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The relationship between trade and environment has been one of the main battle lines in the development of trade law. The battleground for skirmishes on this issue has primarily been the dispute resolution mechanisms of the international trading system.

The battle line was drawn initially with respect to two disputes under the General Agreement on Tariffs and Trade (GATT). The Tuna-Dolphin cases between Mexico and the United States in 1991 and between the European Union and the United States in 1994 concerned a U.S. import ban on tuna caught in a manner that harmed dolphins. This embargo was applicable to domestic and foreign fishing vessels as well as third countries where tuna was processed before its final destination into the United States. In both cases, the measures to preclude direct trade and indirect trade through a third country were found to be inconsistent with the GATT.

The Tuna-Dolphin cases raised two important issues that are at the crux of the trade and environment debate. First, they challenged the meaning of “like” products within the context of the GATT principles of most favoured nation and national treatment. From an environmental perspective, products should be distinguished based on process and production methods (PPMs) (i.e., how they are produced)—so that tuna caught in a manner that harms dolphins is differentiated from tuna caught without harming dolphins. The panel, however, held that “likeness” should be determined based on the physical characteristics of a product and not the manner in which they are processed or produced. This interpretation was favoured by many developing countries, which feared the imposition of environmental standards addressing non-product related PPMs. The concern of developing countries was that introducing PPMs as a criterion to determine “like” products could open the door to trade protectionism and restrict market access for their exports.

Secondly, in the Tuna-Dolphin cases, the GATT panel was confronted with the question of whether a country could extend its environmental regulations beyond its borders as a necessary measure for the protection of animal, plant life or health or exhaustible natural resources as provided under the Article XX exceptions to GATT obligations. The panel found that the GATT does not permit extraterritorial protection of life and health and that, even if it did, in this case, the United States had not taken all necessary measures or explored all other available options including negotiation of international agreements to pursue its objective of dolphin protection.

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Dispute Resolution

Howard Mann and Yvonne Apea
The Tuna-Dolphin decisions and their impact on public opinion signaled several things, depending on the audience. For developing countries, they signaled both the risk of environmental protection acting as a brake on trade liberalization and the opportunity to use trade law to confront environmental barriers to trade. Developing countries, in particular, vehemently voiced their concern that environmentalism had become the new framework for constraining development and vowed to fight the acceptance of green protectionism in the trading system. For many developed countries and their non-governmental organizations (NGOs), they signaled the risk of trade rules overriding legitimate and necessary environmental protection measures, both domestic and international. By the entry into force of the North American Free Trade Agreement (NAFTA) on 1 January 1994 and the World Trade Organization (WTO) on 1 January 1995, the legal, political and policy relationship between trade and the environment had taken firm root in trade institutions and policy debates. It was the Tuna-Dolphin cases that created the political conditions for this development.

In large part due to the public pressure from NGOs following the Tuna-Dolphin cases as well as the results of the 1992 United Nations Conference on Environment and Development (UNCED), the Agreement establishing the WTO recognized the need for trade to be consistent with the goal of sustainable development and established a Committee on Trade and Environment (CTE).

Ultimately, the debate of the early 1990s led to important changes in how both trade agreements and environmental agreements are constructed and interpreted, mobilized a new generation of civil society activists, was one factor leading to public activism at trade meetings, and set a political context that continues to generate both attempts at conciliation and ongoing antagonism on trade and environment issues.

Interests and Fault Lines

The role of GATT and WTO disputes has been seminal in the evolution of the trade and environment debate. While the restrictive legal interpretation in the Tuna-Dolphin cases characterized the initial debate as one of trade versus the environment, the dynamics of the relationship have evolved significantly since the establishment of the WTO, largely through the WTO dispute settlement system. The first WTO case to be brought to the newly created Appellate Body was environment-related. This dispute concerned the import of reformulated gasoline into the U.S. from Venezuela. From this case forward, the Appellate Body has reshaped the legal interpretations of the Tuna-Dolphin cases in the GATT, establishing a role for multilateral environmental agreements (MEAs) in the context of trade law and setting new tests for balancing trade and environmental issues. The Appellate Body has devised a two-tier approach to analyzing the exceptions provisions set out in GATT Article XX in the environment-related cases that have come before it.

