trade in Services while Annex 1C contains the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). Annex 3 contains a Trade Policy Review Mechanism while Annex 2 contains the Dispute Settlement Understanding (DSU).

[5] Hoekman 2016, p. 1087.

[6] WTO Agreement, above n 2, preamble (emphasis added).

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

growth or a rise in living standards—should not be at the expense of the environment or sustainable development more generally, provides important background to understanding the legal compact of the WTO.[7] The placement of the principle of sustainable development in preambular language means that it operates at the level of general principle and is not binding in the way that other provisions of the WTO agreements are.[8] However, this preambular statement is accompanied by numerous provisions within the WTO covered agreements which attempt to strike a balance between a Member's 'right to regulate' for environmental purposes with the other trade related goals of the WTO.[9] There is, however, no specific legal agreement on the relationship between trade and environmental protection and accordingly, important questions of Members' regulatory space to enact environmental measures have—at least in part—been left to the dispute settlement system to deliberate upon.

As we will see, the relationship between trade and environmental protection is one that has provoked much by way of debate, including question marks over the relationship between WTO law and multilateral environmental agreements (MEAs).[10] The extent to which the WTO dispute settlement system can, and moreover should, apply other provisions of international law so as to 'defragment' the public international law system and ensure the mutual supportiveness of WTO law is a further, related issue, that has arisen in the context of the trade and environment relationship.[11] While there is some reference within the WTO legal texts to the fact that trade liberalisation can impact environmental protection, as noted above, much of the more contentious issues pertaining to the relationship between trade and the environment have largely been left—arguably purposely[12]—to the dispute settlement system to pronounce on.

Given the above context, the general aim of this chapter is to assess the strengths and weaknesses of the WTO dispute settlement system as a forum for resolving disputes involving environmental matters. The next section (Sect. 5.2) provides an overview of the WTO and its dispute settlement system. This is followed (Sect. 5.3) by a discussion on certain of the more significant disputes that the WTO dispute settlement system has heard involving trade and the environment. After this (Sect. 5.4), we will assess strengths and weaknesses of the WTO dispute settlement system as a forum for resolving disputes involving environmental matters. In line with other scholars, it will be argued that the WTO dispute settlement system, and in particular the Appellate Body, have been sensitive to the concerns of certain constituencies that the WTO should provide space for countries to enact measures for environmental purposes with an impact upon trade. However, despite such sensitivity, question

[7] Trachtman 2017, pp. 273–274.

[8] Lydgate 2012, p. 624.

[9] Trachtman 2017, p. 274.

[10] Kulovesi 2016, p. 49.

[11] Kulovesi 2016.

[12] Indeed, from the early days of the GATT, certain commentators placed significant prominence on dispute settlement and were 'intrigued' by using it as, 'a format for studying environment and trade issues' see discussion in Brown Weiss 2016, p. 367.

marks remain over a number of questions such as to how international law agreements emanating from outside the WTO, such as MEAs, should be treated within the dispute settlement system. With an increasing range of environmental threats facing the world, not least the spectre of climate change, change is needed within the WTO to better ensure a mutually supportive relationship between trade and environmental protection.

5.2 An Overview of the WTO and Its Dispute Settlement System

5.2.1 Operation of the Dispute Settlement System

At the date of writing,[13] Members have lodged almost 600 disputes before the WTO dispute settlement body, with over 350 formal rulings issued.[14] Compared to certain other international adjudicatory systems such as ITLOS and the ICJ, Members have made extensive use of the WTO dispute settlement system.[15] This section will provide an overview of the operation of the dispute settlement system, with consideration given, *inter alia*, to its jurisdiction, evidentiary requirements, the burden of proof and issues of applicable law. Where possible, commentary will be entered into on how these issues interface with the relationship between trade and environmental protection though a more detailed treatment of such issues will be provided in the following Section (Sect. 5.3).

As noted above, the WTO Understanding on Rules and Procedures for the Settlement of Disputes—known as the WTO Dispute Settlement Understanding (DSU)—sets out the governance framework for dispute settlement under the WTO.[16] The mandate of the WTO dispute settlement system is set out in Article 3.2 DSU as being: 'security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law.'

However, while the mandate granted to the WTO dispute settlement at first sight appears quite broad, the third sentence of Article 3.2 notes the somewhat 'circumscribed'[17] nature of this mandate. The third sentence to Article 3.2 directs that, '(r)ecommendations and rulings of the Dispute Settlement Body (DSB) cannot add to or diminish the rights and obligations provided in the covered agreements.' In

[13] February 2021.

[14] WTO Dispute Settlement Body.

[15] Van Den Boscche and Zdouc 2017, p. 165.

[16] WTO, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) (DSU).

[17] Van Den Boscche and Zdouc 2017, p. 190.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

essence, the rulings of the WTO dispute settlement system cannot 'make law.' Accordingly, as noted by Devaney, the mandate of the dispute settlement system is quite constrained when compared with that of the ICJ, with the latter also tasked with the progressive development of international law.[18]

The WTO DSB administers the dispute settlement system. The DSB comprises representatives of all WTO Members. It is essentially the WTO General Council sitting in another guise.[19] The dispute settlement process commences with a request for consultations by the complaining Member. In terms of locus standi, only WTO Members may bring a dispute—and indeed, be the subject of a complaint—before the dispute settlement system. Interested Members with a substantial interest in the dispute[20] may act as 'third parties' to the dispute. The DSU recognises the right to third parties to be heard and to make submissions.[21] Only Members may be third parties.

The rules on standing are significant from an environmental perspective; environmental interest groups and indeed international environmental organisations do not have *locus standi* to bring a dispute to the WTO. They may submit *amicus curiae* briefs—discussed below—but, as will be argued, this process is quite limited. It does not, for example, guarantee a right to be heard or a right of access to the dispute settlement system by non-WTO parties.

5.2.1.1 The Consultations and the Panel Stage

As noted above, all disputes commence with a request for consultations by the complaining Member. The consultations stage has proven quite successful in helping to resolve disputes,[22] though in the event that the parties are unable to resolve the matter through consultations within 60 days of the commencement of consultations,[23] the complaining party may seek formal adjudication before a dispute settlement Panel. The complainant must provide a written, 'summary of the legal basis of the complaint sufficient to present the problem clearly.'[24]

The dispute settlement Panel is an *ad hoc*, as opposed to standing body,[25] and usually consists of three panellists though there is provision for a five Member Panel if the parties to the dispute so agree.[26] A single Panel—as opposed to multiple

[18] Devaney 2016, p. 129.
[19] WTO Agreement, above n 2, Article IV.3.
[20] DSU, above n 16, Articles 4.11, 10 17.4.
[21] Ibid., Article 10.
[22] Davey 2014, p. 688.
[23] DSU, above n 16, Article on the procedure for consultations.
[24] Ibid., Article 6.2.
[25] Ibid., Article 8 on the composition of Panels.
[26] Ibid., Article 8(5).

Panels—may be established 'whenever feasible,'[27] where two or more Members request the establishment of a Panel in relation to the same matter.

The function of the Panel is set down in Article 11 DSU as being to make an

> objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

The usual 'terms of reference' of a Panel require it to examine, '*in light of the relevant provisions of … the covered agreements* (emphasis added),' the claims set out in request by the complaining Member to establish a Panel.[28] What this means in practical terms is that a complainant cannot make new claims after the establishment of the Panel.[29] While the parties involved may agree to special terms of reference, such agreement is rare.[30] The reference to the 'covered agreements' of the WTO in Article 11 DSU is notable in that it is clear the focus of the WTO dispute settlement system is very much on WTO law, rather than on clarifying the relationship between WTO law and other areas of international law such as the relationship between WTO law and MEAs. While issues of jurisdiction and applicable law are discussed further below, the circumscribed nature of the Panel's remit, as set down in Article 11 DSU, is to be noted at this juncture.

The DSU sets out quite detailed provisions in respect of the timelines to govern dispute settlement proceedings. Panel proceedings are tasked, as a 'general rule' to take no more six months—three in urgent cases such as those involving perishable goods—and should '(i) no case exceed nine months.'[31] While the emphasis in the DSU upon strict timescales can be contrasted with the ICJ and ITLOS,[32] in practice, and in part due to the increased complexity of disputes being brought before the WTO dispute settlement system, these timeframes are oftentimes exceeded.[33] Notably, there is no fast-track procedure for disputes involving environmental concerns though to the extent a dispute involving environmental aspects would be considered as 'urgent', the parties could avail of the more compressed timeframe of three months for Panel proceedings set out in the DSU.[34]

Once the parties have had an opportunity to make submissions and the Panel has deliberated on the issues before it, the Panel will issue its report to the parties involved in the dispute. The report is then circulated to the wider Membership before publication on the WTO website.[35] Panel reports are not binding until formal adoption

[27] Ibid., Article 9(1).

[28] Ibid., Article 7.1.

[29] Van Den Boscche and Zdouc 2017, p. 220.

[30] Ibid., p. 221.

[31] DSU, above n 16, Articles 12.8 to 12.9.

[32] Subedi 2010, p. 180.

[33] Davey 2014, p. 691.

[34] See e.g. DSU, above n 16, Article 12.8.

[35] Van Den Boscche and Zdouc 2017, pp. 277–278.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

by the DSB. The DSU mandates that adoption occurs within 60 days of the publication unless there is either a consensus against its adoption (the so-called 'negative consensus' or 'reverse consensus' rule) or the complaining party or the defending Member lodges an appeal.[36] In other words, in the absence of an appeal, adoption of Panel reports is quasi-automatic. This is a significant change from the practice of dispute settlement under the precursor to the WTO, the GATT, in respect of which panel reports were only adopted if all parties—including the losing party—agreed to adoption. The now infamous *Tuna—Dolphin* GATT panel reports—discussed below in Sect. 5.3.1.1—which are considered a nadir in the relationship between trade and environmental, were in fact not adopted, a situation which is highly unlikely to arise nowadays given the negative consensus rule. Therefore a ruling which was fundamentally at odds with environmental norms—while very unlikely to arise in practice—would nevertheless almost certainly be adopted due to the reverse consensus rule.

5.2.1.2 The Appellate Body Stage

The WTO Appellate Body hears appeals from the Panel stage. In contrast to the Panel, the Appellate Body is a standing body. As noted by Van Den Bossche and Zdouc, the WTO dispute settlement system is one of only a handful in the international system to make provision for appellate review.[37] While establishment of an Appellate Body within the WTO was something of an afterthought,[38] in its early days, it was praised as the 'jewel in the crown' of the trading system.[39] Around 70% of Panel reports have been appealed.[40]

The DSU directs that the Appellate Body shall have seven Members, each with four-year terms, renewable once.[41] Divisions of three Appellate Body Members hear appeals. Only the parties—not including third parties—to a dispute can appeal a Panel report[42] and appeals can only be lodged on the basis of 'issues of law covered in the Panel report and legal interpretations developed by the Panel.'[43] Members cannot appeal findings of fact and there is no remand authority for the Appellate Body to refer issues back to the Panel for further assessment.[44] In terms of its mandate, the Appellate Body 'may uphold, modify or reverse the legal findings and conclusions of the Panel.'[45]

[36] DSU, above n 16, Article 16.4.
[37] Van Den Boscche and Zdouc 2017.
[38] Van den Boscche 2005.
[39] Creamer 2019.
[40] Bacchus and Lester 2020, p. 186.
[41] DSU, above n 16, Article 17.2.
[42] Ibid., 17.4.
[43] Ibid., 17.6.
[44] See discussion in Pierola 2005, pp. 193–216.
[45] DSU, above n 16, Article 17.13.