Trade Versus Environment

In Reformulated Gasoline, the Appellate Body ruled on a January 1995 claim by Venezuela and Brazil that U.S. laws for conventional and reformulated gasoline discriminated against gasoline from their refineries and, therefore, were in breach of GATT obligations and could not be justified under the exceptions provisions. GATT Article XX(g) provides an exception from the trade rules for measures that relate to the conservation of exhaustible natural resources. In Reformulated Gasoline, the Appellate Body held that WTO law must be understood and applied within the context of the broader body of international law. The Appellate Body emphasized that “in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment.”
These major shifts in legal approach by the Appellate Body had the effect of altering how the trade and environment relationship was to evolve in the following years. This shift in interpretation was fully revealed in the Shrimp-Turtle case. Originally launched against the United States by India, Pakistan, Thailand and Malaysia in 1997, the dispute concerned an import ban by the United States on shrimp that was not harvested in a way that was certified as complying with U.S. standards to protect endangered sea turtles.

Initially, the four countries that brought the dispute to the WTO were successful in their claim. In 1998, the Appellate Body ruled that the U.S. regulation in question unjustifiably and arbitrarily discriminated between countries where the same conditions prevail. Nevertheless, the legal reasoning and interpretation of Article XX innovatively dealt with the difficult issue of non-product-related PPMs. The final approval of the U.S. measure in the Shrimp-Turtle case includes elements of two issues: the accommodation of North-South interests and the protection of the global commons.

This case marked a major milestone in the shift from trade versus environment to an integrated approach to trade and environment. The Appellate Body called for multilateral solutions to address concern for endangered turtles. The decision in effect accepted that there was an international consensus to protect certain species of endangered sea turtles. A “line of equilibrium” was set between the right of a country to market access and the right to take measures relating to the conservation of exhaustible natural resources—endangered sea turtles—under Article XX(g). The Shrimp-Turtle decisions made clear that environmental protection could be integrated into trade law. The isolation of the trading system from the broader corps of international law was thus ended, emphatically. A new era of considering how to incorporate the environmental into trade law had begun.

Reforming the DSU

By Welber Barral

At the end of the Uruguay Round, the Dispute Settlement Understanding (DSU) was seen as an enhanced mechanism for guaranteeing predictability in the world trading system. The DSU eliminated the unstable, consensus-based enforcement provisions in the General Agreement on Tariffs and Trade (GATT); thus, the expectations about its capability to make the system more rule-oriented and stable were high.

A decade later, opinions as to the success of the DSU are mixed. The DSU created the most used international court in human history and contributed remarkably to the legitimacy and legal security of the World Trade Organization (WTO). Furthermore, the evolution of case law contributed to international law in general by facing complex issues and raising the interest for legal aspects of international relations; indeed, a remarkable contribution in times of chronic unilateralism.

The glass-half-empty critics, however, recall that most developing countries have never used this mechanism and accuse its pro-trade bias of eclipsing other development concerns. Political criticisms abound: governments have accused panels and the Appellate Body of judicial activism, of being a threat to sovereignty, of adopting extended interpretations that lead to deadlocks.

Most of these criticisms disregard the fact that any mechanism for dispute resolution is derived from a limited political commitment. As a consequence, WTO panels and the Appellate Body are constantly treading a fine line: they must bring a solution to the dispute using the literal interpretation of pro-trade, purposely ambiguous, compromise language, while respecting the rights and obligations of WTO Members.

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In any case, some of these shortcomings were implicitly recognized in Doha. Hence, the Ministerial Declaration dedicates a paragraph to the reform of the DSU (Paragraph 30). Reform would not be linked to the negotiations and should have been completed by May 2003. That deadline proved unrealistically optimistic, for the reform of the DSU is stuck in the mud of mistrust that has pervaded Geneva since 2001. DSU reform became an element in the customary trade-offs in trade negotiations and its result, consequently, will most certainly follow the destiny of the overall negotiations. The proposals advanced so far have the potential to solve procedural flaws (like the “sequencing” problem); other proposals could reinforce special and differential treatment for developing countries and make effective the hortatory provisions in the DSU.

WTO Members, however, are skeptical about bringing any proposal to reform the DSU that could be specifically directed at sustainable development. Such an omission is politically understandable. On the one hand, it derives from the apprehension of developing countries that any mention of concerns other than trade could legitimate protectionist devices. On the other hand, this omission is based on the reasoning that sustainable development, if and when taken into account in the WTO, should be considered in substantive provisions, such as in the exceptions provisions set out in GATT Article XX or the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Moreover, the argument follows, substantive results should be negotiated in the Committee on Trade and Environment if it moves beyond the rhetorical phrases that have plagued its meetings so far.

Undeniably, changing the WTO agreements is the best option to address environmental concerns. Nevertheless, procedural changes in the DSU may become equally relevant. Dispute settlement is not only a technical device for calming two litigating parties, but also a political tool for bringing stability and legitimacy to the system. Changes in procedural aspects, especially those related to legal interpretation, may move development concerns (including sustainable development) to center stage. Presenting politically acceptable proposals is therefore the complex task faced by those concerned with sustainable development.

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The corollary also turned out to be true over this same period. MEAs were paying more attention to trade rules when designing trade-related provisions. The Stockholm Convention on Persistent Organic Pollutants (2001), the Cartagena Protocol on Biosafety (2000), and the Rotterdam Convention on Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade (1998) refer to their relationship with other international agreements. For example, the relationship between the Biosafety Protocol and WTO rules was one of the crucial issues during the negotiation of the Protocol; the preamble states that the Protocol shall not be interpreted as implying a change in rights and obligations of parties under other existing international agreements, and take into account that this shall not mean that the Protocol is subordinate to other international agreements.

In the subsequent Asbestos case, which involved a challenge by Canada to a French import ban on asbestos and asbestos-containing products, the Appellate Body further illustrated its ability to interpret WTO rules of importance to the environment in expanding the test for “like” products to include toxicity in a report issued in 2001. The Appellate Body addressed the inclusion of the health impacts of a product as part of the “like” product analysis required to establish a breach of GATT Article III (national treatment). In its simplest form, if two products are not considered to be “like,” the treatment they receive under national regulations can differ.

A key question in the Asbestos case was whether the negative human health impacts of a product could be considered in determining whether products were “like.” The Appellate Body ruled that such effects were a relevant factor. Although market substitutability remained the key test in determining “likeness,” the Appellate Body made clear that the health impacts of a product were part of the public perception of market substitutability. Here again, the WTO dispute settlement system struck a compromise between trade and non-trade concerns. If health considerations, such as toxicity, are relevant to the determination of “likeness,” will the environmental effects of production methods be next? The Shrimp-Turtle and Asbestos decisions took this expectation one step closer to reality.

**Developing Country Concerns**

The Appellate Body’s interpretation of Article XX, particularly with respect to non-product-related PPMs in the Shrimp-Turtle case and the inclusion of non-economic factors to differentiate between “like” products in the Asbestos case are considered problematic by many WTO Members. Many developing countries, in particular, are concerned about the resort to unilateral actions in environmental and potentially other non-trade matters. However, much of the concern expressed hides a critical fact in practice: the acceptance by three of the original four complaining states in the Shrimp-Turtle case to negotiate an international agreement on sea turtle conservation. Malaysia was the only complainant to seek to reverse the ruling on the need to negotiate in the first decision of the Appellate Body.