All WTO Members are required to agree—or at least not disagree—on the appointment of individuals to the Appellate Body. Since 2016, the US has blocked the appointment of new Members as well as the reappointment of existing Appellate Body Members with the result that since December 2019, the Appellate Body has ceased to have enough Members to function.[46] While the causes of the so-called Appellate Body crisis are outside the scope of this chapter,[47] the lack of a functioning Appellate Body has (at least) two practical consequences for the operation of the WTO. The first consequence relates to the adoption of Panel reports; while WTO Members are still utilising the dispute settlement process,[48] the Dispute Settlement Body cannot adopt if an appeal is lodged.[49] There is nothing to prevent the losing side from appealing 'into the void',[50] thereby effectively blocking the adoption of the Panel report and rendering it devoid of legal force.

Numerous proposals have been made to avoid appeals being lodged into the 'void.' These include that at the outset of a dispute, parties agree not to appeal.[51] Certain Members have also moved forward to develop and alternative arbitration forum as a 'stop-gap'[52] alternative to the Appellate Body through the creation of a multi-party interim appeal arbitration arrangement—the MPIA.[53] Article 25(1) DSU provides the legal authority for the creation of the MPIA. This provision offers the possibility, 'for expeditious arbitration within the WTO as an alternative means of dispute settlement which can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties' with the procedures to be followed under arbitration required to be agreed by the parties involved.[54]

As at December 2020, the EU and 22 other Members are participants to the MPIA.[55] The participating parties to the MPIA have agreed, 'to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure … so long as the Appellate Body is not able to hear appeals of Panel reports in disputes among

[46] Three Appellate Body members are required to hear appeals; Article 17.1 DSU. By December 2019, the number of Appellate Body members had reduced to one. For discussion, see Hoekman and Mavroidis 2020b.

[47] And indeed, these causes have been well documented elsewhere; see, for example, Hoekman and Mavroidis 2020a.

[48] At the date of writing, the most recent request for consultations was November 2020; see WTO 2020b.

[49] In full, DSU, above n 16, Article 16.4, '(w)ithin 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report'.

[50] As, for example, has already occurred; see WTO, *United States—Countervailing Measures on Softwood Lumber from Canada—Notification of an appeal by the United States under article 16 of the Understanding on Rules and Procedures governing the Settlement of Disputes*, Panel Report, 29 September 2020, WT/DS533/5.

[51] WTO 2020a.

[52] European Commission 2020a.

[53] WTO 2020c.

[54] DSU, above n 16, Article 25(2).

[55] European Commission 2020b.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

them due to an insufficient number of Appellate Body Members.'[56] The parties involved have already appointed ten arbitrators under the MPIA,[57] which largely mirrors WTO processes with, for example, three arbitrators appointed to arbitrations. While the creation of the MPIA as a stopgap is outside the scope of this chapter, it is nonetheless important to note its significance to the multilateral trade system. If it ends up hearing 'appeals' on matters pertaining to trade and environment, much critical attention will be paid to the resulting jurisprudence.

5.2.1.3 Jurisdiction

Leaving aside the issue of the Appellate Body crisis for now, and as summarised by Van Den Boscche and Zdouc, the jurisdiction of the WTO dispute settlement system is compulsory, exclusive and contentious.[58] A compulsory aspect of WTO Membership is acceptance of the jurisdiction of the dispute settlement system as part of the 'package deal' of WTO Membership.[59] The lack of exceptions to such compulsory jurisdiction has led Subedi, for example, to remark that the dispute settlement system of the WTO is the 'only truly compulsory system currently extant in the international field.'[60] Jurisdiction is exclusive in the sense that Members *may only* seek redress of violations of WTO obligations or other nullification or impairments of benefits through recourse to the WTO dispute settlement.[61] Finally, the WTO dispute settlement system only operates when there is an actual 'live' dispute between Members; in contrast with the ICJ, it does not enjoy any form of advisory jurisdiction. Accordingly, in the absence of an actual dispute, there is no scope, for example, for a Member to seek an advisory opinion on the WTO legality of a proposed of trade-impacting environmental measure. Arguably, this may have a chilling effect on the willingness of Members to utilise trade measures to pursue environmental goals.

[56] WTO 2020d, para 1.

[57] WTO 2020e.

[58] Van Den Boscche and Zdouc 2017, pp. 168–169.

[59] Ibid. This may be compared with the ICJ which under Article 36 of the ICJ Statute cannot force States to accept jurisdiction; see e.g. ICJ, *and East Timor (Portugal v Australia)*, Judgment, 30 June 1995, ICJ Reports 1995, p. 90.

[60] Subedi 2010, p. 179. Subedi does, of course, recognise that dispute settlement under the 1982 UNCLOS does have compulsory aspects, but argues that, 'both in terms of the number of cases referred to the International Tribunal for the Law of the Sea (ITLOS) and other arbitral tribunals and the significant exceptions to compulsory jurisdiction' mean that the WTO is the 'only truly' compulsory system internationally.

[61] Van Den Boscche and Zdouc 2017, p169, drawing on Article 23.1 DSU which notes that, 'When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreement or an impairment of any objectives of the covered agreements, they *shall* have recourse to, and abide by, the rules and procedures of this Understanding' (emphasis added).

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

5.2.1.4 Mutually Acceptable Solutions

Formal adjudicatory proceedings *are not* the optimal outcome sought by the DSU. Rather, as noted in Article 3.7 DSU, 'A solution *mutually acceptable* to the parties to a dispute and consistent with the covered agreements is clearly preferred (emphasis added).' Other mechanisms to resolve a dispute are available under the DSU, including good offices, conciliation and mediation.[62] Such processes are voluntary under the DSU,[63] and unlike under the Law of the Sea Convention,[64] and indeed many other treaties, the WTO DSU contains no formalised provisions on conciliation.[65] The only relevant mention(s) of conciliation and mediation are made in Article 5(6); that the Director General of the WTO may offer, in an *ex officio* capacity, good offices, conciliation or mediation and the provision in Article 24(2) that, '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.' Such processes are 'almost never used.'[66] In addition, while in principle, the parties to a dispute may request the establishment of a working party—and this certainly occurred in the early days of the GATT 1947—there is no formal mention made within the DSU of either working parties or processes for their establishment.[67] Recourse to arbitration under Article 25 DSU is also possible though Members have seldom used this provision.[68] The creation of the MPIA will almost certainly change this.

Finally, other mechanisms such as the raising of 'specific trade concerns' under the WTO Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Committees also provide Members with various fora to air and indeed settle disputes informally in these areas of WTO law.[69] More generally, WTO committee work may allow for grievances to be aired and settled before they reach the more formal stage of dispute settlement proceedings governed by the DSU.[70] While the more informal role played by WTO committees will not be considered further in this piece, it is important to underscore the importance of this largely 'hidden'[71] aspect of WTO governance in helping to resolve trade conflicts. In line with the practice of others commentators in the arena of trade and environmental protection,[72] this

[62] DSU, above n 16, Article 5(1).

[63] Ibid.

[64] Tanaka 2018, p. 288.

[65] Ibid. Note that certain commentators such as Georges Abi-Saab would argue that the GATT 1947 dispute settlement system was akin to a conciliation system; see Abi-Saab 2005, p. 8.

[66] Busch and Pelc 2014, p. 408.

[67] Merrills 2005, p. 217.

[68] *See* WTO, *United States—Section 110(5) of the US Copyright Act—Recourse to Arbitration under Article 25 of the DSU*, Award of the Arbitrators, 9 November 2001, WT/DS160/ARB25.

[69] WTO 2018; Horn et al 2013.

[70] WTO 2018; Horn et al. 2013.

[71] Lang and Scott 2009.

[72] See Cosbey and Mavroidis 2014b, p. 289.

chapter therefore does not seek to denigrate the utility and moreover effectiveness of specific trade concerns though due to the confines of space, the focus of this chapter is on disputes on trade and environment protection heard before the dispute settlement system. Further attention is given to the role of the Committee on Trade and Environment below (Sect. 5.3.1).

5.2.1.5 Applicable Law

In terms of applicable law, Article 7 DSU sets out the 'terms of reference' for a Panel and instructs it to, 'address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.' At least two competing interpretations exist as to the scope of this provision; that a Panel may *only* apply the WTO covered agreements when arbitrating on a dispute *or* that it lays out a minimum requirement and does not preclude reference to non-WTO rules by a Panel.[73] Pauwelyn, who espouses the latter view, notes that the practice of the Panel and Appellate Body has been such that they have not limited themselves to considering only WTO law in their deliberations.[74] Accordingly, both Panel and Appellate Body reports have at times referred to the general principles of international law,[75] customary international law[76] as well as non-WTO law Treaties.[77] As we shall see, references to such non-WTO sources have included Convention on International Trade of Endangered Species of Wild Flora and Fauna (CITES).[78]

As noted above, Article 3.2 DSU directs that the underpinning purpose of the dispute settlement system is the settlement of disputes 'in accordance with customary rules of interpretation of public international law.'[79] By extension, the Appellate Body has noted that WTO law, 'is not to be read in clinical isolation from public international law.'[80] The Appellate Body has recognised that Articles 31 and 32 of the Vienna Convention of the Law of Treaties (VCLT) constitute the customary rules of interpretation of public international law. Despite this recognition, and the inclusion therein of the principle of systemic integration under VCLT Article 31(3)(c) which states that, '(t)here shall be taken into account, together with the context: (a)ny relevant rules of international law applicable in the relations between the parties', there is still a lack of certainty as to how non-WTO norms can be taken into account

[73] See discussion in Pauwelyn 2008, p. 7.

[74] See generally Pauwelyn 2008, p. 7.

[75] See discussion in Cameron and Gray 2001, pp. 248–298.

[76] See discussion in Cameron and Gray 2001, pp. 248–298.

[77] See generally Pauwelyn 2008, pp. 7–8.

[78] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243, entered into force 1 July 1975 (CITES).

[79] See discussion in Pauwelyn 2008, pp. 7–8.