In Shrimp-Turtle, it is clear that, in allowing a unilateral U.S. import ban on shrimp, which in particular came from developing countries, the Appellate Body was conscious of the North-South relationship. As such, the Appellate Body sought to impose a cooperative process that emphasized “good faith” negotiations towards the development of bilateral or multilateral agreement for the protection and conservation of sea turtles. It sought to buffer any negative impacts of the requirement to negotiate with obligations for capacity building and technical assistance to supply the necessary technologies, support negotiating costs, ensure sufficient transition periods, and seek balanced solutions that were in keeping with developing country capacities.
Protection of the Domestic Versus the International Environment

A key aspect of the evolution of trade and environment disputes was the Appellate Body’s rejection of the Tuna-Dolphin jurisprudence that only measures taken to protect the domestic environment (not the global commons or shared environmental resources) were consistent with trade law. The Appellate Body recognized the need to see the environment in a more holistic way noting that, in the particular circumstances of the Shrimp-Turtle case, there was a sufficient link between the policy goal of protecting migratory and endangered marine populations which transcended U.S. jurisdiction and the trade measures that the U.S. had adopted for their protection. Nonetheless, the trade measure was originally found to constitute arbitrary discrimination in that it sought to impose guidelines on other countries without assessing the appropriateness of those guidelines for the specific conditions prevailing in those countries. However, the panel charged with ruling on Malaysia’s challenge to the U.S. implementation of the Appellate Body decision affirmed that the application of the revised guidelines by the U.S. had addressed the concerns set out by the Appellate Body, given the offers of technical support and good faith negotiations towards an agreement by the U.S.

In the Shrimp-Turtle case, the Appellate Body established, but did not elaborate upon, a “sufficient nexus” test that required a link between the protection of the domestic environment and the international environment. In Shrimp-Turtle, this nexus was based on the fact that the endangered sea turtles migrated through U.S. territorial waters. It is clear from a comparison of the Shrimp-Turtle and Asbestos cases that having a sufficient nexus is not the only condition for regulations impacting a foreign jurisdiction’s environmental policies and measures. In the Asbestos case, the Appellate Body gave a wide berth for France to set its domestic human health protection goals and the measures to achieve these goals. However, in Shrimp-Turtle, the Appellate Body placed significant restrictions both as to the process for establishing measures applicable to activities outside a country’s jurisdiction and to the nature of such measures. This differentiation is a reflection of the balancing of trade and environmental interests.

Tariff Preferences

Environmental advocates point to the April 2004 WTO Appellate Body ruling in the Generalized System of Preferences (GSP) dispute as further cementing the Appellate Body’s endeavor to achieve a balanced relationship between trade and environment concerns. In this case, India challenged the WTO consistency of tariff preferences accorded under the EU’s special arrangement for combating drug production and trafficking (drug arrangement) for being “discriminatory” as the benefits granted were only available to certain developing countries. The Appellate Body overturned the panel’s earlier decision and held that developed countries were not prohibited by WTO rules from granting different tariffs to products originating in different developing countries under the Generalized System of Preferences (GSP) provided that identical treatment was made available to all “similarly-situated” GSP beneficiaries that shared the “development, financial and trade needs” to which the treatment in question was intended to respond.

Significantly, the Appellate Body found that because the preferences granted under the drug arrangements were not available to all GSP beneficiaries that were similarly affected by a drug problem they were not justified under the enabling clause. In contrast to the drug arrangements, the Appellate Body noted that the EU’s “special incentive arrangements for the protection of labour rights” and the “special incentive arrangements for the protection of the environment” (which were not at issue in this case) includ-
ed detailed provisions setting out the procedure and substantive criteria that apply to a request by a country to become a beneficiary. This would imply, albeit subtly, that these environment arrangements were WTO compatible, confirming that WTO Members are free to include sustainable development concerns in their GSP schemes provided they meet the relevant conditions and are justified under the relevant WTO rules.

**Investment Agreements and Investor-State Arbitration**

One of the most important spin-offs from the trade and environment debate and related disputes in the WTO has been the emergence of investor-state arbitration processes as a tool to challenge environmental protection measures. Originally seen as a logical extension of trade rules to the flow of capital, many trade negotiators and trade institutions in the early- to mid-1990s took up the cause for investment agreements. The NAFTA, with its Chapter 11 on investment, became the first of its type of integrated regional trade and investment agreements. Over 2,400 bilateral investment agreements have been concluded, notably with little notice or fanfare.