[80] WTO, *United States—Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, 29 April 1996, WT/DS2/AB/R, p. 17 (*US—Gasoline*).

in WTO jurisprudence.[81] While numerous commentators[82] have called for greater recourse under the dispute settlement system to the principle of systemic integration, the Appellate Body has been rather circumspect in its approach to this issue, clarifying that, 'a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.'[83] Indeed, as we will see in our discussion of the dispute of *US—Shrimp*, there is a lack of clarity as to when, and more significantly, how, a Panel or Appellate Body will consider and apply relevant provisions of MEAs.[84]

While non-WTO law may be referred to and indeed used as an aid to interpretation within the WTO dispute settlement system, it is unlikely that other sources of international law *will* be held to have modified existing WTO rights and obligations, or that a party to a non-WTO Agreement can invoke its terms as a defence to a violation of WTO rules.[85] Accordingly, in *Peru – Agricultural Products*, the Appellate Body held that other treaties do not modify WTO obligations pursuant to Article 41 of the VCLT. Article 41 provides for *inter se* agreements to modify multilateral treaties between certain of the parties only. The non-application of Article 41 VCLT was because 'the WTO Agreements contain specific provisions addressing amendments, waivers, or exceptions … which prevail over Article 41.'[86] While the dispute concerned a regional trade agreement between Peru and Guatemala that Peru claimed allowed it to maintain non-WTO compliant agricultural duties, it is likely the case that MEAs would not in general be considered capable under the WTO dispute settlement system of modifying the rights and obligations of Members under WTO law.[87]

Finally, the dispute settlement system may hear disputes brought, 'pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the [DSU].'[88] In other words, the *jurisdiction* of the Panel and the Appellate Body is such that it may only hear claims related to one or more of the WTO covered agreements but jurisdictional concerns are separate from questions of the *applicable law* that a Panel or the Appellate Body may consider in a particular dispute.[89]

[81] Kulovesi 2016, p. 57.

[82] See e.g. Kulovesi 2016.

[83] WTO, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, Appellate Body Report, 18 May 2011, WT/DS316/AB/R, paras 844–845.

[84] Kulovesi 2016, p. 57.

[85] C.f. Pauwelyn 2003, pp. 473–491.

[86] WTO, *Peru—Additional Duty on Imports of Certain Agricultural Products*, Appellate Body Report, 31 July 2015, WT/DS457/AB/R, para 5.112; cited and discussed in Trachtman 2017, p. 302.

[87] See Trachtman 2017, pp. 302–303.

[88] DSU, above n 16, Article 1.

[89] See generally Pauwelyn 2008, p. 7.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

5.2.1.6 Burden of Proof

The DSU is silent on a number of important issues, including the burden of proof applicable under the dispute settlement system.[90] However, in *US—Wool Shirts and Blouses,* the Appellate Body noted that, 'various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether as a claimant or the respondent, is responsible for providing proof thereof.'[91] It is therefore for the complaining party to establish a prima facie case in relation to its claims. Once the complaining party has met the requirement, it is for the defending party to rebut the prima facie case.[92] In respect of the invocation of an exception, the party invoking that particular exception owes the burden of proof. As Grando notes, however, both the Appellate Body and Panel have struggled with defining what is and is not an exception[93] though GATT Article XX, which as we will see is a central provision in the relationship between trade and the environment is firmly recognised as an affirmative exception.[94]

5.2.1.7 The Standard of Review, Fact-finding and Evidence

In terms of the standard of review to be employed, Article 11 DSU requires the Panel to, 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'.[95] While there is no provision within the DSU in respect of rules of evidence, the Panel is empowered under Article 13 DSU to 'seek information and technical advice from any individual or body which it deems appropriate … (and to) seek information from any relevant source and ... consult experts to obtain their opinion on certain aspects of the matter.' While the latter provision may seem to be quite far reaching,[96] and indeed, potentially beneficial in cases involving environmental protection, Panels have not fully utilised their broad

[90] Though a small number of provisions exist within individual WTO covered agreements directly allocating the burden of proof, e.g. Article 10.3 of the Agreement on Agriculture; see Grando 2010, p. 152.

[91] WTO, *US-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, 25 April 1997, WT/DS33/AB/R, 335 (*US—Wool Shirts and Blouses*).

[92] WTO, *United States—Sections 301–310 of the Trade Act of 1974,* Panel Report, 25 January 2000, WT/DS152/R, para 7.14. For an excellent discussion on fact-finding and the burden of proof under WTO law, see Grando 2010.

[93] Grando 2010, pp. 153–154.

[94] WTO, *US—Wool Shirts and Blouses*, above n 91, para 337.

[95] Note that Article 17.6 of the WTO Anti-Dumping Agreement sets out a special standard of review to be applied to anti-dumping investigations; this shall not be considered in this chapter.

[96] An example of a panel consulting experts pursuant to its authority under Article 13 DSU can be found in WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, 15 May 1998, WT/DS58/R, paras 5.1 et seq. (*US—Shrimp (Panel Report)*).

fact-finding authority and instead have relied largely on evidence submitted to them by the parties.[97]

The Appellate Body has directed that Members are 'under a duty and an obligation to "respond promptly and fully" to requests made by Panels for information under Article 13.1 of the DSU'[98] and Panels may draw inferences from facts, 'including the fact that (a Member) had refused to provide information sought by the Panel.'[99] The Appellate Body's mandate is, 'limited to issues of law covered in the Panel report and legal interpretations developed by the Panel', and so it does not have a fact finding role as such, instead relying on evidence submitted to the Panel.[100] As noted above, the Appellate Body does not have remand authority to remand a dispute back to a Panel.

Of particular note is that both the Panel and the Appellate Body have the authority to consider *amicus curiae* briefs. This power is not explicitly set out in the DSU. Instead, this authority derives from, *inter alia*, a broad reading of Article 13 DSU (the right of a Panel to seek information)[101] and Article 17.9 DSU (the right of the Appellate Body to draw up its own procedures for review).[102] While certain commentators have noted the potential of *amicus curiae* briefs to open up, 'a green cosmopolitan public sphere that seeks more reflexive modernization and facilitates horizontal forms of regime accountability',[103] in practice both the Panel and the Appellate Body have been relatively circumspect in considering briefs received. As argued by Squatrito, briefs considered primarily are those endorsed by one of the disputing Members as well as those that cohere with the previous findings of the dispute settlement system.[104] Accordingly, there are limits to which *amicus curiae* briefs will be accepted and considered, thereby limiting the potential of environmental groups and organisations to influence disputes involving environmental concerns.

5.2.1.8 Precedent

There is no formal system of precedent within the WTO dispute settlement system and the findings of both the Appellate and the Panel are not binding, 'except with

[97] Devaney 2016, p. 132 and 140–141. Note that there are also special expert bodies established under a number of the covered agreements; see discussion in Devaney 2016, pp. 138 to 139.

[98] WTO, *Canada—Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report 2 August 1999, WT/DS70/AB/R, para 187 (*Canada—Aircraft*).

[99] Ibid., para 203.

[100] Devaney 2016, p. 141.

[101] See WTO, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, 12 October 1998, WTO/DS58/AB/R, para 108 (*US—Shrimp (Appellate Body Report)*).

[102] WTO, *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Appellate Body Report, 10 May 2000, WTO/DS138/AB/R, para 39.

[103] Eckersley 2007.

[104] See generally Squatitro 2018.

respect to resolving the particular dispute between the parties to that dispute.'[105] It is also to be remembered that Article 3.2 DSU is explicit in its direction that, '(r)ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements' of the WTO. However, at the same time, the Appellate Body has held that, 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.'[106] By extension, the Appellate Body has directed that in respect of Panel proceedings, 'to rely on the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from Panels, especially where the issues are the same'.[107]

5.2.1.9 Enforcement

Unlike in certain other systems of international dispute settlement, provisional measures are not available under the WTO DSU.[108] This is particularly relevant for environmental disputes since in other international fora, provisional measures do play an important role in the domain of environmental protection.[109]

Following a dispute, and assuming a Panel or the Appellate Body finds inconsistency with a provision of a covered agreement, 'it shall recommend that the Member concerned bring the measure into conformity with that agreement.'[110] Unless either side lodges an appeal, and as noted above, the DSB automatically adopt reports of the Panel unless there is a consensus among the Parties against adoption.[111] Similarly, in respect of the adoption of reports of the Appellate Body, Article 17.14 DSU sets out that,

> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.

As noted above, however, the Appellate Body is no longer functional, raising concerns that the losing side to a Panel report could lodge an appeal effectively into

[105] WTO, *Japan—Taxes on Alcoholic Beverages*, Appellate Body Report, 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 14, p. 97 at 107–108.

[106] WTO, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico,* Appellate Body Report, 30 April 2008, WT/DS344/AB/R, para 160, (*US—Stainless Steel (Mexico)*).

[107] WTO, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina—Recourse to Article21.5 of the DSU by Argentina*, Appellate Body Report, 17 December 2004, WT/DS268/AB/RW, para 188.

[108] For a discussion on provisional measures within international legal processes more generally, see Miles 2017.

[109] Miles 2017.

[110] Article 19(1) DSU.

[111] DSU, above n 16, Article 16.4.

the 'void', thereby preventing the report's adoption.[112] Under the MPIA, the DSB is notified of arbitrations but does not formally adopt them.[113]

5.2.1.10 Surveillance, Compensation and Suspension of Concessions

Leaving aside for now the legal and practical issues associated with the current Appellate Body crisis, under the 'normal' functioning of the dispute settlement system, the DSB performs a surveillance function in respect of the implementation of Panel and Appellate Body reports. In the event that immediate compliance is not possible, the Member concerned is given a 'reasonable period of time' to implement the findings of the Panel or Appellate Body and bring itself into compliance. If the parties cannot agree as to what constitutes a 'reasonable period of time', arbitration may be sought with a maximum of fifteen months acting as a starting point for the arbitrator.[114] The parties can see further recourse to dispute settlement, including to the original Panel, in the event of disagreement on whether implementation has in fact occurred.[115]

Should the reasonable period of time expire and the losing side have failed to bring itself into compliance, the complainant may seek compensation on a voluntary basis from the defendant.[116] Compensation is relatively uncommon, in part because it requires agreement from the losing party but also because its application must be consistent with the covered agreements. The practical consequence of this is that compensation needs to be applied, inter alia, on a Most-favoured nation basis.[117]

In the absence of mutual agreement on compensation, the Member concerned may seek authorisation from the DSB to 'suspend' concessions. In real terms, this gives the Member the right to enact trade retaliation. Trade retaliation cannot be instituted unilaterally without the authorisation of the DSB. It is also prospective and cannot therefore take into account prior damage. The general principle governing the suspension of concessions is that it should be in the same sector as any violation or nullification and impairment occurred but if it would not be practical or effective to do so, suspension of concessions in another sector—so-called cross retaliation—may be authorised.[118]

As underscored in Article 21.1 DSU, 'Compensation and the suspension of concessions or other obligations are temporary measures … neither … is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.' While arguably the possibility of the suspension of

[112] Pauwelyn 2019.

[113] MPIA, Annex 1, para 16.

[114] DSU, above n 16, Article 21.3(c).

[115] Ibid., Article 21.5.

[116] Ibid., Article 22.2.

[117] See discussion in Van Den Boscche and Zdouc 2017, p. 204.

[118] Busch and Pelc 2014.

concessions gives the WTO dispute settlement system 'teeth' that certain other international dispute settlement processes do not have, the system been used only infrequently[119] and has been the subject of extensive criticism.[120] Indeed, the WTO itself has no enforcement powers and instead operates as a decentralised system of self-enforcement.[121] In addition, the system of retaliation is ill suited to provide a remedy for environmental harms, focused as it is on trade, as opposed to other harms.

5.3 Significant Environmental Disputes Within the WTO Dispute Settlement System

Having provided an overview of the operation of the WTO dispute settlement system, our attention now turns to the specific issue of how the WTO dispute settlement system has dealt with issues pertaining to the relationship between trade and environment. This section will commence with a short introduction to the various environmental provisions in the WTO agreements before a discussion is then engaged in on certain WTO key disputes that have dealt with environmental concerns. It is to be noted that the confines of space preclude a discussion of all disputes dealing with issues related to the environment. However, it is intended that the selected disputes will help to draw out certain of the key themes applicable to discussions on the treatment of environmental protection under the dispute settlement system.

5.3.1 Environmental Provisions in the WTO Covered Agreements

There is no freestanding agreement on Trade and Environment within the WTO. At the same time, however, and as underscored by Hoekman, the WTO does not have unrestrained free trade as its goal.[122] Sustainable development as well as preservation and protection of the environment feature prominently in the preamble to the Marrakesh Agreement establishing the WTO. In addition, numerous provisions exist within the WTO 'covered' agreements allowing Members to enact measures for environmentalesque purposes which would otherwise be in breach their WTO obligations. Under the TRIPS Agreement, for example, Members may exclude from patentability inventions, 'the prevention within their territory of the commercial exploitation of which is necessary … to protect human, animal or plant life or health or to avoid

[119] Ibid.

[120] See e.g. Davey 2014.

[121] Busch and Pelc 2014.

[122] Hoekman 2016, p. 1087.

serious prejudice to the environment…'[123] A further example can be found under the TBT Agreement in respect of which Members are required to ensure that technical regulations 'are not more trade restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create.' Such legitimate objectives are noted under the TBT Agreement to include 'protection of human health or safety, animal or plant life or health, or the environment' though it is to be noted that this list is not exhaustive.

Perhaps the most well-known provision of WTO law associated with a Member's right to regulate for environmental purposes is Article XX of the GATT. A wealth of case law related to the relationship between trade and environment exists in respect of the operation of the GATT Article XX defence. It is often used as a justification either for a breach of the so-called national treatment provision outlined in GATT Article III and the most-favoured nation clause in GATT Article I.1, or the prohibition of quantitative restrictions set out in GATT Article XI.

In essence, GATT Article XX grants Members policy space to enact measures that would otherwise be in breach of a Member's obligations under the GATT so long as the measure in question is justifiable under one of the subparagraphs of GATT Article XX as well as the provisions of its chapeau. To expand, the chapeau to GATT Article XX directs that a measure may only pass muster under one of the subparagraphs of GATT Article XX to the extent that it is, 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries were the same conditions prevail, or a disguised restriction on international trade.' In this way, the GATT Article XX exception attempts to carefully circumscribe the relationship between a Member's obligations under the GATT and its right to regulate. Should a Member seek to rely on the GATT Article XX defence, the Panel/Appellate Body will firstly assess whether the measure in question falls within one of the subparagraphs of the Article XX and assuming that it does, the examination will then turn to whether the measure fulfils the requirements of the chapeau.[124]

In terms of the subparagraphs of GATT Article XX most relevant to environmental protection, GATT Article XX(b) allows for measures 'necessary to protect human, animal or plant life or health' while Article XX(g) provides legal cover for measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.' Article XX(a) further provides an exception for measures 'necessary to protect public morals.'[125]

---

[123] WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994), Article 27.2.

[124] WTO, *US—Gasoline*, above n 80, p. 22.

[125] This defence was relevant in the dispute of WTO, *EC–Seal Products,* Appellate Body Report, 22 May 2014, WT/DS400/AB/R, WT/DS401/AB/R. The protection of animal welfare by the EU was accepted as a matter of public morality and was thereby able to avail of the GATT Article XX(a) defence, albeit the particular measures in question failed to pass muster under the chapeau to GATT Article XX.

Notably, while, as we will see below, the text of GATT Article XX(a), (b) and (g) can and indeed have been interpreted to allow for otherwise GATT violating measures to be taken for environmental ends, it must also be underlined that there is no explicit reference in the text of GATT Article XX environmental protection more generally, nor to more specific environmental concerns such as climate change.[126] With very limited exceptions, the GATT Article XX defence is only available as a defence to a breach of the GATT. It is not therefore available to justify a breach of, for example, the provisions of the WTO Agreement on Subsidies and Countervailing Measures.[127]

In addition to the numerous provisions of the WTO covered agreements which attempt to grant Members policy space to enact environmental measures which would otherwise be in breach of their WTO obligations, the WTO Committee on Trade and Environment also provides an institutional forum for discussions of the relationship between trade and environmental protection.[128] Under the WTO Doha Round launched in 2001, a Special Session of the Committee on Trade and Environment was tasked, inter alia, to negotiate on, 'the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements.' A large number of multilateral environmental agreements allow for trade related measures[129] and the Doha Round negotiations were to be conducted 'with a view towards enhancing the mutual supportiveness of trade and environment.'[130] To date, negotiations have not concluded.

5.3.1.1 Discussion and Analysis of Key Disputes Relating to Environmental Concerns

Arguably, the most appropriate starting point to assess the treatment of environmental concerns under the dispute settlement system of the trade regime is *Tuna-Dolphin*. These infamous disputes were conducted under the GATT 1947, and were litigated on before the coming into force of the WTO as an institution. Nevertheless, they are significant in that they set the scene for the later confrontation of trade and environmental issues in the WTO.

[126] On this note, see Cima 2018, pp. 668–669.

[127] See discussion in Feld and Switzer 2012.

[128] For a discussion of the operation of the Committee on Trade and Environment, see Sinha 2013 and Teehankee 2020. See also WTO, Decision on Trade and Environment, Ministerial Decision of 14 April 1994, 33 ILM 1267 (1994).

[129] WTO 2017.

[130] WTO, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), para 31.

Tuna—Dolphin

In the GATT Panel report of *Tuna – Dolphin*[131] (first dispute), the GATT Panel was required to consider the GATT legality of a US import embargo applied to tuna, depending upon where the tuna was caught and the particular method used to catch the tuna. While there was no doubt that aspects of the measure constituted a breach of GATT Article XI:1, which prohibits the imposition of quantitative restrictions,[132] the more pertinent question for the Panel was the applicability of the GATT Article XX(b) and (g) defences to the US measure. In a controversial finding, the Panel held that the unilateralism inherent in the US measure was such that it could not find a safe harbour under GATT Article XX(b) with a similar finding made in respect of GATT Article XX(g).[133] In the view of the Panel, the risks of allowing such unilateralism were simply too great to the trading system; doing so could fundamentally undermine the rights of the contracting parties under the GATT.[134] As contended by Howse: '[t]he Panel based its decision on an intuition that trade measures to protect the environment might somehow open the door to "green" protectionism, thereby threatening the market access negotiated in the GATT framework'.[135]

A second *Tuna—Dolphin* Panel[136] dealing with a similar set of facts came to the same conclusion and struck down the measure at issue, albeit the second Panel's interpretation of the freedom of contracting parties to enact measures with potential impact upon other parties was slightly broader than the first Panel.[137] While under the pre-WTO system of dispute settlement the losing party could block the adoption of a Panel report and neither GATT Panel report was adopted, their combined effect was such as to introduce a concern among environmentalists that free trade would always trump other concerns such as environmental protection.[138] As we will see, the *Tuna-Dolphin* reports are now considered something of an 'outlier'[139] in terms of the WTO jurisprudence on trade and environment, with the implication of the first

[131] GATT *United States – Restrictions on the Imports of Tuna,* Dispute Panel Report, 3 September 1991, unadopted, BISD 39S/155 (*Tuna-Dolphin (1991)*) .

[132] Ibid. paras 5.17–5.19.

[133] The panel was also asked to consider the compliance of dolphin safe labelling requirements but found they were not incompatible with US obligations under the GATT; GATT, *Tuna-Dolphin (1991)*, above n 131, paras 5.41–5.44.

[134] GATT, *Tuna-Dolphin (1991)*, above n 131, para 5.27.

[135] Howse 2002, p. 491.

[136] GATT, *United States—Restrictions on Import of Tuna*, Dispute Panel Report, 16 June 1994, 33 ILM 839 (1994).

[137] As noted by Howse 2002, p. 491 (footnote 9), while the first panel had introduced a jurisdictional limitation on the freedom of action of contracting parties under GATT Article XX, this limitation was dealt with differently by second panel; p. 491. According to Howse, in the, 'second Tuna/Dolphin ruling, the panel rejected the territorial limitation that the first Tuna/Dolphin panel had placed on Article XX, instead suggesting that Article XX(b) and (g) could not apply to measures that would only be effective in protecting the environment were other countries to change their policies'.

[138] Howse 2002, p. 491.

[139] Cosbey and Mavroidis 2014b, p. 289.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

Panel's findings that the GATT was a sort of, 'centralized authority, the permission of which was required to pursue the social agenda at home'[140] now firmly rejected.

US—Shrimp

With the coming into force of the WTO, the scene was set for a confrontation between the trade community and environmentalists. The WTO dispute of *US—Shrimp* provided the first significant opportunity for the Appellate Body in particular to establish its approach to the relationship between trade and environmental protection.[141]

The dispute of *US—Shrimp* concerned what in essence was an import ban imposed by the United States on shrimp caught using methods liable to produce high levels of mortality in sea turtles. Since 1990, US domestic trawlers had been required to install turtle excluder devices (TEDs) and/or introduce so-called 'tow time restrictions'.[142] In 1989, the US Congress also enacted legislation requiring that only shrimp from countries certified as having a regulatory programme for turtle protection similar to that of the US or a fishing programme with no risk to turtles could be imported, with certification to take effect by 1991 and every year thereafter.[143] A later set of regulations, together with a 1995 court case,[144] led to a general import ban on shrimp from countries whose fleet did not employ TEDs together with a certification programme.[145]

The complainants in the dispute, India, Malaysia, Thailand and Pakistan, alleged numerous breaches of the GATT that they contended were not justifiable either under GATT Article XX(b) or (g). The Panel found a breach of GATT Article XI[146]—the prohibition on quantitative restrictions—and agreed with the complainants that this breach was not justified under GATT Article XX. The Panel rejected the GATT Article XX defence on the basis of a narrow reading of the GATT Article XX chapeau. As summarised by the Appellate Body, the Panel held that:

> [i]f an interpretation of the chapeau of Article XX were followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those Agreements would be threatened.[147]

[140] Cosbey and Mavroidis 2014b, p. 294.

[141] Though earlier disputes had dealt with issues pertaining to trade and environmental protection; e.g. WTO, *US—Gasoline*, above n 80. The confines of space preclude an exhaustive analysis of all disputes dealing with environmental issues.

[142] WTO, *US—Shrimp (Panel Report)*, above n 96, paras 2.6 & 2.17.

[143] WTO, *US—Shrimp (Panel Report)*, paras 2.7–2.8.

[144] Ibid., paras 2.8–2.10.

[145] Ibid., paras 2.11–2.16.

[146] Ibid., para 7.13. Indeed, the US did not dispute this aspect of the complainants' argument.