A key feature of these instruments has been a special dispute settlement system known as the investor-state arbitration process. This allows private foreign investors to sue the host state in an international arbitration under international investment rules. Environmental protection measures and key development-oriented policy measures have been the subject of several challenges by investors under this system. A key feature of the investor-state cases is that they can lead to immediate awards of damages, and awards of over $100 million are no longer uncommon, with some reaching almost half a billion dollars. Whereas trade cases result in periods to change the measure at issue, the potential for awards and the ability of investors to take the cases directly means that resort to investor arbitrations can be anticipated to increase.

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**PPMs, trade law and the environment**

*By Robert Howse*

A widely held assumption is that international trade law, especially the law of the World Trade Organization (WTO), prohibits states from regulating imported products based on the environmental impacts of their process and production methods (PPMs). This assumption has had a profound influence on the debate on trade and environment. However, the text of the WTO treaties contains no such prohibition. It is an invention of practice under the General Agreement on Tariffs and Trade (GATT)—the WTO’s predecessor regime; by contrast, the recent case law of international trade in the WTO does not support the notion of a prohibition on PPM-based environmental regulations that affect imported products.

The only textual reference to the PPMs concept in the WTO treaties is in the Agreement on Technical Barriers to Trade (TBT), establishing that technical regulations for purposes of the Agreement include regulations that address not only the characteristics of products but their “related” process and production methods. The word “related” here indicates that since the TBT Agreement deals with trade in goods, regulation of process and production methods apart from the goods that are there as a result is not a TBT issue. Such regulation may well be a services or intellectual property matter and thus fall under some WTO Agreement not concerned with trade in goods as such.

The PPMs notion was brought into being in the context of the notorious GATT era *Tuna-Dolphin* dispute. The United States had imposed a ban on sale in the U.S. of both domestic and imported tuna that was fished in a manner that led to excessive incidental killing of dolphins. In theory, assuming that the ban were imposed *evenhandedly* on both domestic and imported tuna, under the law of continued on page 74
the GATT it would be viewed as an “internal law, regulation or requirement” that met the National Treatment obligation in Art. III:4 of the GATT that such measures provide “no less favourable” treatment to imports than to “like” domestic products.

The GATT dispute panel found such a consequence unacceptable. The underlying thinking was apparently that such a measure, even if evenhanded, imposed unilaterally on the country of export American environmental standards, which would be an illegitimate exercise of extraterritoriality. The panel considered it intuitively obvious that such measures could not be consistent with the GATT regime. In order to create a legal foundation for this intuition, the panel suggested that the National Treatment obligation in Article III:4 of the GATT pertained only to measures that directly regulated the imported “product” as a physical commodity, in this case tuna; measures that purported to regulate how a “product” was produced would need to be assessed, not as “internal laws, regulations or requirements” under Article III:4, but rather as quantitative restrictions under Article XI. While Article III:4 allows evenhanded measures that fall within its ambit, Article XI operates differently; once a measure is determined to fall within Article XI, then it is per se illegal under GATT, subject only to certain exceptions. The panel also found that the ban could not be justified under either the animal health and life (Article XX(b)) or conservation (Article XX(g)) exceptions in the GATT. Here, the panel was more direct in its reasoning, asserting the view that measures that are somehow “extraterritorial” cannot be justified under GATT Article XX exceptions.

As jurisprudence, the panel’s approach was clearly wrong. From the early Italian Agricultural Machinery case on, GATT panels had, in fact, rejected the notion that a measure did not fall under Article III because it did not regulate directly the imported product as a physical commodity. After all, the text of Article III did not apply to measures regulating products, but to any internal law, regulation, or requirement affecting, inter alia, the marketing and sale of the product.

Perhaps for these reasons, an alternative theory of the PPM doctrine was already visible even from the second panel in the Tuna-Dolphin case. This theory was that, even if Article III:4 were applicable, domestic and imported products are “like” even if they have different PPMs. Only different physical characteristics can distinguish products as not “like.” Thus, dolphin-unfriendly imported tuna is “like” dolphin-friendly domestic tuna and must be treated the same.