[147] WTO, *US—Shrimp (Appellate Body Report)*, above n 101, para 112.

In essence, according to the Panel, the unilateral aspects of the US measure were such that the measure was bound to fail under the scrutiny of the chapeau to GATT Article XX. On appeal, the Appellate Body agreed that the US measures were not justifiable under GATT Article XX. Significantly, however, the Appellate Body diverged from some of the central reasoning of the Panel. It found that:

> conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, *be a common aspect of measures falling within the scope of one or another of the exceptions* (under GATT Article XX) [emphasis added].[148]

The Appellate Body continued 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, renders 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.[149]

Described by Cosbey and Mavroidis as, 'one of the most remarkable U-turns on trade and environment,' the above findings of the Appellate Body underlined that a trade measure enacted for environmental purposes should not be struck down on the narrow grounds that it is unilateral.[150] This marked a significant divergence from the findings of the GATT Panel in *Tuna-Dolphin*, which notably the Appellate Body failed to cite.

While the US lost the dispute (albeit it was successful in later Article 21.5 DSU compliance proceedings), the findings of the Appellate Body in respect of why are instructive for better understanding this foundational jurisprudence on the trade and environment nexus. In addition to its clarification that unilateralism may be a 'common aspect of measures' falling within the scope of GATT Article XX, the dispute is also significant for the Appellate Body's interpretative approach to the meaning of exhaustible natural resources under GATT Article XX(g). Adopting a dynamic and evolutionary interpretation[151] of this phrase, the Appellate Body held that:

> [t]he words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.[152]

Accordingly, and with reference to the principle of sustainable development embodied in the preamble to the WTO Agreement, the Appellate Body held that

[148] Ibid., para 121.

[149] Ibid.

[150] Cosbey and Mavroidis 2014b, p. 289.

[151] WTO, *US—Shrimp (Appellate Body Report)*, above n 101, para 130.

[152] Ibid., para 128.

living natural resources that Members sought to conserve could fall within the legal scope of exhaustible natural resources.[153] This was significant as the complainants had alleged that only mineral and non-living resources such as oil and gas would be considered as 'exhaustible' within the context of GATT Article XX (g).[154] In adopting its evolutionary interpretation of this phrase, the Appellate Body drew inspiration from a range of international instruments, including Article 56 of the United Nations Convention on the Law of the Sea. This refers to natural resources as 'either living on non-living.'

In terms of whether the sea turtles that the US sought to protect are 'exhaustible natural resources', the Appellate Body again turned to other sources of international law as context for its examination. It noted that under Annex 1 of the Convention on International Trade of Endangered Species of Wild Flora and Fauna (CITES), all seven species of sea turtle are noted as being 'species threatened with extinction which are or may be affected by trade.'[155] Given this listing, the Appellate Body held that 'the exhaustibility of sea turtles would in fact have been very difficult to controvert.'[156]

The dispute was also significant for the Appellate Body's examination of the function of the chapeau to Article XX. While the Appellate Body rejected the notion that unilateralism was prohibited *per se* under GATT Article XX, it underlined that the chapeau is the embodiment of a recognition of the requirement to strike a balance between the right of Members to utilise the exceptions under GATT Article XX(a) to (g), and the need to protect the rights of other Members from being impeded upon.[157] The Appellate Body found that the US measure did in fact constitute unjustifiable discrimination – thereby failing to adhere to the fundamental requirements of the chapeau. One aspect of such discrimination was that the US imposed a blanket obligation on countries intending to import into the US in that they had to adhere to the same requirements as that imposed on US domestic trawlers.[158] In the view of the Appellate Body:

> [w]e believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any enquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries.[159]

[153] Ibid., paras 128–131.

[154] See discussion in WTO, *US—Shrimp (Appellate Body Report)*, above n 101, para 127. For a useful overview of more recent jurisprudence in respect of GATT Article XX(g), see Chi 2014.

[155] CITES, above n 78, Article II.1, cited in WTO, *US – Shrimp (Appellate Body Report)*, above n 101, para 132.

[156] WTO, *US – Shrimp (Appellate Body Report)*, above n 101, para 132.

[157] Ibid. para 156; in full; 'we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand'.

[158] Ibid., para 161.

[159] Ibid., para 165.

Furthermore, while the US had engaged in negotiations on the measure with respect to western countries, the same was not the case in relation to the complainants, with the Appellate Body questioning whether, 'across-the-board negotiations with the objective of concluding bilateral or multilateral agreements'[160] had been engaged in. While there is no 'free standing duty to negotiate outlined in GATT Article XX', according to Howse,

> (1) undertaking serious negotiations with some countries and not with others is, in circumstances such as these, "unjustifiable discrimination," and (2) that a failure to undertake serious negotiations may be closely connected with, and indeed part and parcel of, various discriminatory effects of a scheme, and may reinforce or perhaps even tip the balance towards a finding that those discriminatory effects amount to "unjustifiable discrimination" within the meaning of the chapeau.[161]

There is much to praise in respect of the decision in *US – Shrimp*, not least the Appellate Body's reliance upon the provisions of other sources of international law as relevant context for the interpretation of WTO law. However, Kulovesi notes that while this was indeed a welcome development, the Appellate Body could have done more to clarify the nature of the relationship between WTO law and MEAs and other instruments of international environmental law.[162] Accordingly, the Appellate Body failed to delineate whether it was obligated to rely upon these other sources of law, or whether such a move was a voluntary act on its part.[163] While greater clarity could have been offered by the Appellate Body on this issue,[164] the dispute at least did offer an insight into the sensitivities of the Appellate Body to concerns, 'that trade liberalisation and environmental protection agendas are irreconcilable.'[165]

Brazil—Tyres[166]

The pertinent facts of this dispute centre upon the imposition by Brazil of an import ban on retreaded tyres.[167] The ban had been imposed due to both environmental and health concerns relating to the accumulation and disposal of used tyres.[168] In essence, retreaded tyres have a shorter lifespan than new tyres. Retreaded tyres accumulate as waste at a faster level than is the case for new tyres. Waste tyres also form ideal breeding grounds for mosquitos, contributing to outbreaks of serious diseases such as malaria and dengue fever. Burning waste tyres also produces toxic gases. The complainant, the European Communities, argued that the ban contravened GATT

[160] Ibid., para 166.

[161] Howse 2002, p. 505.

[162] Kulovesi 2016, p. 57.

[163] Ibid.

[164] Kulovesi 2016.

[165] See discussion in Stephens 2009, p. 344.

[166] WTO, *Brazil—Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, 3 December 2007, WT/DS332/AB/R (*Brazil – Tyres (Appellate Body Report)*).

[167] McGrady 2009 provides a useful analysis of this dispute.

[168] WTO, *Brazil—Measures Affecting Imports of Retreaded Tyres*, Panel Report, 12 June 2007, WT/DS332/R, para 7.53 (*Brazil—Tyres (Panel Report)*).

Article XI:1. Brazil sought to justify the ban pursuant to GATT Article XX(b) as being 'necessary to protect human, animal or plant life or health.' The ban did not, however, extend to all imported retreaded tyres as following a 2002 ruling by a MERCUSOR Panel, an exception was made for a specific type of retreaded tyres from Mercosur countries. Local retreaders had also successfully used the Brazilian court system to apply for preliminary injunctions against the import ban to import casings.[169] These exceptions would ultimately prove problematic for Brazil's GATT Article XX defence.

At first instance, the Panel held that the import ban did breach GATT Article XI:1 and while it held that the measure could be provisionally justified under GATT Article XX(b), it found that the effect of the preliminary injunctions was such as to undermine the requirements of the GATT Article XX chapeau. The Panel found, however, that the MERCUSOR exception did not breach the conditions of the chapeau, a finding that the European Communities went onto appeal.

In *Brazil—Tyres*, the Appellate Body underscored the 'fundamental principle' that WTO Members have the right to determine their own desired level of protection.[170] In examining the compliance of the Brazil's measures under GATT Article XX(b), the Appellate Body drew on its previous jurisprudence in the dispute of *US – Gambling* so as to elaborate more fully on the meaning of 'necessary' in the text of GATT Article XX(b). In doing so, the Appellate Body quoted *US—Gambling* to note that,

> [the] weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure" and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce.[171]

In essence, the requirement of necessity mandates analysis of the 'importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness.'[172] In terms of the necessity analysis required under Article XX(b), a measure need not be indispensable to be considered as 'necessary' but rather must make a 'material contribution to the achievement of the objective' at issue.[173] Such a material contribution need not be assessed quantitatively.[174] Assuming this threshold test is met, a comparison must then be made with other possible alternative measures and the extent to which these might be less trade restrictive while also contributing to achievement of the objective

[169] Ibid., para 7.140.

[170] *Brazil—Tyres (Appellate Body Report)*, above n 166, para 210.

[171] WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Appellate Body Report, 7 April 2005, WT/DS285/AB/R, para 306, cited in *Brazil—Tyres (Appellate Body Report)*, above n 166, para 143.

[172] *Brazil – Tyres (Appellate Body Report)*, above n 166, para 178.

[173] Ibid., para 150.

[174] Ibid., para 146.

in question.[175] Any such comparison must be carried out in light of the importance of the objective in question.[176]

Notably, the Appellate Body went on to 'rank' particular objectives, agreeing with the Panel that protection of human health is 'both vital and important to the highest degree'[177] while protection of the environment is merely noted as being 'important.'[178] While the Appellate Body ultimately agreed with the Panel that the import ban was necessary within the meaning of GATT Article XX(b),[179] the basis for such ranking is unclear,[180] and raises concerns as to the underpinning ideological stance of the Appellate Body in seemingly ranking protection of the environment as less vital than the protection of human health.[181] Indeed, such an anthropocentric approach also fails to grasp the complex interlinkages between human and environmental health and how such concerns cannot be neatly siloed.

Leading on from the above, while the Appellate Body agreed with the findings of the Panel that the measure was necessary, it overturned the Panel's findings that the MERCOSUR exception met the requirements of chapeau. The Appellate Body held in respect of the legal test under the chapeau, discrimination would be arbitrary or unjustifiable if, 'the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX.'[182] The MERCUSOR exception, in essence, failed to demonstrate a rational connection to the public health goals that the import ban sought to fulfil. According to the Appellate Body:

> we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.[183]

What is notable about this finding is that a full, rather than selective import ban, would undoubtedly have passed muster before the Appellate Body,[184] putting paid to the notion that the jurisprudence of the WTO dispute settlement system will always rule in favour of more, as opposed to less trade.[185]

Canada—Renewable Energy

This dispute, in fact two parallel cases brought by the European Union and Japan, arose from the imposition by Ontario of domestic content requirements for certain

[175] Ibid., para 178.
[176] Ibid.
[177] Ibid., para 179. See discussion in Andersen 2015, p. 397.
[178] Ibid., para 179. See discussion in Andersen 2015, p. 397.
[179] Ibid., para 210.
[180] Andersen 2015, p. 397.
[181] For a general discussion on such issues, see Andersen 2015.
[182] *Brazil—Tyres (Appellate Body Report)*, above n 166, para 227.
[183] Ibid., para 227.
[184] Cosbey and Mavroidis 2014b, p. 299.
[185] Ibid.

generators of renewable energy in order to be eligible for a feed-in tariff programme (FIT).[186] The programme was designed to increase the levels of renewable electricity within the Ontario energy supply system.[187] Entities participating in the FIT programme were paid a guaranteed price under a 20 or 40-year contract for every kilowatt-hour of eligible electricity generated.[188] An additional requirement under the FIT programme for 'minimum required domestic content levels' was applied to the development and construction of facilities for energy generation from solar photovoltaic (PV) and wind power.[189]

In the dispute, the EU and Japan claimed that the domestic content requirements applicable to solar photovoltaic and wind power generation facilities constituted a prohibited subsidy as defined by Article 3.1(b) and Article 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM). These provisions prohibit, 'subsidies contingent, whether solely or as one of several other conditions, *upon the use of domestic over imported goods* (emphasis added).' The complainants also alleged a violation of the national treatment obligation under GATT Article III:4 and Article 2.1 of the Agreement on Trade Related Measures (TRIMS). Both the Panel and the Appellate Body upheld the claim that the local content requirements at issue violated GATT Article III:4 and thus by extension, constituted a violation of TRIMS Article 2.1. Canada had attempted to rely on the Article III:8(a) GATT derogation for government procurement, an argument which was not upheld.[190] In addition, both the Panel and the Appellate Body failed to find a violation of the SCM, albeit in respect of certain aspects of the dispute, they adopted different reasoning. It is the SCM dimension of the dispute that has sparked the most commentary.

Under the WTO SCM, a subsidy exists when, 'there is a financial contribution by a government or any public body within the territory of a Member (and …) a benefit is thereby conferred.'[191] A benefit is conferred when the recipient receives a financial contribution more advantageous than that available on the market.[192] By extension, '(t)hat a financial contribution confers an advantage on its recipient cannot be determined in absolute terms, but requires a comparison with a benchmark,

[186] There has been extensive discussion of this dispute in the literature. See, for example, Espa and Durán 2018; Farah 2015; Farah and Cima 2013; Cosbey and Mavroidis 2014a; Davies 2015; Dawson 2019; Weber and Koch 2015.

[187] WTO, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, Appellate Body Report, 24 May 2013, WT/DS412/AB/R (*Canada—Renewable Energy (Appellate Body Report)*); WTO, *Canada–Measures Relating to the Feed-In Tariff Program*, Appellate Body Report, 24 May 2013, WT/DS426/AB/R (*Canada—Feed-In Tariff Program (Appellate Body Report*) para 4.17.

[188] Ibid.

[189] Ibid., paras 4.21–4.23.

[190] The reasoning of the Appellate Body in respect of the legal interpretation of Article III:8(a) was arguably narrower than that employed by the Panel; see discussion in Charnovitz and Fischer 2015.

[191] See WTO, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14, Article 1 for the definition of a subsidy.

[192] WTO, *Canada—Renewable Energy (Appellate Body Report)*); WTO, *Canada—Feed-In Tariff Program (Appellate Body Report*), above n 187, para 5.163.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

which, in the case of subsidies, derives from the market.'[193] In other words, key to the definition of a benefit is the task of defining the benchmark of the relevant market. The Panel was not satisfied that a separate market existed for electricity from wind or solar PV. The Panel instead found that the relevant market was that for all electricity[194] but that no such competitive market for wholesale electricity actually existed or could reasonably be achieved in Ontario due to the levels of intervention required to achieve a satisfactory diversity in sources of supply for electricity.[195] Instead, the Panel observed that one way to assess whether a benefit existed was via, 'the relevant rates of return of the challenged …contracts with the relevant average cost of capital in Canada.'[196] However, in the absence of required information, the Panel was unable to complete its analysis and therefore was unable to uphold the complainants' contentions that a benefit existed.[197]

On appeal, the Appellate Body did not uphold the appellants' claims that a benefit did in fact exist but proceeded along different lines to that of the Panel. The Appellate Body rejected that the relevant benchmark was the wholesale market for electricity as a whole and instead found that the relevant market benchmarks should take account of existence of a separate market for solar PV and wind electricity sector.[198] However, in the view of the Appellate Body, 'where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it'.[199] Accordingly, for the Appellate Body, it was the market for renewable electricity that should provide the benchmark against which the existence of a benefit should be assessed.[200] In this respect, 'the relevant question is whether wind and solar electricity suppliers would have entered the renewable electricity market given those targets but absent the FIT program, not whether they would have entered the blended electricity wholesale market without the subventions.'[201] However, in the absence of full exploration of relevant evidence by the Panel, the Appellate Body was unable to complete the analysis in respect of

[193] Ibid., para 5.164.

[194] WTO, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, Panel Report, 19 December 2012, WT/DS412/R, (*Canada—Renewable Energy (Panel Report)*); WTO, *Canada—Measures Relating to the Feed-in Tariff Program*, Panel Report, 19 December 2012, WT/DS426/R (*Canada – Feed-In Tariff Program (Panel Report)*), para 7.318.

[195] Ibid., paras 7.318–7.327.

[196] Ibid., para 7.327.

[197] Ibid., para 7.328.

[198] WTO, *Canada—Renewable Energy (Appellate Body Report)*); WTO, *Canada—Feed-In Tariff Program (Appellate Body Report*), above n 187, para 5.190. In essence, the 'proper benchmark for wind- and solar PV-generated electricity should take into account the Government of Ontario's definition of the energy supply-mix as including wind- and solar PV-generated electricity, which implies the existence of separate markets for wind- and solar PV-generated electric' para 5.204.

[199] WTO, *Canada—Renewable Energy (Appellate Body Report)*); WTO, *Canada—Feed-In Tariff Program (Appellate Body Report*), above n 187, para 5.118.

[200] Ibid., para 5.187.

[201] Charnovitz and Fischer 2015, p. 198.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

whether a benefit existed and so was unable to assess whether the scheme in question constituted a prohibited subsidy.[202]

The legal test employed by the Appellate Body in this dispute made it virtually 'impossible' for the FIT programme to constitute a subsidy within the meaning of the WTO Agreement on Subsidies and Countervailing Measures (SCM).[203] This was because, the Appellate Body, 'in effect, moved the goalpost by redefining the market to be electricity from renewable sources. As a result, the question of whether the prices paid in the FITs are above market prices no longer has an obvious answer'[204] and certainly a much less obvious answer than one if the relevant market had been the wholesale electricity as a whole. Cosbey and Mavroidis have commented on the, 'significant legal acrobatics that the (Appellate Body) had to employ to avoid finding that a FIT—a widespread and effective tool of climate change mitigation policy—was a subsidy.'[205] Of significance within this acrobatic jurisprudence is that the Appellate Body did not attempt to justify its reasoning by reference to the policy distinction between the two types of electricity production at issue within the dispute; i.e. their respective impacts of renewable energy on the one hand, and electricity powered by fossil fuels on the other, on *climate change emissions*.[206] While attempting to illustrate its environmental *bona fides* by directing that, "fossil fuel resources are exhaustible, and thus fossil energy needs to be replaced progressively if electricity supply is to be guaranteed in the long term,'[207] the Appellate Body would have been on firmer ground, at least from an environmental law perspective, to have focused on the climate change aspects of the move away from fossil fuels, rather than emphasising the exhaustibility of conventional fuels.[208]

More generally, the dispute leaves open important questions as to the mutual supportiveness of the international trade and climate regimes.[209] Indeed, it has been argued that while the legal acrobatics performed by the Appellate Body here so as to avoid a finding that the FIT scheme constituted a subsidy was likely the result of a desire to ensure the mutual supportiveness of WTO law with the demands of the environmental community, a finding of a subsidy may well have prompted a more focused and detailed discussion on the need for, 'reasonable environmental exceptions in the SCM Agreement'.[210] This would undoubtedly be more beneficial than having to rely on 'judicial creativity' on an ongoing basis.[211]

---

[202] WTO, *Canada—Renewable Energy (Appellate Body Report)*); WTO, *Canada – Feed-In Tariff Program (Appellate Body Report*), above n 187, paras 5.245–5.246.

[203] See Espa 2019, p. 989.

[204] Charnovitz and Fischer 2015, p. 204.

[205] Cosbey and Mavroidis 2014b, p. 298.

[206] Ibid.

[207] WTO, *Canada—Renewable Energy (Appellate Body Report)*); WTO, *Canada—Feed-In Tariff Program (Appellate Body Report*), above n 187, para 5.186.

[208] Charnovitz and Fischer 2015, p. 208.

[209] See e.g. Kulovesi 2016. For more a general discussion, see also Amerjee and Nakul Nayak 2014.

[210] Charnovitz and Fischer 2015, pp. 207–209.

[211] Ibid. See also Bigdeli 2014.

US—Tuna II

The *US—Tuna II* dispute centred upon US labelling requirements for use of the terminology of 'dolphin safe' when tuna is sold in the US.[212] In 2008, Mexico brought a dispute to the WTO alleging that the US, in its 'dolphin safe' labelling requirements, had breached numerous provisions of the TBT and the GATT. The US 'dolphin safe' labelling requirements distinguished between tuna depending upon where it was caught and the fishing method used.[213] The essence of these requirements was that tuna caught in the eastern tropical pacific (ETP) using purse seine nets to set on or encircle dolphins would not be eligible for the 'dolphin safe' label. This was the case even if no dolphins were killed or injured in the process. The requirements at issue had a particular impact upon the Mexican tuna fleet.

The Panel in *US—Tuna II* found that the labelling regime constituted a technical regulation and therefore fell within the purview of the TBT Agreement. However, the Panel considered that there had been no breach of the non-discrimination obligation under Article 2.1 TBT.[214] However, the Panel did uphold Mexico's complaint that the US labelling requirement was a violation of Article 2.2 TBT as it was 'more trade restrictive than necessary to fulfil a legitimate objective.'

On appeal, the Appellate Body upheld the Panel's finding that the labelling regime constituted a technical regulation but reversed the Panel's finding that it constituted a breach of Article 2.2 TBT. The Appellate Body found, however, that the US regime *was* in breach of its obligations under Article 2.1 TBT, reversing the Panel's findings on that issue. Article 2.1 TBT requires that any like imported product be granted 'no less favourable treatment' in comparison with a liked domestic product. The Appellate Body held that in respect of the obligation contained in Article 2.1 TBT, 'technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.'[215] The Appellate Body found that the difference in labelling regime, depending upon the fishing methods used and where the tuna was caught was not sufficiently justified by the US. In essence, whereas the risk from setting on dolphins in one particular area—the Eastern Tropical Pacific—was fully internalised within the US regime, the same could not be said for tuna caught outside of the ETP using different fishing

[212] There has been extensive discussion of this dispute in the literature. See, for example Fagundes Cezar 2018; Crowley and Howse 2014; Howse and Levy 2013; Kelly 2014.

[213] WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* Panel Report, 15 September 2011, WT/DS381/R (*US—Tuna II (Panel Report)*) paras 2.9 to 2.26.