The Tuna-Dolphin rulings were controversial and never adopted, but the idea of PPMs as illegal in the GATT stuck and became conventional wisdom. In the WTO era, a case came before the dispute settlement system not dissimilar to Tuna-Dolphin. The Shrimp-Turtle dispute concerned a U.S. ban on shrimp fished without technologies that prevented killings of endangered species of sea turtles. In that case, the U.S. did not challenge the PPM construction, but instead invited the WTO Appellate Body to reject the GATT notion that measures directed at other countries’ PPM policies could not be justified under Article XX. In broad measure, the Appellate Body agreed with the United States, but addressed concerns of unilateralism and inequity (particularly where measures were targeted at developing countries) through its interpretation of the chapeau of Article XX, i.e., the requirement that justified measures not arbitrarily or unjustifiably discriminate between different countries. The impact of the Shrimp-Turtle case is to blunt the importance of the PPM assumption, since the very kinds of measures supposedly prohibited through that assumption may well be justifiable under the conservation or life and health exceptions in Article XX.

The assumption has also been bypassed by recent jurisprudence of the WTO Appellate Body on “like” products in Article III:4 (the Asbestos case); consumer habits and tastes may be of decisive importance in determining whether products are “like,” thus belying the notion that only physical differences in themselves count in the analysis. In sum, from a legal perspective, the PPM assumption has
Trends and Future Directions

Many environmental observers are concerned that the current Doha Round of trade negotiations will provide an opportunity for a rollback of the perceived gains in the trade and environment debate, such as outlined above. Critics point to the limited negotiating mandate given to the CTE in Special Session in Paragraph 31 of the Doha Ministerial Declaration.

Several developed countries are pushing for more transparency and public participation in the context of the review of the WTO Dispute Settlement Understanding (DSU); an agenda that is favoured by many in the environment community interested in participating in key trade and environment disputes. For instance, the U.S. and the EU have submitted proposals in favour of opening up the dispute settlement process to the public, as well as the establishment of guidelines for handling amicus curiae submissions.

In 2005, the WTO panel hearing the EU’s challenge against continued retaliatory sanctions on its exports imposed by the U.S. and Canada in the long standing Beef Hormones dispute announced that the proceedings would be open to the public. This development, the first of its kind in the history of WTO dispute settlement, comes in response to a joint request filed by all three countries. It will be interesting to see how this step towards opening up dispute proceedings in the WTO is reflected in the DSU review negotiations. Two questions are raised. Firstly, whether this sets a precedent for future practice in dispute settlement proceedings and, secondly, whether public participation in the Beef Hormones proceedings could revive the debate on transparency in the DSU review.

To date, the position of panels and the Appellate Body with respect to amicus curiae submissions has been that, while they are under no obligation to consider these briefs, they have the authority and discretion to accept and consider them. Amicus briefs have been submitted by environmental and other NGOs in Shrimp-Turtle, Asbestos and the recent U.S.-EU biotech dispute involving genetically modified organisms (GMOs). Civil society’s push for transparency and access to the WTO dispute settlement system has faced opposition from the WTO membership, particularly developing countries, which tend to be largely opposed to such participation because it can create an imbalance in the process. Moreover, developing countries are wary of green protectionism. In practice, this opposition has not stopped the acceptance of amicus briefs, despite the fact that WTO Members have yet to adopt any formal procedures to regulate how to deal with these submissions.

With a view to advancing the objectives of sustainable development, policy-makers have sought to work towards a convergence between trade and environment. To this end, trade negotiators made reference to the environment in the preamble to the WTO Agreement, and the WTO dispute settlement process has shown its ability to accommodate environmental concerns. While the balance may not be perfect and stakeholders from dif-
different perspectives continue to disagree over a myriad of issues, it is clear that a return to trade versus the environment is no longer acceptable. Thus, developments in WTO rules will have to be based on a better mutual accommodation of interests in pursuit of development that is sustainable. MEAs, which represent a multilateral consensus on specific environmental concerns, are likely to be used as an interpretive aid to trade rules in the interests of incorporating WTO law into the wider corps of public international law.