[214] Ibid., paras 6.41 to 6.44. The Panel exercised judicial economy in respect of Mexico's claims under GATT Article I:1 and III:4. This was because it considered that, 'in addressing all aspects of Mexico's claims under the TBT Agreement, including, but not limited to, its discrimination claims, we have addressed Mexico's claims in a manner sufficient to resolve the dispute;'.

[215] WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* Appellate Body Report, 16 May 2012, WT/DS381/AB/R (*US—Tuna II (Appellate Body Report, Appellate Body Report)*) para 213.

523985_1_En_5_Chapter ☑ TYPESET ☐ DISK ☐ LE ☑ CP Disp.:30/12/2021 Pages: 38 Layout: T1-Standard

methods.[216] Accordingly, the regulation applicable to non-ETP tuna fishing was insufficiently calibrated to the risks involved and hence was too lax.[217] The lack of calibration according to the risk profile involved hence led to the Appellate Body's finding of a breach of the 'no less favourable treatment' obligation set out in Article 2.1 TBT.

In response to the Appellate Body's findings, the US instituted a number of changes to its labelling regime, including the introduction of a requirement that in respect of tuna caught *outside* the ETP using purse seine nets, certification would be required to confirm that no dolphins were killed or seriously injured in the process. Additional tracking and verification requirements were also added for tuna caught *within* the ETP. Compliance proceedings under Article 21.5 DSU were subsequently taken in respect of the new requirements. Breaches of Articles I:1 and III:4 of the GATT were found by both the Panel and the Appellate Body though again, the findings were based on different legal grounds. In relation to whether the measure in question could be justified under GATT Article XX, the Appellate Body found that the conditions of the chapeau were not satisfied. In addition, both the Panel and the Appellate Body again struck down the US regime as being a breach of Article 2.1 TBT, albeit for different reasons. The reasoning here was similar to its first findings in the dispute and concerned the calibration of risk in respect of dolphin injury and mortality.[218] Further changes were made to the US regime with a view to improving the risk calibration of the measure, and in a second set of compliance proceedings, the measure finally passed muster before both the Panel and the Appellate Body.[219]

The facts and indeed legal analysis engaged in in *US—Tuna II* are undoubtedly complex. However, some preliminary points can be made in respect of the analysis engaged in in the dispute and its contribution to the coherence of trade and environment jurisprudence. Of particular note is the Appellate Body's focus on the concept of risk calibration in its non-discrimination analysis under TBT Article 2.1. While it is not to be denied that there was indeed a lack of even-handedness to the US measure,[220] rather than the 'risk-based approach constraining WTO decision-making, it might even reasonably appear that an emphasis on risk unshackled adjudicators from principled constraints.'[221] This is because, '(a)s soon as one distinction was addressed, there seemed to be another problematic one to be found.'[222] Furthermore, as articulated by Coglianese and Sapir, the Appellate Body provided little

[216] Ibid., para 297; 'The US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP"'.

[217] Ibid.

[218] For a useful discussion on the issue of risk calibration, see Coglianese and Sapir 2017.

[219] For a useful summary, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm Accessed 18 December 2020.

[220] Coglianese and Sapir 2017.

[221] Ibid., p. 347.

[222] Ibid.

by way of clarification to guide policy makers[223] on how to manage the process of risk calibration. It is one thing to direct that measures should be calibrated in accordance with the different profiles of risk that may exist, but it is an entirely different task to provide useful guidance on such calibration processes. In the absence of such guidance, profound potential exists for a chilling effect to occur. Furthermore, while the dispute was—eventually—heralded as a 'win' for environmental protection, 'Mexican tuna producers … responded to this dispute by diversifying their export destinations rather than changing their methods to increase their US market share.'[224] Accordingly, while the *legal* results of the dispute were such that US efforts to reduce the practice of 'setting on' dolphins were ultimately upheld, in real terms, the US regulatory efforts also likely brought about trade diversion of Mexican exports to other jurisdictions without such stringent—and costly—requirements.[225]

As explored further below, the jurisprudence of the Panel and of the Appellate Body has many positive aspects in respect of helping to fashion a jurisprudence more responsive to environmental concerns. However, and as demonstrated by *US—Tuna II,* problems do remain, a fact that will be further elucidated in the succeeding section which attempts to assess the strengths and weaknesses of the WTO dispute settlement system as a forum for resolving disputes involving environmental matters.

5.4 Assessment of the Strengths and Weaknesses of the WTO Dispute Settlement System as a Forum for Resolving Disputes Involving Environmental Matters

It is important to underscore that there has been little by way of legal change within the WTO in respect of the relationship between trade and environmental protection.[226] However, as demonstrated above and as argued by Cosbey and Mavroidis, '(t)he case law, by contrast, has showed a significant and welcome evolution… (with) the dominant trend (being) toward deference towards nationally enunciated objectives and the measures chosen to achieve them, even where those measures are trade restrictive.'[227] Such deference marks a considerably *volte face* from the dark days of the GATT era *Tuna-Dolphin* litigation.

Despite the failure of the Doha Round environmental mandate negotiations to conclude, commentators such as Quick would argue against the feasibility and moreover need for further negotiations on the relationship between trade and environmental protection, pointing to the dispute settlement system's ability to 'get the job

[223] See generally Coglianese and Sapir 2017.

[224] See generally Baroncini and Brunel 2020.

[225] See discussion in Baroncini and Brunel 2020.

[226] Cosbey and Mavroidis 2014b, p. 300.

[227] Ibid.

done.'[228] In a similar vein, Howse has noted the ability of the jurisprudence of the WTO dispute settlement to deftly strike the balance between trade liberalisation on the one hand, and the protection of sensitive interests on the other.[229] In the view of Howse, the Appellate Body has very much crafted its own role, separate from that of the WTO 'insider' community. A central underpinning vision of the Appellate Body was that 'a kind of fundamental balance or equilibrium between an inherent right to regulate and specific disciplines on its use' existed within the WTO Agreements.'[230]

While, however, the Appellate Body has managed to dampen some of the more vehement critiques of how environmental concerns are treated under the WTO dispute settlement, its jurisprudence is not absent of problems. The Appellate Body's 'ranking' of values in *Brazil—Tyres*, for example, evokes an anthropocentric approach which may devalue the position of environmental protection more generally. Furthermore, while the reference to various MEAs in *US—Shrimp* is seemingly positive, more generally, the jurisprudence of the WTO dispute settlement system does not provide, 'a solid basis for constructive interaction between the international trade and environmental regimes.'[231] As discussed above, there seems little scope for the WTO dispute settlement system to allow MEAs to be utilised as in a way that modifies the rights and obligations of Members, leading to greater potential for a conflict between WTO law and environmental law.[232]

Leaving it to the dispute settlement system to delineate the appropriate relationship between trade and environmental protection is additionally problematic in that we are reliant upon the 'right' disputes being brought to influence state behaviour. To exemplify, we now have a rich—if still incomplete—jurisprudence on support measures for renewable energy, albeit one that saw the Appellate Body engage in considerable legal acrobatics to avoid a finding of that a subsidy existed. However, we have no case law on support for environmentally destructive fossil fuels.[233]

In a similar vein to Howse, Trachtman praises the 'good instincts' of the Appellate Body and credits it, together with the influence of the wider trade community, for generally making decisions sensitive to the environment.[234] However, he argues that too much emphasis has been placed on such good instincts due to a lack of an internally coherent body of jurisprudence on the relationship between trade and environment. This jurisprudential incoherence poses significant risks of what Trachtman refers to as a, 'virtual environmental disaster in Geneva.'[235] Trachtman criticises two particular aspects of this jurisprudence; the tendency of Appellate Body findings to apply in an overly broad manner, such as to invalidate sound environmental regulation, while also at the same time, providing too little of a rationale for allowing

[228] Quick 2013, p. 981.
[229] Howse 2016, p. 9.
[230] Ibid., p. 44.
[231] Kulovesi 2011, pp. 81 to 82.
[232] Trachtman 2017, p. 304.
[233] Asmelash 2015.
[234] Trachtman 2017, p. 274.
[235] Ibid., p. 274.

violations.[236] For example, and as elaborated upon above, while the focus on the calibration of risk which underpinned the *US—Tuna II* case law may at first sight appear 'rational', the lack of clarity over its invocation has the potential to result in incoherence.[237] To the extent that the jurisprudence of the WTO dispute settlement system helps to shape Member's perceptions of the meaning of WTO law,[238] such a lack of clarity over the application of a particular measure could result in a chilling effect. Furthermore, and perhaps more fundamentally, leaving the debate on trade and environment to be developed within and by the dispute settlement system will only get us so far,[239] particularly because the Appellate Body has, particularly recently, been largely comprised of former government officials;' 'trade insiders' as it were.[240] It is difficult to envisage trade insiders pushing a 'strong critique'[241] of current jurisprudence on the relationship between trade and environmental protection. Accordingly, it may be a case of 'too much is never enough' in respect of the dispute settlement system's treatment of trade and environmental protection. In addition, procedural issues, such as the lack of provisional measures, further limit the practical impact of the WTO dispute settlement system as a bulwark against environmental degradation.

5.5 Conclusions

Considerable uncertainty currently exists over the future trajectory of WTO dispute settlement. The Appellate Body system is no longer functioning. To the extent that the task of resolving the relationship between trade and environment has fallen to the WTO dispute settlement system, the system has been able to move beyond the dark days of the GATT Panel reports in *Tuna-Dolphin*. The Appellate Body in particular has been able to craft a jurisprudence that recognises the fundamental right of Members to regulate to protect interests such as environmental protection. However, the jurisprudence of the WTO dispute settlement system in respect of the trade and environmental protection is not without its flaws. Moreover, the current Appellate Body crisis blows into stark relief the risks inherent in the relationship between trade and environment being produced by the dispute settlement system. With an increasing range of environmental threats facing the world, not least the spectre of climate change, it is clear that change is needed within the WTO to better ensure a mutually supportive relationship between trade and environmental protection.

[236] Ibid., pp. 273–275.

[237] Drawing on insights from the excellent piece by Coglianese and Sapir 2017.

[238] Busch and Pelc 2014, p. 412. See also Izaguerri and Lanovoy 2013.

[239] See generally Trujillo 2013.

[240] Pauwelyn 2016.

[241] See generally Offor 2020. See also Boisson de Chazournes 2016.

References

Abi-Saab G (2005) The WTO Dispute Settlement and General International Law. In: Yerxa R, B Wilson (eds) Key Issues in WTO Dispute Settlement: The First Ten Years. Cambridge University Press, Cambridge, pp 7–12

Amerjee A, Nayak N (2014) A "Heated" Debate: The WTO's Climate Question. Trade, Law and Development 6:1–8

Andersen H (2015) Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions. Journal of International Economic Law 18:383–405

Anon (2019) United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process. American Journal of International Law 113:822–831

Asmelash H B (2015) Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged. Journal of International Economic Law 18:261–285

Bacchus J, Lester S (2020) The Rule of Precedent and the Role of the Appellate Body. Journal of World Trade 54:183–198

Baroncini E, Brunel C (2020) A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US–Tuna II (Mexico) case. World Trade Review 19:196–215

Bigdeli S Z (2014) Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes over Green Industrial Policy. Trade, Law and Development 6:177–209

Boisson de Chazournes L (2016) WTO and Non-Trade Issues: Inside/Outside WTO. Journal of International Economic Law 19:379–381

Busch M, Krzysztof P (2014) Dispute Settlement in the WTO. In: Martin L L (ed) The Oxford Handbook of the Political Economy of International Trade. Oxford University Press, Oxford, pp 1–19

Cameron J, Gray K R (2001) Principles of International Law in the WTO Dispute Settlement Body. The International and Comparative Law Quarterly 50:248–298

Cezar R F (2018) The Politics of "Dolphin-Safe" Tuna in the United States: Policy Change and Reversal, Lock-in and Adjustment to International Constraints (1984-2017). World Trade Review 17:635–663

Charnovitz S, Fischer C (2015) Canada-Renewable Energy*:* Implications for WTO Law on Green and Not-So-Green Subsidies. World Trade Review 14:177–210

Chi M (2014) "Exhaustible Natural Resource" in WTO Law: GATT Article XX(g) Disputes and Their Implications. Journal of World Trade 48:939–966

Chisik R, Fang C (2020) Cross-retaliation and International Dispute Settlement. https://ideas.repec.org/p/rye/wpaper/wp078.html Accessed 23 December 2020

Cima E (2018) Promoting Renewable Energy Through FTAs? The Legal Implications of a New Generation of Trade Agreements. Journal of World Trade 52:663–695

Coglianese C, Sapir A (2017) Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin-Safe Tuna Labeling Regime. World Trade Review 16:327–348

Cosbey A, Mavroidis P C (2014a) A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO. Journal of International Economic Law 17:11–47

Cosbey A, Mavroidis P C (2014b) Heavy Fuel: Trade and Environment in the GATT/WTO Case Law. Review of European, Comparative & International Environmental Law 23:288–301

Creamer C (2019) From the WTO's Crown Jewel to its Crown of Thorns. AJIL Unbound 113:51–55

Crowley M A, Howse R (2014) *Tuna-Dolphin II*: a legal and economic analysis of the Appellate Body Report. World Trade Review 13:321–355

Davey W J (2014) The WTO and Rules-Based Dispute Settlement: History, Evolution, Operational Success and Future Challenges. Journal of International Economic Law 17:679–700

Davies A (2015) The GATT Article III:8(a) Procurement Derogation and *Canada – Renewable Energy*. Journal of International Economic Law 18:543–554

Dawson A (2019) Safeguarding the Planet? Renewable Energy, Solar Panel Tariffs, and the World Trade Organization's Rules on Safeguards. Trade, Law and Development 11:334–371

Devaney J (2016) Fact Finding Before the International Court of Justice. Cambridge University Press, Cambridge

Eckersley R (2007) A Green Public Sphere in the WTO?: The Amicus Curiae Interventions in the Transatlantic Biotech Dispute. European Journal of International Relations 13(3):329–356

Espa I, Marín Durán G (2018) Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond *Canada – Renewable Energy/Fit Program.* Journal of International Economic Law 21:621–653

European Commission (2020a) Interim appeal arrangement for WTO disputes becomes effective. https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143 Accessed 23 December 2020

European Commission (2020b) The WTO multi-party interim appeal arrangement gets operational. https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176 Accessed 23 December 2020

Farah P D (2015) WTO and Renewable Energy: Lessons from the Case Law. Journal of World Trade 49:1103–1116

Farah P D, Cima E (2013) Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel. Journal of International Economic Law 16:707–740

Graewert T (2008) Conflicting Laws and Jurisdictions in the Dispute Settlement process of Regional Trade Agreement and the WTO. Contemporary Asia Arbitration Journal 1:287–334

Grando M (2010) Evidence, Proof, and Fact Finding in WTO Dispute Settlement. Oxford University Press, Oxford

Hoekman B M, Mavroidis P C (2020a) Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It? https://scholarship.law.columbia.edu/faculty_scholarship/2606 Accessed 23 December 2020

Hoekman B (2016) The World Trade Order: Global Governance by Judiciary? European Journal of International Law 27:1083–1093

Hoekman B M, Mavroidis P C (2020b) To AB or Not to AB? Dispute Settlement in WTO Reform. Journal of International Economic Law 23:1–20

Horn H, Mavroidis P C, Wijkstrom, E N (2013) In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees. Journal of World Trade 47: 729–759

Howse R (2002) The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate. Columbia Journal of Environmental Law 27:489–519

Howse R (2016) The World Trade Organization 20 Years On: Global Governance by Judiciary. European Journal of International Law 27:9–77

Howse R, Levy P I (2013) The TBT Panels: *US-Cloves, US-Tuna, US-COOL.* World Trade Review 12:327–375

Kelly T (2014) Tuna-Dolphin Revisited. Journal of World Trade 48:501–524

Kulovesi K (2011) The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation. Kluwer, Alphen aan den Rijn

Kulovesi K (2014) International Trade Disputes on Renewable Energy: Testing Ground for the Mutual Supportiveness of WTO Law and Climate Change Law. Review of European, Comparative & International Environmental Law 23:342–353

Kulovesi K (2016) International Trade: Natural Resources and the World Trade Organisation. In: Morgera E, Kulovesi K (eds) Research Handbook on International Law and Natural Resources. Edward Elgar, Cheltenham, pp 46–65

Lang A, Scott J (2009) The Hidden World of WTO Governance. European Journal of International Law 20:575–614

Lydgate E (2012). Sustainable development in the WTO: From mutual supportiveness to balancing. World Trade Review 11:621–639

McGrady B (2009) Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures. Journal of International Economic Law 12:153–173

Merrills J G (2005) International Dispute Settlement. Cambridge University Press, Cambridge

Miles C A (2017) Provisional Measures before International Courts and Tribunals. Cambridge University Press, Cambridge

Offor I (2020) Animals and the Impact of Trade Law and Policy: A Global Animal Law Question. Transnational Environmental Law 9:1–24

Pauwelyn J (2003) Conflict of Norms in Public International Law: How WTO Law Relates to Other Norms of International Law. Cambridge University Press, Cambridge

Pauwelyn J (2008) How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits. In: Griller S (eds) At the Crossroads: The World Trading System and the Doha Round. Springer, Vienna, pp 1–53

Pauwelyn J (2016) The WTO 20 Years On: 'Global Governance by Judiciary' or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members? European Journal of International Law 27:1119–1126

Pauwelyn J (2019) WTO Dispute Settlement Post 2019: What to Expect? Journal of International Economic Law 22:297–321

Pierola F (2005) The Question of Remand Authority for the Appellate Body. In: Mitchell D A (ed) Challenges and Prospects for the WTO. Cameron May, London, pp 193–216

Quick R (2013) Do We Need Trade and Environment Negotiations or Has the Appellate Body Done the Job? Journal of World Trade 47:957–983

Sinha M (2013) An Evaluation of the WTO Committee on Trade and Environment. Journal of World Trade 47:1285–1322

Spiegel-Feld D, Switzer S (2012) Whither Article XX? Regulatory autonomy under non-GATT agreements after China—raw materials. Yale Journal of International Law Online 38:16–30

Squatitro T (2018) Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement? World Trade Review 17:65–89.

Stephens T (2009) International Courts and Environmental Protection. Cambridge University Press, Cambridge

Subedi S P (2010) The WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law. In: French D et al (eds) International Law and Dispute Settlement: New Problems and Techniques. Hart, Oxford, pp 173–190

Tanaka Y (2018) The WTO Dispute Settlement System. In: Tanaka Y (ed) The Peaceful Settlement of International Disputes. Cambridge University Press, Cambridge, pp 275–310

Trachtman J P (2017) WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe. Harvard International Law Journal 58:273–309

Trebilcock M J, Howse M (2005) The Regulation of International Trade. Routledge, Abingdon

Trujillo E (2013) A Dialogical Approach to Trade and Environment. Journal of International Economic Law 16:535–585

Van den Bossche P (2005) From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=836284 Accessed 23 December 2020

Van den Bossche P, Zdouc W (2017) The Law and Policy of the World Trade Organization: Text Cases and Materials. Cambridge University Press, Cambridge

Weber R H, Koch R (2015) International Trade Law Challenges by Subsidies for Renewable Energy. Journal of World Trade 49:757–780

Weiss E B (2016) Integrating Environment and Trade. Journal of International Economic Law 19:367–369

WTO (2017) Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements - Note by The Secretariat. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28%28%20@Symbol=%20wt/cte/w/160/rev.5%20%29%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true Accessed 23 December 2020

WTO (2018) Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee. https://www.wto.org/english/res_e/reser_e/ersd201811_e.pdf Accessed 23 December 2020

WTO (2020a) DDG Wolff urges start of "serious discussion" on WTO reforms. https://www.wto.org/english/news_e/news20_e/ddgaw_30oct20_e.htm Accessed 23 December 2020

WTO (2020b) Hong Kong, China initiates dispute complaint against US origin marking requirements. https://www.wto.org/english/news_e/news20_e/ds597rfc_03nov20_e.htm Accessed 23 December 2020

WTO (2020c) Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU. https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf Accessed 23 December 2020

WTO (2020d) Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in The Conduct Of WTO Disputes. https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf Accessed 23 December 2020

WTO (2020e) Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes. https://trade.ec.europa.eu/doclib/docs/2020/august/tradoc_158911.12-Suppl.5%20(002).pdf Accessed 23 December 2020

WTO Dispute Settlement. https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm Accessed 23 December 2020

Stephanie Switzer is a senior lecturer and Co-Director of the University of Strathclyde's Centre for Environmental Law and Governance, Glasgow, Scotland. The author wishes to thank Iyan Offor and Mitchell Lennan for their help, discussions and advice in preparing this chapter. Any errors are the author's own.

MARKED PROOF

Please correct and return this set

Please use the proof correction marks shown below for all alterations and corrections. If you wish to return your proof by fax you should ensure that all amendments are written clearly in dark ink and are made well within the page margins.

Instruction to printer	*Textual mark*	*Marginal mark*
Leave unchanged	··· under matter to remain	New matter followed by
Insert in text the matter indicated in the margin		or (x2)
Delete	through single character, rule or underline or through all characters to be deleted	or (x2)
Substitute character or substitute part of one or more word(s)	through letter or through characters	new character or new characters
Change to italics	under matter to be changed	
Change to capitals	under matter to be changed	
Change to small capitals	under matter to be changed	
Change to bold type	under matter to be changed	
Change to bold italic	under matter to be changed	
Change to lower case	Encircle matter to be changed	
Change italic to upright type	(As above)	
Change bold to non-bold type	(As above)	
Insert 'superior' character	through character or where required	or under character e.g. or
Insert 'inferior' character	(As above)	over character e.g.
Insert full stop	(As above)	
Insert comma	(As above)	
Insert single quotation marks	(As above)	or and/or or
Insert double quotation marks	(As above)	or and/or or
Insert hyphen	(As above)	
Start new paragraph		
No new paragraph		
Transpose		
Close up	linking characters	
Insert or substitute space between characters or words	through character or where required	
Reduce space between characters or words	between characters or words affected	